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The principle of legality and the Iraqi Special Tribunal

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MEMORANDUM FOR THE IRAQI SPECIAL TRIBUNAL

ISSUE: THE PRINCIPLE OF LEGALITY AND THE IRAQI SPECIAL TRIBUNAL

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I. INTRODUCTION AND SUMMARY OF THE CONCLUSIONS

A. Issues

With the enactment of the Statute of the Iraqi Special Tribunal, IST, genocide, crimes against humanity and war crimes have been outlawed for the first time in Iraqi jurisprudence. This raises the possibility that the statute may in fact be applying ex post facto laws, thus violating the concept of *nulla crimen sine et poena sine lege,* known as the principle of legality. The principle consists of two separate but related concepts of *nulla crime sine lege,* that no crime can exist without antecedent law, and *nulla poena sine lege*, that no penalty can exist without an antecedent law. The Iraqi Special Tribunal will thus have to deal with two interrelated issues. First, like all previous international tribunals, the IST will have to confront the principle of legality with respect to the Statute itself as imposing law after the fact. Second, the IST will have to look to the Iraqi Penal Code and to precedent set by previous war tribunals to establish guidelines for penalties that are consistent with the principle of legality.

B. Summary of Conclusions

1. **IN LIGHT OF THE JURISPRUDENCE OF NUMEROUS WAR CRIMES TRIBUNALS WHICH HAVE HELD THAT APPLYING CUSTOMARY INTERNATIONAL LAW TO WAR CRIMES AND GENOCIDE IS NOT IN VIOLATION OF THE PRINCIPLE OF *NULLEM CRIMEN SINE LEGE,* A SOUND LEGAL ARGUMENT CAN BE MADE THAT THE IRAQI STATUTE ALSO COMPLIES WITH THE PRINCIPLE.**

Fifty years after the Nuremberg Trial and the Trial of the Far East in Tokyo, no leaders can now seriously contend that they failed to foresee that war crimes, the crime of genocide and crimes against humanity were not customary international law. The tribunals, such as those in Nuremberg, Yugoslavia and elsewhere have consistently held

that the principle of legality is predicated upon justice, which requires that those who violate the moral and natural laws, which form the basis of customary international law should held accountable for their acts. Furthermore, the international tribunals have found that violators can be held criminally responsible even if the offenses were not specifically codified or otherwise identified at the time. All that is required is that the crime be firmly established as a violation of customary international law at the time of its commission. The crimes enumerated in the Statute for the Iraqi Special Tribunal are derived from both treaties and international legal precedent. As a party to those treaties and a member of the United Nations, Iraq is bound by those laws, and by the precedent of the various International tribunals. Thus, any assertion of the *nullum crime sine lege* defense is bound to fail before the IST as it did in Germany, Tokyo, Yugoslavia and Sierra Leone.

2. Incorporating Pre-Existing Iraqi Law and Precedent from Former Tribunals into Sentencing Guidelines, the Iraqi Special Tribunal will satisfy the Principle of Nulla Poena Sine lege.

Since neither the Iraqi Special Tribunal Statute nor any of the various international treaties specify penalties for the crimes, the principle of *nullum poene sine lege*, must be satisfied by other means. Looking to the Yugoslavia and Rwanda tribunals, the use of pre-existing domestic sentencing guidelines can help to satisfy the requirements of the *nullum poene* principle. Article 24 of the IST Statute incorporates the idea of using pre-existing Iraqi law by requiring that sentences be given in accordance to 1969 Iraqi Criminal Code. The Iraqi Tribunal can also rely on the precedent established in the past fifty years by the numerous international tribunals to determine

sentences; as such any sentence would have been foreseeable to the accused, satisfying the principle of *nulla poena sine lege.*

II. FACTUAL BACKGROUND

The Statute for the Iraqi Special Tribunal, IST, grants it jurisdiction over any Iraqi national accused of committing specified crimes between July 17, 1968 and May, 1, 2003.[1] It is therefore essential to understand the relevant events that took place in Iraq, to fully appreciate the need for the IST.

In July of 1968 the Baath Party officers, including Saddam Hussein, overthrew the pre-existing government and eventually gained complete control of Iraq.
In 1979, after serving second in command, Saddam Hussein become the president of the Republic of Iraq.[2] One of Saddam's first acts was to purge the Baath Party of all members who were still loyal to the former President; Saddam forced many Baath Party leaders to confess to invented crimes and then summarily executed them. Their families were held hostage to ensure their confessions, and firing squads were made up of remaining Baath party members to foster loyalty to Saddam.[3]

Aside from the elimination of political opposition, the Baath party, which was primarily associated with the Sunni sect of Islam, began killing religious figures that

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[1] The Statute for the Iraqi Special Tribunal, December 10, 2003, available at http://www/cpa-iraq.org/human_rights/statute.htm (last visited April 12, 2005) [hereinafter IST Statute] [reproduced in the accompanying notebook 1 at Tab 1].

[2] Iraq," Microsoft® Encarta® Online Encyclopedia 2005 [reproduced in the accompanying notebook 4 at Tab 102]. *See also*, Thomas Reynolds, Foreign Law: Current Source of Codes and Legislation In Jurisdiction of the World, "Iraq", Vol. III A. (1994) [reproduced in the accompanying notebook 4 at Tab 99].

[3] Charges Facing Hussein, BBC News, July 7, 2004, *available at* http://news.bc.co.uk/go/pr/fr/-/2/hi/middle_east/332093.stm (last visited April 12, 2005) [reproduced in the accompanying notebook 4 at Tab 101].

Kuwait; holding of thousand of foreign nationals hostage to dissuade their countries from joining the coalition against Saddam's regime; and the use of hostages as human shields.[11] The international response to the second war was swift, with the United Nations issuing Resolution 660,[12] the first of many condemning the aggression and calling for Iraqi withdrawal. In October of 1990 the United States went to the U.N. for international authorization to use force, which resulted in Resolution 678,[13] authorizing force to compel Iraq to withdraw from Kuwait within forty-five days. Saddam refused to budge and the war began on 28 of February 1991. Defeated, Saddam Hussein, entered into a cease-fire under UN Resolution 686, requiring Iraq to leave Kuwait, pay reparations, and release all POWs.[14] During the war, Iraq is reported to have committed numerous atrocities against Kuwaiti and American troops who were captured, including various methods of torture used to extract information and as punishment. The reports cite the use of beatings, electric shocks, burns, mock executions, rape, cutting off ears and tongues, gouging of eyes and castration.[15]

Immediately following the invasion of Kuwait, Shiite Muslims in the south of Iraq and the Kurdish minority in the north staged uprisings against Saddam's regime.

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[11] Charges Facing Hussein, supra note 3.

[12] S.C. Res. 660, U.N. SCOR, 2932nd mtg., U.N. Doc. S/RES/660 (1990) [reproduced in the accompanying notebook 2 at Tab 37].

[13] S.C. Res. 678, U.N. SCOR, 2963rd mtg., U.N.Doc. S/RES/678 (1990) [reproduced in the accompanying notebook 2 at Tab 38].

[14] S.C. Res. 686, U.N. SCOR, 2978th mtg., U.N. Doc. S/RES/686 (1991) [reproduced in the accompanying notebook 2 at Tab 39].

[15] Jones, *supra* note 6.

Hussein's response was shift and harsh, he ordered the killing of thousands of Iraqi's and around 2 million Kurds were forced to flee their homes.[16]

The events of September 11, 2001 fundamentally altered U.S foreign policy, first towards *Al Qaeda* and then towards Iraq. By the end of 2001, it was clear that the new Bush administration would focus not on containment, but on regime change in Iraq.[17] On March 20, 2003 the United States, Great Britain along with a small coalition launched a military attack on Iraq without the auspice of the United Nations. The military campaign was swiftly concluded and largely complete against organized resistance by May 1, 2003, at which time an end to major combat activity in Iraq was proclaimed by the President of the United States.[18] This however, was hardly the end of war; death and casualties rose as gun battles and explosions continue even after the capture of former Iraqi President Saddam Hussein on December 13, 2003.[19] On December 10 2003, the Iraqi Governing Council adopted the "Statute of the Iraqi Special Tribunal" [IST]. The Statute provides for the legal foundation for the IST, and lays out its organization, jurisdiction, and basic procedures. To date, most of the 55 most wanted of Saddam's top Baath party leaders are in custody, including his vice president, prime minister, duty

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[16] Charges Facing Hussein, *supra* note 3.

[17] PHOBE MARR, THE MODERN HISTORY OF IRAQ (Westview Press, 2004) at 389 [reproduced in the accompanying notebook 4 at Tab 96].

[18] *Id.* at 391.

[19] GEOFF SIMONS, IRAQ: FROM SUMER TO POST-SADDAM (Palgrave Macmillan, 2004) at 397 [reproduced in the accompanying notebook 4 at Tab 98].

prime minister and numerous relatives of Hussein who were instrumental in the Saddam's reign.[20]

III. HISTORY OF THE PRINCIPLES OF LEGALITY

The Principles of n*ullum crimen sine lege* and n*ulla poena sine lege* have become, since the late 1800's fundamental principles of criminal law in the world's major criminal justice systems.[21] The prohibition of retroactive penalties, known by the Latin phrase *nulla poena sine lege*, is usually approached in tandem with the prohibition of retroactive offences, *nullum crime sine lege*.[22] Together, the two are often described as the "Principles of Legality." The purpose of the principles of legality are to enhance the certainty of the law, provide justice and fairness for the accused, achieve the fulfillment of the deterrent function of the criminal sanction, prevent abuse of power and strengthen the application of the rule of law.[23]

A. Application of the Principles to Domestic Law:

Since World War II, the principles of legality have been recognized in all the world's criminal legal systems. Their application of the principle, however, has varied in part because of how the principle has evolved. The major difference centers on whether

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[20] Member of the *Ba'th* party that are in custody of today, Saddam Hussein president of Iraq; Abid Hamid Mahnud personal secretary/national security adviser; Ali Hussein chemical Ali; Aziz Sajih Al-Numan Baath Party regional Command Chairman; Bazan Irbahim Hasan presidential Advisor; Kamal Sultan Former secretary general of Iraqi Republican Guard; Muhammad Humza Zubaydi Former prime minister and deputy prime minister of Iraq; Sabir Adul Aziz Al-Douri Director of Iraqi military intelligence; Sultan Hashim Ahmad Former Iraqi Defense Minister; Taha Yasin Ramadan, Former Iraqi vice president; Tariq Aziz, Former deputy prime minister of Iraq; Watban Ibrahim Hasan Presidential Adviser.

[21] CHIEF M BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW, 2nd Rev. Ed. (Kluwer Law International, 1999) at 123 [reproduced in the accompanying notebook 4 at Tab 92].

[22] Though the principle of legality can be found in several legal systems, their modern European origin is attributed to Paul Anselm Von FeuerBach who first articulated them in his 1801 *LEHBRUCH DES GERMEINEN IN DEUTSCHLAND GULTIGEN PEINLICHEN RECHT; reprinted in, BASSIOUNI, supra* note 21 at 124.

[23] BASSIOUNI, *supra* note 20 at 125.

practices of individual states including their treaties, and certain basic national principles, which over time become known as general principles.[37] It is this combination of sources that leads to the recognition of the principle of legality in the international criminal law context.

However, the principles of legality in international criminal law differ from those in national legal systems in respect to standards and application. International criminal law and national legal systems are each unique, since each must balance different policy considerations and objectives, including taking into account the nature of international law, the absence of international legislative policies and standards, as well as the assumption that international criminal law norms will be embodied in the domestic criminal law of the various states.[38]

The principle of *nullum crimen sine lege* has been expressly incorporated in at least two major international instruments: the Universal Declaration of Human Rights[39] and the International Covenant of Civil and Political Rights.[40] Both state that: "no one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offense was committed." One should note that nothing in this language

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[37] Jorden J. Paust, *Customary International law: Its Nature, Sources and Status of Law of the United STATES,* 12 MICH. J INT'L L 59 (1990) [reproduced in the accompanying notebook 2 at Tab 54].

[38] BASSIOUNI *supra* note 14 at 127.

[39] Universal Declaration of Human Rights, Art. 11(2), G.A. Res. 217 (III), U.N. GAOR, U.N. Doc A/810 at 71 (1948) [reproduced in the accompanying notebook 1 at Tab 3].

[40] International Covenant on Civil and Political Right, Art. 15, March. 23, 1976, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 5 Doc. A/ 6316 (1966), 999 U.N.T.S. 171 [hereinafter the ICCPR] [reproduced in the accompanying notebook 1 at Tab 4].

says that the law must be statutory; in fact, article 15 of the Covenant adds the qualification: "nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."[41] Thus, the International Law Commission in 1994 was able to contemplate the possible prosecution of crimes prohibited by customary international law.[42]

Additionally, none of the 315 international criminal instruments created between 1815 and 1988 specify penalties. Consequently, customary international law does not include the principle of *nulla poena sine lege*, which is found in most national criminal systems. Insofar as international criminal law is concerned, penalties are left to the realm of national legal systems which are expected to establish penalties using analogies to similar national crimes.[43]

IV. VIEWING THE NUMEROUS TRIBUNALS WHO HAVE ALL HELD THAT APPLYING INTERNATIONAL CUSTOMARY LAW TO WAR CRIMES AND GENOCIDE IS NOT IN VIOLATION OF THE PRINCIPLE OF NULLEM CRIMEN SINE LEGE, A SOUND LEGAL ARGUMENT CAN BE MADE THAT THE IRAQI STATUTE HAS ALSO CONFORMS WITH THE PRINCIPLE.

The principle of legality in its modern form, owes much of its development to the various military tribunals that has debated and applied the principle in the modern context of international criminal law. The principle was first espoused at Nuremberg where it

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[41] *Id.* at Art. 15(2).

[42] Edward M. Wise, *The International Criminal Court: A Budget of Paradox,* 8 TUL. J. INT'L & COMP. L 261 (2000) at 227 [reproduced in the accompanying notebook 3 at Tab 67].

[43] Jorden J Paust, *Conceptualizing violence: Present And Future Development in International Law: Panel II: Adjudicating violence: Problem confronting international law and policy on war crimes and crimes against humanity: Its no defense: Nullum Crimen, International Crimes and the Gingermean Man,* 60 ALB. L. REV.705 (1997) at 671[reproduced in the accompanying notebook 2 at Tab 55].

was used as a defense after the end of the war against the charge of war crimes. Over fifty year later, the defensive used of the principle would reappear in the tribunals for Yugoslavia, Rwanda and Sierra Leone. All these tribunals returned to the precedent established at Nuremberg as a means of satisfying the principle of legality. Similar defenses are bound to arise in Iraq, and like its predecessors, Iraq must rely on both its own international obligations, as well as its own national criminal code to satisfy the demands of the legality.

A. Application of The Principles of Legality to Nuremberg Trials and the International Tribunal for the Far East

i. International Military Tribunal at Nuremberg

The principle of legality came to the forefront of international criminal law during the trial of Nazi war criminals after the end of the Second World War, and the establishment of the International Military Tribunal in Nuremberg. The Nuremberg Charter,[44] which authorized the International Military Tribunal at Nuremberg, identified three types of crimes for which the defeated Germans were ultimately tried: (1) crimes against peace,[45] (2) war crimes,[46] and (3) crimes against humanity.[47] At the time of the

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[44] Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 284 [hereinafter London Charter]; see also Karl Arthur Hochkammer, *The Yugoslav War Crimes Tribunal: The Compatibility of Peace, Politics, and International Law*, 28 VAND. J. TRANSNATT'L L 120 (1995) at 142 [reproduced in the accompanying notebook 1 at Tab 5].

[45] London Charter *id.* art. 6(a). Crimes against peace were defined as "planning, preparation. Initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."

[46] London Charter *id.* art. 6(b), Crimes against peace were defined as "violations of the law or customs of war", including, but not limited to "murder, ill-treatment or deportation to slave labor or for any other purpose or civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessary.

Nuremberg however, crimes against peace, humanity and aggressive war were novel concepts in international law. The accused Nazi war criminals invoked the *nullum crimen, nulla poena sine lege* norm at Nuremberg, particularly with respect to charges of crimes against peace and aggressive war. According to the Nuremberg judgment, Defendants had argued that a fundamental principle of law- international and domestic- is that there can be no punishment of crime without a pre-existing law: '*nullum crimen sine lege, nulla poena since lege'*.[48] It was submitted that *ex post facto* punishment is abhorrent to the law of all civilized nations; that no sovereign power had made aggressive war a crime at the time the alleged criminal acts were committed, that no statute had defined aggressive war; that no penalty had been fixed for its commission, and no court had been created to try and punish offenders. [49]

The International Military Tribunal (IMT) rejected the plea because under "such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished... [The defendants] must have known that they were acting in defiance of all international law when in complete deliberation they carried out the designs of invasion and aggression.[50]

The International military tribunal further stated:

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[47] London Charter i*d* art. 6(c), Crimes against humanity were defined as " murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions of political, racial or religious grounds in execution of or in connection with any crimes within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated"

[48] William A Schabas, *Perverse Effects of the Nullla Poena Principles: National Practice And the Ad Hoc Tribunal,* EJIL 2000 11(521) at 521[reproduced in the accompanying notebook 2 at Tab 59].

[49] *Id.* at 552.

[50] *France et al. v. Goering et al.*, 22 IMT (1946) 203, *reprinted in* Schabas, *supra* note 47 at 522.

> In the first place, it is to be observed that the maxim *crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attached neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished[51]

In other words, substantive justice punishes acts that harm society deeply and are regarded as abhorrent by all members of society, even if those acts were not prohibited as criminal when they were preformed.

When faced with an argument that an international agreement outlawing war as an instrument of national policy does not specifically define war as a crime nor these it provide courts to try alleged transgressors and therefore the principle of *nullum crimen sine lege* is violated, the IMT had also declared:

> To that extent the same is true with regard to the laws of war contained in the 1907 Hague Convention...many of these prohibitions had been offered long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offenses against the law of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, not any mention made of a court to try and punish offenders[52]

The Tribunal also noted that the law of war "is not static but by continual adaptation follows the needs of a changing world."[53]

Robert Jackson, Chief American prosecutor of Nuremberg (then on leave from the U.S. Supreme Court) in his opening address responded to many of the objections raised

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[51] International Military Tribunal (Nuremberg), Judgment and Sentences (1946) 41 Am. J. Int'l L. 172, 217 (1947); 6 F.R.D.69 at 111, *reprinted* in Jordan Paust, *Nullum Crimen and Related Claims*, 25 DENV. J. INT'L & POL'Y 31(1997) [reproduced in the accompanying notebook 2 at Tab 56].

[52] *Id.* at 218.

[53] *Id* at 219.

about the legality of the Nuremberg Trials.[54] Jackson claimed, wagging an aggressive war was a crime in international law long before the start of World War II, and the Germans knew this. He noted several international treaties and agreements[55] signed by numerous nations in the early part of the century which, he claimed, had the effect of outlawing aggressive warfare.[56] Jackson refused to allow the Nazi's to hide behind their complaint that international law would continue to "lag so far behind the moral sense of mankind." Jackson asked rhetorically "Does it surprise these men that murder is a crime?" Concluding that since murder and assault are crimes, it should not come to a surprise to anyone then, that genocide and torture would be punished. [57]

The Nuremberg Tribunal was the first major war crimes tribunal to deal with a defense challenge asserting the Charter violated the principle of legality by applying ex post facto laws after the crimes were committed. The Tribunal dealt with these challenges, by both asserting that the crimes with which the defendants were charged had in fact been crimes in Germany when the criminal acts were committed in the form of legally binding treaties which Germany had entered into, and that the national criminal

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[54] Robert H. Jackson, Opening Address for the United States, Nuremberg Trials reprinted in DAVID M ADAMS, PHILOSOPHICAL PROBLEMS IN THE LAW, 7, 12 (1992) at 7 [reproduced in the accompanying notebook 3 at Tab 69].

[55] *Id.* Justice Jackson cites the following international instruments that made aggressive war a crime. (1) Briand-Kellogg Pact of 1928, by which Germany, Italy, and Japan in common with practically all nations of the world, renounced war as an instrument of national policy, bound themselves to seek the settlement of disputes only by pacific means and condemned recourse of war for the solution of international controversies. (2) Geneva Protocol of 1924 for the Pacific Settlement of International Disputes, signed by representatives of forty-eight governments, declared that "war of aggression constitutes...an international crime." (3) Eight Assembly of the League of Nations in 1927, on unanimous resolution of the representatives of forty-eight member nations, including Germany, declared that a war of aggression constitutes an international crime. (4) Sixth Pan-American Conference of 1928 , the twenty-one American Republics unanimously adopted a resolution stating that "a war of aggression constitutes an international crime against the human species.

[56] Jackson *supra* note 53, at 7.

[57] Ellis Washington, The *Nuremberg Trials: The Death of the Rule of Law in International Law*, 49 LOY. L. REV. 471 (2003) [reproduced in the accompanying notebook 3 at Tab 66]

code of Germany outlawed many of the criminal acts which the defendants were accused of on a larger scale.

ii. Control Council Number 10.

After the conclusion of the first Nuremberg trial, 12 more trials were held under the authority of Control Council Law No. 10 [CC No. 10], which closely resembled the London Agreement but provided for war crimes trials in each of the four zones of occupied Germany. About 185 individuals were indicted in the 12 cases.[58]

In *United States v. Alstoetter* (The Justice Case) the CC No.10 the tribunal stated:

> Obviously the principle in question constitutes no limitation upon the power or right of the tribunal to punish acts which can properly be held to have been violation of international law when committed...War crimes has by reference incorporated the rules by which war crimes are to be identified. In all such cases it remains only for the Tribunal...to determine the content of those rules under the impact of changing conditions.[59]

The tribunal went on to state that "the ex post facto rule", as known to constitutional states, "does not apply to a treaty, a custom, or a common law decision of an international tribunal."[60] Many consider is doubtful, that either the IMT at Nuremberg or the CC No. 10 considered the principle of legality to be a principle of international law, regardless, both tribunals considered is appropriate to prosecute persons for acts that were

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[58] WAR CRIMES TRIALS, Microsoft Encarta, Online Encyclopedia (2005) available at http://encarta.msn.com [reproduced in the accompanying notebook 4 at Tab 103].

[59] III Trials of War Criminals before the Nuremberg Military Tribunal under Control Council Law No.10, 1946-1949 at 974 [reproduced in the accompanying notebook 3 at Tab 70].

[60] *Id.* at 975, See also, The Prize Cases, 67 U.S. 635, 671 (1882) (stating, in a U.S. Supreme Court Case decision involving four criminal cases, that ex post facto principles "cannot be received as authoritative in a tribunal administering...international law") [reproduced in the accompanying notebook 3 at Tab 74].

recognizable criminal "when committed."[61] The policy rational behind the principle of legality is based on the concept of providing notice to the defendants that the act, when committed, was indeed criminal. Both Nuremberg tribunals felt that international treaties and conventions provided adequate notice to the defendants that the acts being committed were in violation of international law, and thus not implicating the principle of legality.

In The Hostage Case,[62] Judge Edward F. Carter, sitting for the CC No. 10 Tribunal, followed the precedent of countries with uncodifed systems of criminal law, were some flexibility normally applies in complying with the demands of *nullem crimen sine lege*. He observed:

> Any system of jurisprudence, if it is to be effective, must be given an opportunity to grow and expand to meet changed conditions. The codification of principles is a helpful means of simplification, but it must not be treated as adding rigidity where resiliency is essential. To place the principles of international law in a formalistic strait-jacket would ultimately destroy any effectiveness that it has acquired. [63]

Judge Carter went on to say:

> It is not essential that a crime be specifically defined and charged in accordance with a particular ordinance, statute, or treaty if it is made a crime by international convention, recognized customs and usages of war, or the general principles of criminal justice common to civilized nations generally. If the act charged were in fact crimes under international law when committed, they cannot be said to be ex post facto acts or retroactive pronouncements.[64]

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[61] Paust, *supra* note 50 at 333.

[62] *United States of America v. Von List & Others*, XI Trials of War Criminals Before the Nuremberg Military Tribunal Under Control Council No. 10, Nuremberg October 1946 to April 1949, 757 [reproduced in the accompanying notebook 3 at Tab 72].

[63] *Id.* at 1235.

[64] *Id.* at 1239.

> Even though no judicial mechanism had heretofore existed to punish the leaders of large nations which violated treaties, a man who violates a treaty must act at peril of being punished by the offended party's employing self-help. The fact that the self-help happens to involve the declaration of new principle of international law affords the perpetrator no additional grounds of compliant." [67]

Both tribunals at Nuremberg relied heavily on pre-existing treaties signed by Germany, to prove that the crimes they were now being charged with, were in fact pre-existing law in not only international law, but in Germany as well.

iii. International Tribunal for the Far East

The International Tribunal for the Far East was governed by the Tokyo Charter[68], which closely resembled the Nuremberg Charter. As at Nuremberg, the defense repeatedly raised and argued that the Charter was in violation of the principles of legality. The majority for the Tokyo War crimes trials followed the same rationale as their counterparts at Nuremberg, dismissing any and all claims that the charter was being applied retroactivity.[69] While the majority view at the trial was that of Nuremberg, some of the justices took varying approaches to the principle.

The majority held that retroactivity was not an issue because the law of the Charter was valid international law. It felt that the Charter and its definitions of crimes were decisive and binding and it held that the Allies had acted "within the limits of

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[67] Telford Taylor, An *approach to the preparation of the prosecution of axis criminality,* June 1945 *reprinted in,* SMITH, *supra* note 51, at 211.

[68] Charter of the International Military Tribunal for the Far East, April 26, 1946, *reprinted in* RICHARD H. MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL, (Princeton University Press, 1971) at 185 [reproduced in the accompanying notebook 4 at Tab 97].

[69] JOHN ALAN APPLEMAN, MILITARY TRIBUNALS AND INTERNATIONAL CRIMES (1972) at 49 [reproduced in the accompanying notebook 4 at Tab 91].

international law" in establishing the Charter.[70] The majority looked to the following for justifications for its findings, first it argued at length that international law included all the crimes listed and defined in the charter, and as such there was no need to address the issue of retroactivity. Second, the majority reiterated the rationale of the Nuremberg tribunals, stating that the "maxim *nullum crimen sine lege* is not a limitation of sovereignty but is in general a principle of justice."[71] The implication being that a tribunal has the inherent authority to construe and apply laws, which are in conformity with international customary laws, as well as its own national laws.

A more extreme position was taken by Justice Jaranilla's concurring opinion in which he held that the principle of legality was not applicable to international law, reasoning that the permanence of the international community depended on such variable standards that the corresponding acts of violation cannot be predetermined.[72]

Meanwhile, Justice Rolling in his dissenting opinion held that Allied powers did have the right to formulate new rules. He wrote:

> If the principle of 'nullum crime sine lege' were a principle of justice, the tribunal would be bound to exclude for that very reason every crime created in the charter ex post facto, it being the first duty of the tribunal to mete out justice. However, the maxim is not a principle of justice but a rule of policy, valid only if expressly adopted"... "Being a expression of political wisdom", not "necessarily applicable

[70] *Id.* at 51.

[71] International Military Tribunal (Nuremberg), Judgment and Sentences, *supra* note 50.

[72] The TOKYO MAJOR WAR CRIMES TRIAL, THE RECORD OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST Vol. 121, November 1, 1948, at 17 [reproduced in the accompanying notebook 3 at Tab 75]. Justice Jaranilla, quoted in his opinion from Professor Jorge Americano, who stated that "the rule that there is not crimes without a prior law defining it, and the rule that there is not penalty without prior legal combination, are not applicable to international law...Such principles cannot be held, because the basis of the category crimes is different from that if the category of harmful act in international law, and because only in the individual sphere is there any restriction on the tools with which crime is perpetrated and on the possibilities of violating the rights of others."

> in present international relations...This maxim of liberty may, if circumstances necessitate it, be disregarded even by powers victorious in a war fought for freedom" [73]

Justice Roling view was clear, the Tokyo charter was retroactive, but retroactivity was permissible. Both the views of Rolling and Jaranilla do not conform with the modern approach to the principle of legality that the principle of legality does in fact apply to customary international law regardless of express adoption.

The only dissenting judge to agree with defendant on the issue of legality was Justice Pal from India, who held that "crimes against peace" did not exist before 1945. He concluded that the Allied Powers had no authority to rewrite international law and then to apply it retroactively. Justice Pal wrote:

> The so-called trial held according to the definition of crime now given by the victors obliterates the centuries of civilization which stretch between us and the summary slaying of the defeated in a war. A trial with law thus prescribed will only be a sham employment of legal process for the satisfaction of a thirst for revenge. It will not correspond to any idea of justice.[74]

He concluded that regardless of ones' view of the principle of legality, a victory in war does not invest the victor with unlimited and undefined power now. Therefore it is "beyond the competence of any victor nation to go beyond the rules of international law as they exist, give new definitions of crimes and then punish the prisoners for having committed offenses according to this new definition." [75]

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[73] Dissenting Opinion of Rolling, Judgment, *reprinted in* MINEAR, *supra* note 54 .

[74] The Tokyo Major War Crimes Trial, The Record of the International Military Tribunal for the Far East, November 1, 1948, Vol. 121 at 40 [reproduced in the accompanying notebook 3 at Tab 75].

[75] Minear, *supra* note 67 at 64.

Though Justice Pal was the only to find a violation of the principle of legality during the WWII trials, there were many critics that accepted his views that the trials were violating the principle of legality. For most critics the principle of legality was absolute, and any legal system that violates these precepts, would make a mockery of justice.[76] For them any violation of ex post facto laws rests on the principle: "if the law can be created after the offense then poser is absolute and arbitrary...the very notion of which is repugnant to constitutionalism."[77] Aggressive war, for the critics had never been set fourth as criminal in either Germany or international criminal law, as evidenced by the fact no nation had ever held another culpable for illegal acts of aggression.[78]

Though, Justice Pal, and the critics' argument may of carried some weigh, in regard to the WWII military tribunals when relatively few international instruments defined criminal acts and no military tribunal precedent preceded them. The same cannot be said for the modern day tribunals, where both the numerous international instruments and the Nuremberg precedent itself, provide clear notice to all would be defendants of the criminal nature of their actions.

iv. Post- Nuremberg Developments and Instruments

Ultimately the Tribunals at Nuremberg and Tokyo justified their application of ex post facto law in two ways: (1) since murder and torture were already against national law at the time, mass murder and torture could not be seem as new laws; (2) Treaties and

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[76] Charles E. Wyzanski, Nuremberg: A Fair Trial?, THE ATLANTIC MONTHLY, Vol. 177 (April 1946), at 66-70 [reproduced in the accompanying notebook 3 at Tab 68].

[77] SHELDON GLUECK, THE NUREMBERG TRAIL AND AGGRESSIVE WAR, (University Microfilms, 1946) at 75 [reproduced in the accompanying notebook 4 at Tab 95].

[78] Washington, *supra* note 56 at 502.

other international instruments to which Germany was party to had outlawed aggressive war prior to the war, as such it was not a violation of *nullum crimen sine lege* to prosecute crimes against peace. As of the IMT judgments of 1946, all potential offenders have been put on notice that war crimes and crimes against humanity are subject to the most severe sanctions. The Allies intended the London Charter, CC No. 10 and the Tokyo Charter to provide legal precedent and to constitute a building block for the future evolution and development of international criminal law.[79] Several post-charter substantive instruments have attempted to organize and reiterate the laws applied by the WWII tribunals in regards to crimes against humanity. The instruments in chronological order are as follows:

a. United Nations General Assembly Resolution of December 11, 1946, which reaffirmed the principles of international law recognized by the London Charter at Nuremberg[80]
b. Convention on the Prevention and Punishment of Crime of Genocide, 9 December 1948 (Genocide Convention), [81]
c. ILC Report of July 29, 1950, [82]
d. ILC 1954 Draft Code of Offenses [83]
e. 1973 Apartheid Convention, [84]

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[79] M. Cherif Bassiouni, *Crimes against Humanity: The need for a specialized convention* 31 COLUM, J. TRANSNAT'L L 457 (1994) at 467 [reproduced in the accompanying notebook 2 at Tab 47].

[80] Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal: Report of the Sixth Committee, U.N. GAOR, 1st Sess., pt.2, 55th plen., mtg., at 1144, U.N. Doc. A/236 (1946) (also appears as G.A. Res. 95, U.N. Doc. A/64/Add.1, at 188 (1946) [reproduced in the accompanying notebook 1 at Tab 7].

[81] Convention of the Prevention and Punishment of the Crimes of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention] [reproduced in the accompanying notebook 1 at Tab 8].

[82] Report of the International Law Commission on the work of its second session, 5 June to 29 July 1950, 2 Y.B. INT'L COMM'N 378, U.N. Doc. A/1316[reproduced in the accompanying notebook 1 at Tab 9].

[83] Draft Code of Offenses against the Peace and Security of Mankind, U.N. GAOR, 9th Sess, Supp. No. 9, at 11, U.N Doc. A/293 (1953) [reproduced in the accompanying notebook 4 at Tab 111].

f. 1984 Torture Convention, [85]

g. 1985 Inter-American Torture Convention, and [86]

h. 1987 European Torture Convention. [87]

Of the seven instruments, one is a precatory General Assembly resolution, one is an ILC report, and one is an ILC project, none of which have per se legally binging effect. Two are regional conventions binding only on the signatory states. Five are international conventions binding on their respective signatories, and which may also be binding on non-signatory states as part customary international law and/or *jus cogens*.[88]

Additionally, there exists several substantive instruments that have come into existence after World War II that are applicable in the context of armed conflict, intended to contain prohibitions aimed to protect humanitarian interests.

i. The four Geneva Conventions for the Protection of War Victims, August 12, 1949 and [89]

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[84] International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S 244., G.A Res. 3068 (XXVIII), U.N. GAOR, 28th Sess., Supp. No, at 238, U.N. Doc. A/46/10(1991) [reproduced in the accompanying notebook 1 at Tab 10] .

[85] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess, Supp. No. 51 at 197, U.N.Doc A/39/51 (1984), draft reprinted in 23 I.L.M 1027, with final changes in 24 I.L.M, 535 [hereinafter the Torture Convention] [reproduced in the accompanying notebook 1 at Tab 11].

[86] Inter-American Convention to Prevent and Punish Torture, opened for Signature Dec. 9, 1985, O.A.S.T.S. No. 67, 25 I.L.M 519 [reproduced in the accompanying notebook 1 at Tab 12].

[87] European Convention for the prevention of Torture and Inhuman or Degrading Treatment or Punishment, Opened for Signature Nov. 26, 1987, Europ.. T.S. No. 126, 27 ILM 1152 [reproduced in the accompanying notebook 1 at Tab 13].

[88] BASSIOUNI, *supra* note 59. See also, *Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, 1993 ICJ 3 (April 8) (separate opinion of Judge Oda) [reproduced in the accompanying notebook 3 at Tab 76]; The *Prosecutor v. Musema*, ICTR No. 96-13-A, Judgment and Sentence, January 17, 2000 [reproduced in the accompanying notebook 3 at Tab 79].

[89] Four Geneva Conventions: (1) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, October 21, 1950, 6 U.S.T 3114, 75 U.N.T.S. 21[hereinafter GWS] [reproduced in the accompanying notebook 1 at Tab 14]; (2) Geneva Convention for

j. 1977 Protocols I and II, additional to the Geneva Conventions.[90]

The Geneva Conventions are believed to be customary International Law, with 176 out of 189 member states of the United Nations having ratified them. Furthermore, the International Court of Justice[91]; the International Criminal Tribunal for Yugoslavia[92] and the International Criminal Tribunal for Rwanda[93], have all held that Geneva Conventions are firmly established as customary international law. Their protection and prohibitions can therefore be said to be binding upon non-signatory states. The four Geneva Conventions of 1949 and the two 1977 protocols incorporate components of crimes against humanity by including them among activities prohibited to belligerents in conflicts of an international or internal character.[94]

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the Amelioration of the Conditions of Wounded and Sick, and Shipwrecked Members of the Armed Forces at Sea, October 21, 1950, 6 U.S.T. 3217, 75 U.N.T.S 85 [reproduced in the accompanying notebook 1 at Tab 15]; (3) Geneva Convention Relative to the Treatment of Prisoners of War, October 21, 1950, 6 U.S.T 3316, 75 U.N.TS. 135 [hereinafter GPW] [reproduced in the accompanying notebook 1 at Tab 16]; (4) Geneva Convention Relative to The Protection of Civilian Persons in Time of War, October 21, 1950, 6 U.S.T. 3516, 75 U.N.T.S 287 [hereinafter GCC] [reproduced in the accompanying notebook 1 at Tab 17] .

[90] Protocols Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8 1977, 1125 U.N.T.S 3, 16 I.L.M 1391 [hereinafter Protocol I] [reproduced in the accompanying notebook 1 at Tab 18]; Protocol Additional To the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, June 8 1977, 1125 U.N.T.S. 609, 16 I.L.M 1442 (1977) [hereinafter Protocol II] [reproduced in the accompanying notebook 1 at Tab 19].

[91] *Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia, supra* note 88.

[92] *Prosecutor v. Musema, supra* note 88.

[93] *Prosecutor v. Krstic*, ICTY No. IT-98-33-T, Judgment, August 2, 2001 at 539 [reproduced in the accompanying notebook 3 at Tab 83].

[94] Common Articles 50,51, 130 and 147 of the four 1949 Geneva Conventions provide: Grave Breaches…shall be those involving any of the following acts, if committed against persons or property protected by the Convention: willful killing torture or inhumane treatment, including biological experiments, willfully causing great suffering or serious injury to body or heath and extensive destruction and appropriation of property, not justifies by military necessity and carried out unlawfully and wantonly.

The Genocide Convention of 1948 also covers several Crimes against Humanity as defined by the London Charter which governed at Nuremberg-but only with respect to certain specific acts, which are accompanied by specific intent, and against specifically designated groups. Thus the Convention excludes all other acts and groups not specified in the Convention.[95]

A more recent source of international law regarding armed conflicts is the 1977 Additional Protocol I to the original Geneva Conventions, which establishes additional rules limiting the means and methods of international warfare. However, since Iraq is not a party to Protocol I, it cannot be technically bound by it, though this is true only to the extent that Protocol I establishes new international law and is not simply a codification of existing, customary international law.[96] These instruments along with the precedents set at Nuremberg and Tokyo were meant to deter future leaders from committing the same crimes and to establish legal precedent.

v. Application of International Instruments to Iraqi Atrocities

In light of the numerous international instruments that date all the way back to before the end of the Second World War, the crimes committed by Saddam regime for the most part violated either one or more of the international treaties, or as the very least

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[95] *See,* Genocide Convention, supra note 81. Article II states In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, radical or religious group as such:

(a) Killing member of the group
(b) Causing serious bodily or mental harm to members of group;
(c) Deliberately inflicting on the group, conditions of life calculated to bring about its physical destruction in whole or in part
(d) Imposing measures intended to prevent births within the group
(e) Forcibly transferring children of the group to another group.

[96] Robert A. Bailey, *Why Do States Violate The Law of War? A Comparison of Iraqi Violations in Two Gulf Wars,* 27 SYRACUSE J. INT'L L. & COM. 103 (Winter 2000), at 105 [reproduced in the accompanying notebook 2 at Tab 46].

violated customary international law. The following is an attempt to summarize the major violations committed by the Saddam regime dating back the beginning of their rule and identify the corresponding international instrument that were in effect at the time the crime was committed.

In addition to the International instruments listed in the previous section, the following international instruments bear mentioning:

The United Nations Charter [97]
Hague Convention IV and its Annex Respecting the Laws and Customs of War on Land of 18 October 1907 (Hague IV)[98]
Hague Convention V, Respecting the Rights and Duties of Neutral Powers and persons in Case of War on Land, 18 October 1907 (Hague V); [99]
Hague Convention VIII, Relative to the Laying of Automatic Submarine Conduct Mines, 18 October 1907 (Hague VIII); [100]
Hague Convention IX, Concerning Bombardment by Navel Forces in Time of War, 18 October 1907 (Hague IX);[101]
Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous, or Other Gases and of Bacteriological Methods of Warfare, 17 June 1925[102];
Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954 (1954 Hague)[103]

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[97] UNITED NATIONS CHARTER, June 26, 1945, art. 39-51, prohibiting the use of treats or use of force against the territorial integrity or political independent of any state [reproduced in the accompanying notebook 1 at Tab 20].

[98] Hague Convention, Laws of War: Laws and Customs (Hague IV), October 18, 1907, www.yale.edu/lawweb/Avalon/lawofwar/hague04.html [reproduced in the accompanying notebook 1 at Tab 21].

[99] Hague Convention, Laws of War: Rights and Duties of Neutral Power and Persons in Case of War on Land (Hague V), October 18, 1907, www.yale.edu/lawweb/avalon/lawofwar /hague05.htm [reproduced in the accompanying notebook 1 at Tab 22].

[100] Hague Convention, Laws of War: Laying of Automatic Submarine Contact Mines (Hague VII), October 18, 1907, www.yale.edu/lawweb/avalon/lawofwar /hague08.htm [reproduced in the accompanying notebook 1 at Tab 23].

[101] Hague Convention, Laws of War: Restrictions With Regard to the Exercise of the Right of Capture in Naval War, October 18, 1907, www.yale.edu/lawweb/avalon/lawofwar /hague11.htm [reproduced in the accompanying notebook 1 at Tab 24].

[102] Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Others Gases and of Bacteriological Methods of Warfare, Geneva, 94 L.N.T.S. 65, February 8, 1928 [hereinafter Geneva-Chemical Protocol] [reproduced in the accompanying notebook 1 at Tab 25].

Though the Hague Conventions were not signed by Iraq, they were firmly established as customary international law, at the time of Nuremberg by the IMT. [104] As such, since Iraq was either a party to the treaty or the crime enumerated in the treaty had become customary international law, defendants before the IST cannot claim the statute violates the principle of legality.

Wagging Aggressive War

Iraq's 1990 attack on Kuwait was premeditated and unprovoked.[105] The aggression was unprecedented: it was the first time that a member of the United Nations attempted to dissolve the sovereignty of another member state by force.[106] Such an act could be found to be a "crime against peace", as defined in the London Charter of 8 August 1945:

> Planning, preparation, initiation or wagging of war of aggression, or a war in violation of international treaties, agreement or assurances, or

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[103] Convention on the Protection of Cultural Property in the Event of Armed Conflict with Regulation for the Execution of the Convention, The Hague, 14 May, 1954, ratified by Iraq December 22, 1967 [reproduced in the accompanying notebook 1 at Tab 26].

[104] United States: Department of Defense Report To Congress on the Conduct of The Persian Gulf War-Appendix on the Role of the Law of War, April 10, 1992, *reprinted in* 31 I.L.M. 612 [hereinafter DoD Report] [reproduced in the accompanying notebook 4 at Tab 105]. The report states "While Iraq is not a party to Hague IV, the International Military Tribunal (Nuremberg, 1946) stated that with regard to it that: The Rule of land warfare expressed in... [Hague IV] undoubtedly represented an advance over existing International Law at the time of there adoption...but these rules...were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war.

As customary international law, its obligations are binding upon all nations. Neither is Iraq a party to Hague V, Hague VII. However, the provision of each cited herein are regarded as a reflection of the customary practice of nations and therefore binding upon all nations."

[105] James S. Robbin, War Crimes: The Case of Iraq, 18 FLECTCHER F. WORLD AFF. 45 (1994) [hereinafter Robbin, War Crimes] [reproduced in the accompanying notebook 2 at Tab 58] .

[106] *Id.* at 48.

participation in a common plan or conspiracy for the accomplishment of any of the foregoing. [107]

Charges of aggressive war may also be raised against Iraq for its indiscriminate Scud missile attacks against Israel, a non-combatant state. [108]

Treatment of POWS

During the Gulf war Iraq displayed a callous disregard for the welfare and life of soldiers on the field of battle. U.S. and coalition personal captured by Iraq were POWs protected by the GWS[109] (if wounded, injured, or sick) and GPW. In contravention of Article 26, GPW, all U.S POW's incarcerated by the Iraqi's experience food deprivation as well as inadequate protection for the cold, in violation of Article 25, GPW.[110] All US POWs suffered physical abuse at the hands of there Iraqi captors, in violation of Article 13, 14 and 17, GPW.[111] Most POW's were tortured, a grave breach, in violation of Article 130, GPW. Some POWS were forced to make public propaganda statements, in violation of Article 13, GPW. Iraq also violated Article 23, GPW, which forbids the use of captives as "human Shields" to render targets immune from attack.[112]

War Crimes

Iraqi War crimes were widespread and premeditated. A summary of the specific charges against Iraq during the Gulf War is imposing:

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[107] London Charter *supra* note 44, at art. 6. The Nuremberg principle were unanimously reaffirmed as constituting customary international law by U.N. General Assembly Resolution 95(1) in December 1946, with Iraq concurring, *supra* note 65.

[108] Robbin, War Crimes *supra* note 105 at 48.

[109] GWS *supra* note 89.

[110] DoD Report *supra* 104 at 630.

[111] *Id.*

[112] Robbins, War Crimes, *supra* note 105 at 49.

Taking Kuwaiti nations and third party nationals as hostages and their individual and mass forcible deportation to Iraq, in violation of GCC Articles 34, 49 and 147.

Compelling Kuwaiti and other foreign nationals to serve in the armed forces of Iraq, in violation of GCC Articles 51 and 147.

Use of Kuwaiti and third-country nations as human shields in violation of GCC Articles 28 and 38(4).

Collective punishment of families, including destruction of homes and execution, in violation of GCC Article 33.

Inhumane treatment of Kuwaiti and third-country civilians, including torture and murder, in violation of GCC Article 32 and 147.

Raping Women, in violation of GCC Article 27.

Exposing protected children under age 15 to potential harm, in violation of GCC Article 24.

The Transfer of its own civilian population into occupied Kuwait, in violation of GCC Article 24.[113]

The GCC was ratified by Iraq on the 14 of February 1956, well before the crimes listed above were committed during the Gulf War. As such, any claim that the IST statute is ex post facto, or imposing retroactive laws is bound to fail.

Crimes against Humanity (Genocide)

The most blatant, though perhaps not only, act of genocide committed by the Iraqi's has been against the Kurdish minority in northern Iraq. The March 1988 gassing at Halabja, which killed over 5,000 Kurds, as well as the Anfal campaigns which left 50,000- 100,000 Kurds dead and many more displaced all qualify under both the London Charter and the Genocide Convention as genocide. Furthermore the suppression of 1991 uprising by the Kurds and Shiites in the north and south of Iraq following the

[113] Adopted from Robbins War Crimes, *supra* note 105 at 50.

Gulf War can also be viewed as genocide. The London Charter defines crimes against humanity as murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during war, or persecutions on political, racial or religious grounds.[114] To be a crime against humanity, the act must be a planned process and not just a random hate crime. The Genocide Convention defines genocide to include "killing members of the group", "causing serious bodily or mental harm to members of the group" and "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part." [115] However, in order to charge any Iraqi with genocide under the convention, it must be shown not only that they committed the crime, but also that they were doing it for the purpose of genocide.[116] Iraq ratified the Genocide Convention on January 20, 1956[117] and is bound by the London Charter since it was affirmed by the U.N General assembly making it binding on all member states. Since, the acts committed in Iraq occurred after 1956, the Statute prosecution of the them does not violate the principle of legality.

Use of Chemical Weapons

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[114] London Charter, *supra* note 44, at Art. 6 (c).

[115] Genocide Convention, *supra* note 91, at Art. 2: In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

[116] Robbins War Crimes, *supra* note 105, at 51.

[117] Ratification of International Human Rights Treaties- Iraq Ratification of International Human Rights, *available at* http://www1.umn.edu/humanrts/research/ratification-iraq.html [reproduced in the accompanying notebook 4 at Tab 110].

Despite Iraq's membership in the Geneva- Chemical Protocol prohibiting the use of chemical weapons,[118] Iraq first used them in its war with Iran, and then again against Iraqi Kurds. Iraq's use in the Iraq- Iran war violated the Geneva-Chemical Protocol, as well as article 35(2) of Protocol I.[119] Though Iraq is not bound by the Protocol I, article 35 to 42 and 48-49(1) of the additional Protocol I are considered by most to be customary international law, thus binding Iraq irregardless of it ratification of the Protocol.[120] At the end of the Iraq- Iran war, Saddam used chemical weapons directly against Iraqi Kurds in the north. Although the law of war defined in the Geneva conventions does not cover the treatment of a state's own citizens[121] the IMT at Nuremberg made it clear that attempts to exterminate an entire sub-group of a population would constitute crimes against humanity and subject the perpetrators to war-crimes prosecutions.[122]

B. The Principles of Legality in Modern Age: International Tribunals Post World War II.

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[118] Geneva-Chemical Protocol, *supra* note 102.

[119] Protocol I, *supra* note 90, art. 35(c) which states:

> 1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
> 2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
> 3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

[120] Bailey, *supra* note 96 at 106, citing FRITZ KALSHOVEN, PROHIBITION OR RESTRICTIONS ON THE USE OF METHODS AND MEANS OF WELFARE, IN THE GULF WAR OF 1980-1988: THE IRAN-IRAQ WAR IN INTERNATIONAL LEGAL PERSPECTIVE 97, 99 (lge K. Dekker & Harry H.G. Post eds.. 1992).

[121] GCC, *supra* note 89 at art 4, which states: Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

[122] Robbins, War Crimes, *supra* note 86 at 51.

i. The International Criminal Tribunal for the Former Yugoslavia

The world was destined to once again see the atrocities of war in the Balkans in the early 1990's. With the break up of the former Yugoslavia, severe internal violence resulted. "Ethnic cleansing," the forced removal of people from their homes because of their religious or ethnic roots, characterized the methods employed for killing and driving out the non-Serb minorities.[123] The United Nations Security Council under the authority of Chapter VII of the UN Charter established the International Criminal Tribunal for the Former Yugoslavia (ICTY) in May of 1993 to serve as the legal basis for the prosecution of war crimes.[124] Since Nuremberg the foundation of international law had been greatly fortified, and clearly defined. At the time of Nuremberg, the only international humanitarian law instrument to rely on was the Hague Convention; however, at the time of the ITCY there was widespread acceptance of the 1949 Geneva Convention, the Genocide Convention, and the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment.[125] More importantly, the adoption of the Nuremberg principles by the U.N. contributed significantly to the body of law, which the ITCY can draw from.[126]

Just as the Tribunals of World War II confronted the defendant's ex post facto challenges, the ITCY has likewise needed to address the issue of *nullum crimen sine lege.* Anticipating such, the UN Secretary-General advocated the following view in his report

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[123] Lara Leibman, From *Nuremberg to Bosnia: Consistent Application of International Law*, 42 CLEV. ST. L. REV. 705 (1994), at 725[reproduced in the accompanying notebook 2 at Tab 52].

[124] S.C. Res. 808, U.N. SCOR, 3175th mtg., U.N. Doc. S/RES/808 (1993) created the ICTY which is govern by, Statute For the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, annex, art. 8, U.N. SCOR, 48th Sess., Res. & Dec., at 29, U.N. Doc. S/INF/49 (1993) [reproduced in the accompanying notebook 2 at Tab 40] .

[125] Leibman, *supra* at 710.

[126] *Id.* at 711.

which accompanied the statute of the ICTY: "the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of the customary law so that the problem of adherence of some but not all States to specific conventions does not arise"[127] According to the Report the following conventions are to be considered beyond doubt a part of international customary law: the Hague Conventions, the 1949 Geneva conventions, the 1948 Genocide Convention and the 1945 Nuremberg Charter.[128] The Report concluded that limiting the Yugoslavia Tribunal's jurisdiction to rules that have become accepted as customary international law ensures adherence to the principle of *nullum crimen sine lege.*[129]

A major difference between Nuremberg and the Yugoslavia Tribunal is that whereas at Nuremberg the London Charter created new crimes, the ICTY merely lists crimes that have already existed in international conventional and customary law. From the perspective of the principle of legality the legitimacy of the ICTY was already achieved because all of these conventions and customs existed before the war in the former Yugoslavia, and furthermore, the former Yugoslavia had ratified these conventions and incorporated them into its national Criminal Code.[130]

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[127] Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808, Doc s/25626 (1993), Presented May 3, 1993, U.N. Doc. 25704 [hereinafter the Report for the Secretary-General] [reproduced in the accompanying notebook 2 at Tab 43].

[128] *Id.* at para. 35.

[129] *Id.* at para. 36.

[130] The Geneva Conventions were incorporated into the Criminal Code of the Yugoslavia. Section XVI of the 1976 Criminal Code of the Socialist Federative Republic of Yugoslavia. Articles 142-44, 150, 153 and 155 provide descriptions of the crimes involving violations of the Geneva Conventions. See, Sanja Kutnjak Ivkovic, *Justice by the International Criminal Tribunal for the Former Yugoslavia*, 37 STAN. J. INT'L L. 255 (Summer, 2001) at 268 [reproduced in the accompanying notebook 2 at Tab 51].

The ICTY followed the approach taken in Nuremberg when the trial chamber recognized in *Tadic*, that the prosecution of war crimes committed in violation of common Article 3 of the Geneva Convention did not violate the principle of *nullum crimen sine lege*[131] and prosecution by the Tribunal under its new Statute "does not violate the ex post facto prohibition."[132] It also affirmed that "common article 3 is beyond a doubt a part of customary international law, and therefore, the principle of *nullum crimen sine lege* is not violated by incorporating the prohibitory norms of common Article 3 in Article 3 of the Statute of the International Tribunal."[133]

On appeal, the Appellate Chamber of the Tribunal affirmed jurisdiction and declared that the incorporation of crimes against humanity in the Statue of the ICTY did not violate the principle of *nullum crimen sine lege.*[134] The Appellate Chamber furthermore recognized, with respect to war crimes, that there is no violation of the principle even though "common Article 3 of the Geneva Convention contains no explicit reference to criminal liability," and finally the Chamber added that "individual criminal responsibility is not barred by the absence of treaty provisions on punishment for breaches."[135]

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[131] *Prosecutor v. Dusko Tadic*, ICTY, IT-94-1-72, Decision on the Defense Motion on Jurisdiction, Aug, 10, 1995 [reproduced in the accompanying notebook 3 at Tab 85].

[132] *Id.* at paras. 65-74

[133] *Id.* at para. 72.

[134] *Prosecutor v. Dusko Tadic*, ICTY, IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Appeal Chamber, Oct. 2, 1995, at paras. 139, 141, 143., *reprinted in* 35 I.L.M. 32, 72-73 (1996) [reproduced in the accompanying notebook 3 at Tab 86] . *See also*, VIRGINIA MORRIS AND MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (Transnational Publishers, 1995), on the debate about whether before the Tadic decision, Common Article 3 created individual Criminal liability.

[135] *Id* at para. 128 (citing the IMT at Nuremberg).

In the case of *Hadzihasanovic*, the ICTY held that "In interpreting the principle of *nullum crime sine lege*, it is critical to determine whether the underlying conduct at the time of it commission was punishable. The emphasis on conduct, rather than on the specific description of the offense in substantive criminal law, is of primary relevance."[136] Said another way, it must be "foreseeable and accessible to a possible perpetrator that his concrete conduct was punishable"[137] for the principle to be satisfied.

The principle was again raised in *Delali*,[138] in which the trial Chamber stated that:

> It is undeniable that acts such as murder, torture, rape and inhuman treatment are criminal according to "general principles of law" recognized by all legal systems. The purpose of this principle is to prevent the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission. It strains credibility to contend that the accused would not recognize the criminal nature of the acts alleged in the Indictment. The fact that they could not foresee the creation of an International Tribunal which would be the forum for prosecution is of no consequence.[139]

Once again the Trial Chamber held that the substantive prohibitions in the Geneva Conventions and the provisions of the Hague regulations constitute rules of customary international law which may be applied by the ITCY to impose criminal responsibility for offense alleged by the Tribunal. [140] The Trial chamber emphasized the Criminal Code of the SFRY, which established the jurisdiction of Bosnian courts over war crimes

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[136] *Prosecutor v. Hadizihasanovic, Alagic and Kubura*, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, 12 November 2002, para. 62 [reproduced in the accompanying notebook 3 at Tab 82].

[137] *Id.*

[138] *Prosecutor v. Zejnil Delali*, ICTY, IT-96-21- T, Judgment of Trial Chambers, Nov. 16, 1998, at para. 300-316 [reproduced in the accompanying notebook 3 at Tab 81].

[139] *Id.* at 314.

[140] *Id.* at 320.

committed "at the time of war, armed conflict or occupation."[141] Thus, each of the accused in the present case, according to the Trial Chamber could have theoretically been held individually criminally responsible under their own national law for the crimes alleged in the ITCY indictment. Consequently there is no substance to the argument that applying provisions of the Statute of the ITCY violates the principle of legality, since the prohibitions existed prior to the Statute in the National Criminal Code. [142]

ii. The International Criminal Tribunal for Rwanda

On November 8, 1994, the United Nations Security Council set up the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda (ICTR).[143] The ICTR, parallels the forum set forth by the ITCY, and used the ITCY as precedent in many of its decisions. [144]

The Trial Chamber of the ICTR in its first Judgment in the case of *Akayesu*, followed the ITCY by holding that the Geneva Convention had obtained the status of customary international law.[145] Furthermore the Trial Chamber relied on the "fact that the Geneva Conventions of 1949 were ratified by Rwanda on 5 May 1964 and Additional Protocol II on 19 November 1984, which applied to non-international conflict, and were

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[141] *Id.* at 331

[142] *Id.* at 312.

[143] Statute for the International Criminal Tribunal for the Rwanda, U.N. SCOR, 3453 mtg., U.N. Doc. S/RES/955 (1994) [reproduced in the accompanying notebook 1 at Tab 28].

[144] William A. Schabas, *Prosecuting International Crimes: Justice, Democracy, and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems*. 7 CRIM. L. F. 523, (1996) [reproduced in the accompanying notebook 2 at Tab 60].

[145] *Prosecutor v Jean-Paul Akayesu*, ICTR, ICTR-96-4-T, Chamber I Judgment, September 2, 1998 [reproduced in the accompanying notebook 3 at Tab 77].

therefore in force on the territory of Rwanda at the time of the alleged offences.[146] Moreover the Tribunal held "all the offences enumerated under Article 4 of the Statute", which reaffirms common article 3 of the Geneva Convention, "constituted crimes under Rwandan Law in 1994"[147] Rwandan nationals were therefore aware, or should have been aware in 1994, that they were amenable to the jurisdiction of Rwandan courts in case of commission of those offences falling under Article 4 of the statute."[148]

Furthermore, the Rwanda penal code defines all the usual underlying criminal law infractions necessary to prosecute those responsible for genocide, including murder, rape and pillage; thus even though the international infractions of genocide and crimes against humanity were never specifically incorporated into the criminal code, a case for their prosecution can still be made. [149]

Both the ITCY and ITCR resolved any issues that were presented regarding the principle of *nullum crimne sine lege* by using both past international tribunals and international instruments to show that the law being applied was in fact in conformity with the principle of legality. Both recognize Nuremberg, and the U.N codification of the Nuremberg principles as being customary international law, and as such the principle of legality was easily resolved.[150]

iii. Special Court For Sierra Leone

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[146] *Id.* at 608, states: It is today clear that the norm of Common Article 3 have acquired the status of customary international law in that most States, by their domestic penal codes, have criminalized acts which if committed during internal armed conflict, would constitute violations of Common Article 3.

[147] *Id.* at 617.

[148] *Id.* para.608.

[149] Schabas, *supra* note 144.

[150] *Id.*

In August of 2000, the United Nations created the Special Court of Sierra Leone in an attempt to bring to justice those responsible for the bloody civil war that ravaged the country between 1991 and 1999.[151] According to the Statute for the Special Court of Sierra Leone, the court shall "have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone."[152] The Special Court is unique in that it is neither a UN body like the ICTY or ICTR, nor is it entirely a domestic court. Rather the Special Court is a hybrid UN-Sierra Leone body, jointly administered by both parties.[153]

In one of the Special Courts first decisions, the court grappled with the principle of *nullum crimen sine lege* in the context of the recruitment of children under 15 "into armed forces or groups or using them to participle actively in hostilities"[154] In June of 2003, a Preliminary Motion was filed on behalf of Hinga Norman, in which he challenging the charge against him for the use of child soldiers, submitting that child recruitment was not a crime under customary international law at the time alleged in the indictment, which dated back to November 1996. The Appeals Chamber held that prior to November 1996, the prohibition on child labor had crystallized as customary

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[151] Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, October 4, 2000, S/2000/915[reproduced in the accompanying notebook 1 at Tab 44].

[152] Statute of the Special Court of Sierra Leone, August 14, 2001, at art. 12(1) (a).

[153] Michael A. Carriero, *The Involvement and Protection of Children in Truth and Justice-Seeking Process: the Special Court for Sierra Leone.* 18 N.Y.J. HUM. RTS. 337 (SUMMER 2002) [reproduced in the accompanying notebook 2 at Tab 49].

[154] *Prosecutor v. Sam Hinga Norman*, SCSL-2004-14-AR72 (E), , Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) May 31, 2004, (*hereinafter*, Hinga Norman Child Recruitment Decision) [reproduced in the accompanying notebook 4 at Tab 87].

international law, as demonstrated by the widespread recognition and acceptance of the norm prohibiting child recruitment in international conventions and customs.

The Special Court went into an in-depth discussion on what was customary international law, and the process of how a law became customary international law. The Special Court, held,

> When considering the formation of customary international law, the "number of states taking part in a practice is a more important criterion...than the duration of the practice. It should further be noted that "the number of states needed to create a rule of customary law varies according to the amount of practice which conflict with the rule and that even a practice followed by a very small number of states can create a rule of customary law if there is not practice which conflicts with the rule."

Thus, for the Special Court, the fact that child recruitment had only been criminalized for the first time in the 1998 Rome Statute was not as important as the fact that most of the states prohibited the recruitment of children by 1996.[155]

The Special Court went on to note the requirements for a legal norm to become a customary international law. The Court held that, "the formation of custom required both state practice and a sense of pre-existing obligation (opinio iuris)."[156] The norm, according the Special Court, needs to be adopted by a number of states, and have "widespread recognition and acceptance of the norm".[157] The Special Court recognized that custom takes time to develop and that it's impossible and even contrary to the

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[155] *Id.* at para. 18. The Court went on to state, that "185 States, including Sierra Leone, were parties to the Geneva Convention prior to 1996, it follows that the provisions of those conventions were widely recognized as customary international law. Similarly, 133, including Sierra Leone, ratified Additional Protocol II before 1995. Due to the high number of States Parties one can conclude that many of the provision of the Additional Protocol II, including the fundamental guarantees, were widely accepted as customary international law by 1996.

[156] Hinga Norman Child Recruitment Decision, *supra* note154 at para. 17.

[157] *Id.* at para. 20.

concept of customary law to determine a given date for when a norm would become crystallized into customary international law. [158] What the Special Court did state is that during a period of time, a norm starts to enter the "conscience of leaders and populations" during where customary law begins to develop. The next step in the development is when the norm is incorporated into key international instruments, which eventually lead to a period during which the majority of states crystallize the norm as being criminal.[159]

What the Special Court of Sierra Leone found, like the ICTY and ICTR before it, was that a norm need not be expressly stated in an international convention for it to crystallize as a crime under customary international law. It is enough that, the norm was widely accepted by a large number of states and firmly established in key international instruments representing the will of a majority of the world states. [160]

C. Application of the Principle of Legality to Iraqi Special Tribunal

On December 10, 2003, the Iraqi Governing Council adopted the "Statute of the Iraqi Special Tribunal" providing the legal foundation and laying out the jurisdiction and basic structure for the Tribunal that will be responsible for prosecuting acts of genocide, crimes against humanity and war crimes in Iraq between 1968 and 2003.[161]

The Statute for the Special Iraqi Tribunal in article 11 through article 13 codifies the crimes applying international law, including the Crime of Genocide in article 11;

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[158] *Id.* at para. 50.

[159] *Id.*

[160] Alison Smith, *The Special Court for Sierra Leone: Testing the Water, Child Recruitment and the Special Court For Sierra Leone* 2 J. INT'L CRIM. JUST. 1141 (2004) [reproduced in the accompanying notebook 3 at Tab 63].

[161] IST Statute, *supra* note 1 at art. 1.

Crimes against Humanity in article 12; and War Crimes in article 13.[162] As for the crimes of genocide and war crimes, the statute explicitly states that its reliance is based on the Genocide Conventions and the Geneva Convention, respectively. The Statute explicitly states for example in article 11, that "for the purpose of this Statute and in accordance with the Convention on the Prevention and Punishment of the Crimes of Genocide, dated December 9, 1948, as ratified by Iraq on January 20, 1959, 'genocide' means any of the following..."[163] Similar language is used in article 13 when describing war crimes as "grave breaches of the Geneva Conventions of 12 August 1949."[164]

The Statute is heavily dependent on language dealing with "customary international law" when defining specific prohibited acts. Article 13(b) for example, lists "other serious violations of law and customs applicable in international armed conflicts, within the established framework of international law..."[165] to preface a list of crimes. Elsewhere, the Statute states "serious violations of laws and customs of war applicable in armed conflicts not of international character, within the established framework of international law..."[166] The reason for such language seems to be that the drafters of the Statute wished to follow the guidance of the ITCY, in which the Secretary-General in his report said that in order to conform to the principle of legality, "the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of

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[162] *Id.* art.11-13.

[163] *Id.* art. 11.

[164] *Id.* art. 13 (a).

[165] *Id.* art. 13 (b).

[166] *Id.* art.

the customary law so that the problem of adherence of some but not all States to specific conventions does not arise".[167]

Even with carefully drafting of the Statute one can anticipate that like all Tribunals before it, that the IST will also be confronted with the issue of the principle of *nullum crimine sine lege*, and that it too will have to make a determination, as to whether or not the Statute violates the principle.

Following the example of all the other Tribunals, the IST can look to two places for legal precedent: (1) the judgment and charters of the Tribunals that preceded it, namely Nuremberg, Tokyo, Yugoslavia, Rwanda and Sierra Leone; and (2) the international instruments that have come to establish customary international law, namely the Geneva Convention, the Genocide Convention and the Convention against Torture and other Inhuman Treatment.

In light of the many International Tribunals from Nuremberg to the ICTY and ICTR all of which have firmly established that the crimes of genocide and crimes against humanity are a part of customary international law, any claim by an accused before the Iraqi Special Tribunal that such crimes violate the principle of legality will be futile and sure to fail. Not a single decision by a tribunal has held that the crimes of genocide and crimes of against humanity were not applicable to a defendant, based on the principle of legality.

The precedent established by the Special Court of Sierra Leone in terms of child soldiers and recruitment provides an example of how the Iraqi Special Tribunal can deal with the principle of legality. The Special Court held that customary international law, was established when a norm is excepted by a majority of states which accept it and the

[167] The Report of the Secretary-General, *supra* note127.

presence of a pre-existing obligation on the part of the country to conform with that norm. Such, obligations most likely arise out of treaty and conventions signed and ratified by the state.

Like the ICTY and ICTR, the IST would also rely heavily on the numerous treaties to which Iraq was a member, to show that the crimes in the Statute were in fact part of customary international law at the times the crimes were committed.
As of December 9, 2002, Iraq accepted the terms of the following treaties: the Four Geneva Conventions, ratified by Iraq on February 14, 1956[168]; Convention on the Prevention and Punishment of Crimes of Genocide,[169]ratified on January 20, 1959; International Covenant on Civil and Political Rights;[170] as well as numerous other international treaties.[171] As noted earlier though, Iraq did not sign either the Torture Convention, nor did it sign the two 1977 Additional Protocols to the Geneva Convention. As well, as a member of the United Nations, Iraq has an additional "obligation to promote and protect human rights and fundamental freedoms" and to abide by the "obligations [it has] undertaken" by signing human rights treaties.[172] Furthermore like

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[168] Geneva Convention, *supra* note 89, Iraq however did not sign the Additional Protocols to the Geneva Convention (I or II).

[169] Genocide Convention, s*upra* note 91.

[170] Signed on Feb. 18, 1969 and Ratified on Jan. 25, 1971 by Iraq.

[171] Other treaties include: International Covenant on Economic, social, and cultural Rights (CESCR), which Iraq signed on January 25, 1971; The International Covenant on Civil and Political Rights (ICCPR), signed on January 25, 1971; The International Convention on the Elimination of All forms of Racial Discrimination (CERD), signed on January 14, 1970; The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), signed on August 13, 1986; The Convention on the Rights of Children, signed June 15, 1994.

[172]G.A. Res. 1994/203, U.N. GAOR 94th mtg., U.N. Doc.A/RES/49/203 (1994) [reproduced in the accompanying notebook 2 at Tab 41] .

other states, Iraq must comply with customary international law regardless of treaty ratification status.[173]

It is worth noting that Iraq, though having signed the Geneva Conventions, did not fulfill the Conventions requirement that the Convention be enacted into domestic law. This raises the question as to whether the Geneva Convention was in fact self-executing, due to the express call for implementing legislation within the convention. Failure to enact the necessary legislation cannot affect the international obligations of Iraq to implement the Geneva Convention, namely because the convention has attained the status of customary international law.[174]

The Restatement of Foreign Relations Law helps clarify Iraq's obligations under customary international law. Iraq would violate customary international law if, as a matter of state policy, encouraged or condoned:

> (a) genocide,
> (b) slavery or slave trade,
> (c) the murder or causing the disappearance of individuals,
> (d) torture or other cruel, inhumane or degrading treatment or punishment,
> (e) prolonged arbitrary detention,
> (f) systematic racial discrimination, or
> (g) a consistent pattern of gross violation of international recognized rights. [175]

Section (a) –(f) are considered *jus cogens*, which would mean all countries must adhere to them, regardless of ratification status.[176]

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[173] The Vienna Convention, a multinational treaty prepared by the United Nations, codifies customary international law governing international agreements. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 [reproduced in the accompanying notebook 1 at Tab 30].

[174] Theodor Meron, *The Geneva Convention as Customary Law*, 81 AM. J. INT'L L 348 (April, 1987) [reproduced in the accompanying notebook 2 at Tab 53].

[175] Restatement (Third) of Foreign Relations Law of the United States § 702 (1987) [reproduced in the accompanying notebook 4 at Tab 106].

Each of the Articles, from 11-14 of the Statute for the Special Iraqi Tribunal can trace their origins to a long line of international legal precedent that had binding authority for Iraq when the criminal acts were committed. The following is a brief summary of the legality of each of the sections in context of the crimes committed in Iraq.

i. *Article 11: The Crime of Genocide*:

The 1948 Convention on the Prevention and Punishment of the crimes of Genocide, to which Iraq acceded on January 20, 1959, defined genocide in Article II as:

> Any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to the member of the group
> (c) Deliberately inflicting on the group conditions of like calculated to bring about its physical destruction in whole or in part;
> (d) Imposing transferring children of the group to another group[177]

Article III goes on to state:

> The following acts shall be punishable:
> 1. genocide;
> 2. conspiracy to commit genocide;
> 3. direct and public incitement to commit genocide
> 4. complicity in genocide.[178]

Reading the Statute for the Special Iraqi Tribunal, one will quickly note that Art. 11 of the Statute is identical to provision of the Genocide Convention, thus leaving no room for any argument that the Statute creates anything that was not already binding authority in Iraq for over fifty years. Because Iraq acceded to the Genocide Convention, the crime of

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[176] *Id.* at § 702 (1987) cmt. n.

[177] Genocide Convention, *supra* note 91.

[178] *Id.* at art. III.

genocide existed in the form of a treaty and as customary international law during the 1980's when the majority of the above acts occurred. Accordingly, no significant legal barrier, such as the principle of legality, exists for the prosecution of Saddam Hussein for genocide.[179] Even, if Iraq had not acceded to the Convention, as a party to the United Nations, it must uphold certain basic human rights found in the preamble to the United Nations Charter. The preamble states that member of the United Nations aim to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person."[180] Additionally, predating the Genocide convention, both The London charter and the charter for Control Council Law No. 10, allowed for the prosecutions of genocide. Both charters were reaffirmed as being binding customary international law, by the U.N. General Assemblies resolution[181]

ii. Article 12: Crimes against Humanity:

Like genocide, the term crimes against humanity suggest that such crimes offend the whole of humanity and consequently the ICTR and ICTY considered them international crimes. Unlike genocide, however, definitions of the crimes against humanity vary. The Tokyo Charter in Article 5 (c) resembled the Nuremberg Charter, but did not include persecutions on religious grounds.[182] Allied Control Council No. 10, Article 2, broadened the concept of crimes against humanity in its definition by including the words "not limited to" and by specifically adding "imprisonment, torture, and

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[179] L. Elisabeth Chamblee, *Post War Iraq: Prosecuting Saddam Hussein*, 7 CAL. CRIM. LAW REV.1 (2004) [reproduced in the accompanying notebook 2 at Tab 48] .

[180] Charter of the United Nations, *supra* note 97.

[181] UN Report to the Secretary-General, *supra* note 127.

[182] Charter of the International Military Tribunal for the Far East, *supra* note 68 at Art. 5.

rape."[183] Furthermore the ICTR and ICTY define crimes against humanity differently from both former definitions and from one another.[184] Regardless of the differences, all the Tribunals have included that in order for crimes against humanity to occur, the perpetrator must commit them as "part of widespread or systematic attack directed against a civilian population" and have knowledge of the attack's systematic nature. Such language is seen in the ITCR,[185] ITCY,[186] and the Statute for the International Criminal Court.[187] The Statute for the IST parallels such language; Article 12 states that for the purpose of the statute, "crimes against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge..."[188]

Article 12 goes on to list the specific acts that constitute crimes against humanity, many of which have long been recognized in international law and Iraqi national law. For example, deportation[189] as a crime against humanity has long been recognized as

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[183] Chamblee, *supra* note 179 at 12.

[184] Chamblee, *supra* note 179 at 12, A prosecutor in the ICTY may prosecute "murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial and religious grounds, and other inhumane acts" only when committed in armed conflict and directed against a civilian population. The ICTR, on the other hand, allows the prosecutor to prosecute when the accuses "committed acts as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.

[185] *Prosecutor v. Akayesu*, *supra* note 145 at para. 580.

[186] *Prosecutor v. Tadic,* ICTY, No. IT-94-1-T, Opinion and Judgment of Trial Chamber, May 7, 1997 at paras. 647-48 [reproduced in the accompanying notebook 3 at Tab 84].

[187] Rome Statute of the International Criminal Court, July 1, 2002, U.N. Doc. A/CONF.183/10 (1998) [hereinafter the Rome Statute] [reproduced in the accompanying notebook 1 at Tab 31].

[188] IST Statute, *supra* note 1 at art 12.

[189] *Id.* art.12 (a)(4).

customary international law, starting with Article 6 (c) of the Nuremberg Charter;[190] Article 5(d) of the ICTY;[191] Article 3(d) of the ITCR;[192] as well as in the Control Council No. 10 Statute.[193]

"Imprisonment or other severe deprivation of physical liberty in violation of fundamental norms of international law" is another crime against humanity listed in the statue under Article 12.[194] The ICTR, the ICTY and the Allied Control Council law No. 10 prohibit excessive and unjust imprisonment in their instruments. Previous statutes include the term "other severe deprivation of physical liberty," as a catch all phrase to encompass borderline types of detainment that may not fit within other definitions but nevertheless rises to the levels of crimes against humanity.

The ICTY[195] ICTR[196] and Allied Control Council Law No. 10[197] all expressly list Torture as a crime against humanity, just like the Statute for the Special Tribunal for Iraq.[198] While neither the Nuremberg nor the Tokyo charters specified torture as a crime against humanity, it would have fallen into the "inhuman act" category of both statutes. Even though Iraq is not a party to the Torture Convention,[199] it is a party to the

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[190] London Charter, *supra* note 44.

[191] ICTY Statute, *supra* note 124.

[192] ICTR Statute, supra note 143.

[194] IST Statute, *supra* note 1, at art. 12 (a).

[195] ICTY Statute, *supra* note 124, art. 5 (f).

[196] ICTR Statute, *supra* note 143, art. 3(f).

[197] Allied Control Council Law Punishment of Persons Guilty of War Crimes, Crimes against Pease And Against humanity, Dec. 20, 1945, http://www.yale.edu/lawweb/avalon/imt/imt10.htm [reproduced in the accompanying notebook 1 at Tab 6].

[198] IST Statute, *supra* note 1 at Art (12(6).

[199] Torture Convention, *supra* note at Art 5(2).

International Covenant on Civil and Political Rights, which states in Article 7 that "no one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment."[200] What is evident from the above comparisons is that acts under article 12 of the Statute for the Iraqi Special Tribunal, have a firm footing in international law, in the form of treaties and customary international law to which Iraq is a party too.

From another view, the crimes of genocide and crimes against humanity may not have specifically been codified in the Iraqi Penal Code; however, the underlying crimes of murder, rape, assault or damage and destruction of property were always crimes in Iraq, and as such any claim of lack of knowledge that murder or rape on a massive scale would be a crime, would be frivolous.[201]

The Iraqi Penal Code of 1969[202] defines the various underlying crimes that together on a larger scale make up the crimes codified in the Statute for the IST. Some of the crimes that the Iraqi Penal Code list are as follows:

i. *Murder* defined as a "person who willfully kills another"[203];
ii. *Assault Leading to Death* defined as any person who willfully assaults another by striking or wounding [204]
iii. *Intentional wounding beating and damage*, defined by any person who willfully assaults a person by wounding or beating him or with the use of force or harmful substance.[205]
iv. Theft, defined as the willful appropriation of movable property belonging to another. [206]

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[200] ICCPR *supra* note 40, ratified by Iraq on 25 Jan. 1971 and came into force on 23 March 1976.

[201] The Iraqi Criminal Code with Amendments, Law No, 111, 1969 , Third Edition [reproduced in the accompanying notebook 1 at Tab 32].

[202] *Id.*

[203] *Id.* at para. 405.

[204] *Id.* at para. 410.

[205] *Id.* para. 412.

v. Damage and Destruction to Property[207]

These and many other provisions of the Iraqi Penal Code list the many elements of the crimes codified in the IST Statute. The analogy to domestic ordinary crimes, however fails to take into account the gravity of the international offenses and the magnitude of the crime of genocide and crimes against humanity; nevertheless it does alleviate the demands of the principle of legality to a certain degree.

iii. Article 13: War Crimes:

Unlike, the crimes delineated under Article 11, 12 and 14; the international acceptance of war crimes has been much slower in its evolution. The consequence of this slower development is that, the international community has lagged in its ultimate acceptance of the many of crimes of war, thus many were not considered customary international law until recently. A prime example of this was seen in Sierra Leone, where the use of child soldiers was not considered a part of international customary law until as recently as 1996.[208] IST's statute has jurisdiction over all crimes dating back to the rise of the Baath party in 1968[209], and therefore the IST must be careful in determining that, on the date of the criminal act occurred, whether or not that act was recognized as customary international law or governed by treaties to which Iraq was a member.[210]

iv. Article 14: Article 14(C): The Crime of Aggression

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[206] *Id.* para. 439.

[207] *Id.* para. 477.

[208] Hinga, *supra* note 154.

[209] IST Statute, *supra* note 1, at art. 1.

[210] See, Appendix One, for an overview of major war crimes and the approximate year that they became international customary law.

The Statute for the IST in Article 14, which is entitled "Violations of Stipulated Iraqi Laws", lists as a crime under the Tribunals jurisdiction, "The Abuse of position and the pursuit of policies that may lead to the threat of war or the use of force of the armed forced of Iraq against an Arab country, in accordance with Article 1 of the Law Number 7 of 1958, as amended."[211] Article 14(c) is an attempt to include the crime of aggression in the statute, however neither the IST Statute nor the referenced national law provide for a definition of what the crime of aggression is. For a definition, the IST must turn toward international law.

The practice of a national law relying on international law for an exact definition of a term is not unheard of. Piracy, a crime under the laws of the United States, is defined "by the law of nations", and no further definition is given in the law itself.[212] Thus the law of piracy incorporates the international law of piracy into the laws of the United States, which has meant looking towards both treaty law and customary international law for a definition of piracy. [213] A similar analysis is called for when analyzing, Article 14 (c) of the IST in an effort to find a definition for crimes of aggression.

Thought the crime of aggression has existed in some form for over fifty years under international law, no strict legal definition of aggression has ever been universally

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[211] IST Statute, *supra* note 1, art. 14(c).

[212] 18 U.S.C. §1651 (1982), which states "Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life" [reproduced in the accompanying notebook 4 at Tab 107].

[213] Under the Geneva Convention on the High Seas, April 29, 1958, art. 6, 13 U.S.T. 2312, T.I.A.S. No. 5200, U.N. Doc. A/conf. 13/L 53, *reprinted in* George P. Smith, II *From Cutlass to Cat-O-Nine Tails: The Case for International Jurisdiction of Mutiny on the High Seas* 10 Mich. J. Intl. L. 277 (Winter, 1989) [reproduced in the accompanying notebook 3 at Tab 64].

accepted.[214] The charter of the IMT at Nuremberg was the first to list the crime of aggressive war among the crimes of peace and war crimes.[215] As explained above, the German defense of *nullum crimen sine lege* was raised; however the IMT quickly rejected these notions by citing the precedence of past laws and other historic attempts to curb aggression.[216]

Though the 1945 United Nations Charter contained provisions furnishing guidelines regarding the use of force,[217] it wasn't until 1974 that the General Assembly passed Resolution 3314 providing the first definition of what constitutes the "act of aggression".[218] The General Assembly's declaration of aggression is the most recent and most exhaustive international law definition of this crime.[219] The resolution declares that the first use of armed force "shall constitute prima facie evidence of an act of aggression," [220] It then goes on to define aggression as military acts such as: invasion or

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[214] Damir Arnaut. *When In Rome...The International Criminal Court and Avenues for U.S. Participation*, 43 Va. J. Int'l L 525 (Winter 2003) [reproduced in the accompanying notebook 2 at Tab 45].

[215] IMT Charter, *supra* 1, at art. 7-8.

[216] Reference to the 1899 and 1910 Hague Conventions attempt to curb aggressive war between states, *See also*, Rachel Peirce, *Which of the Preparatory Commission's Latest Proposals for the Definition of the Crimes of Aggression and the Exercise of Jurisdiction Should Be Adopted into the Rome Statute of The International Criminal Court?* 15 B.Y.U. J. Pub. L. 281 (2001) [reproduced in the accompanying notebook 2 at Tab 57].

[217] U.N. Charter, *supra* note 97, at Article 33, which provides that: parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

[218] G.A. Res. 3314, U.N. GAOR, 29th Sess. Supp. No. 31, at 142-43, U.N. Doc. A/9631 (1974) [hereinafter G.A. Res. 3314] [reproduced in the accompanying notebook 1 at Tab 42].

[219] *Id.* at Art. 1, The general part of the definition of aggression is embodied in art. 1 of the Definition Annex, and states that "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.

[220] G.A Resolution 3314, *supra* note 215, at art. 2.

attack, occupation, annexation of territory, bombardment, blockade or ports or coasts, attack on the forces or fleets of another state, use of armed forces within the territory of another state in contravention of the agreement of the state, or any extension of their presence in such territory beyond a third state and the sending of armed groups which carry out acts of armed force against another state of such gravity as to amount to the acts listed above.[221]

Though the definition had been established for over 30 years, the Rome Conference, forming the International Criminal Court after much debate was unable to agree on a definition for the crime of aggression. As a compromise, the conference agreed to put the crime of aggression in the ICC Statute as one of the crimes over which the ICC had jurisdiction, however failed to define aggression within the Statute.[222] The difficulty in defining the crime of aggression revolved around the concern that if a political body, such as the Security Council or General Assembly, decides when a case of aggression reaches the ICC, the potential for politically motivated decisions threatens to undermine the ICC's credibility.[223]

Aside from claiming that the Crime of aggression violated the principle of legality, Iraqi defendant can also raise the defense of *tu quoque*, or "Thou also", or "you

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

[222] Rome Statute, *supra* note 187, at art. 5(1-2) The Statute States: The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the court shall exercise jurisdiction with respect to this crime.

[223] Jennifer Trahan, *Defining Aggression: Why The Preparatory Commission For the International Criminal Court Has Faced Such A Conundrum*, 24 Loy. L.A. Int'l & Comp. L. Rev. 439, (August 2002) [reproduced in the accompanying notebook 3 at Tab 65].

too".[224] A defendant who raises the *tu quoque* defense claims that his or her acts were justified, based on the actions of the state that was harmed or the state making the accusation, due to the fact that it behaved in the same way as the accused.[225] The defense is not invoked to convince the prosecuting state "to desist from it unlawful conduct...but as an estoppel against the enemy's subsequent attempt to call into question the lawfulness of the same kind of conduct of the other side."[226]

The defense was raised only once successfully at Nuremberg in the case of Grand Admiral Karl Donitz, Commander-in-Chief of the German Navy. Donitz when charged with waging unrestrictive submarine warfare, responded by arguing that his order forbidding German naval vessels from helping survivors from the sunken Allied vessels, was given because the American navy had an identical policy. [227] Donitz main piece of evidence in support of his position was testimony from U.S. Admiral Chester Nimitz, commander of the American Feet in the Pacific, in which the Admiral Nimitz acknowledged that the U.S. navy employed a similar policy of unrestricted submarine warfare in the Pacific Ocean.[228] Though IMT at Nuremberg never stated that it had

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[224] Stephanie Berlin, The Tu Quoque Defense, Memorandum for the Office of the Prosecutor of the ICTR, Nov. 2002, at 4 [hereinafter Berlin Tu Quoque Defense]. *See also*, Michael P. Scharf, *The Legacy of Milosevic Trial*, 37 New Engl. L. Rev. 915, 925 (2003) [reproduced in the accompanying notebook 4 at Tab 88].

[225] Berlin, Tu Quoque Defense, *supra* note 221 at 4.

[226] *Id.* at 15.

[227] *Id* at 18, *Also see,* Ahran Kang, The *Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR and SCSL*, Memorandum for the Iraqi Special Tribunal, November 2004, at 9 [hereinafter Kang Key Lesions for the IST] [reproduced in the accompanying notebook 4 at Tab 89] .

[228] Berlin, Tu Quoque Defense, *supra* note 221 at 18.

accepted the defense of tu *quoque,* Donitz was acquitted for the crime of waging unrestricted submarine warfare.[229]

Saddam Hussein may also raise the defense of *tu tuoque* when it comes to the charge of aggressive war for his 1990 invasion of Kuwait. Hussein, could possible argue that the invasion by the United States of Iraq in March 2003, was in fact an aggressive act, no different then his invasion of Kuwait in 1990. Thus like Donitz in Nuremberg who showed that the law on submarine warfare was not clearly established; Hussein will argue that the crime of aggression is likewise without a clearly established definition, and as such he must be acquitted of the crime of waging aggressive war.[230]

Finally, irregardless of the of whether defendants raise the defense of *nullum crimen sine lege* or *tu tuoque*, since the Article 14(c) is dependant on the national law of Iraqi dating back to 1958 any claim of retroactivity or lack of knowledge that aggression was a crime would be mute. Since article 14(c) is literally copied from the Iraqi Code[231], the crime of aggression is per se in conformity with the principle of legality.

V. INCORPORATING PRE-EXISTING IRAQI LAW AND PRECEDENT FROM FORMER TRIBUNALS INTO SENTENCING GUIDELINES, THE IRAQI SPECIAL TRIBUNAL WILL SATISFY THE PRINCIPLE OF NULLA POENA SINE LEGE.

A. Sentencing by the International Tribunals In Accordance with the Principles of Legality.

The Next Step in satisfying the principle of legality is to satisfy the criteria of *nullum ponea sine lege* (no penalty with law) which prohibits the retroactive application

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[229] *Id.*

[230] Kang, Key Lesions for the IST, *supra* note 159 at 12.

[231] Article 1 of Law Number 7 of 1958.

of sentences. The principle requires that punishment for criminal acts must be laid down in law when the crime was committed in order that the Court may mete out the punishment.

i. General Principle of Sentencing in Past International Tribunals

Though the post-world war II trials established many important principles, especially with respect to defining crimes against humanity as part of customary international law, the international tribunals have left few sentencing guidelines applicable to cases of war crimes and crimes against humanity.[232] The trial at Nuremberg and Tokyo provided no separate proceeding for addressing matters concerning sanctions once guilt was established. At most, the judgments of Nuremberg would have one paragraph, appended to their judgment reviewing "mitigating factors" in the rare case where such factors were even present.[233] This, however, changed dramatically with the establishment some fifty years later of the ICTR and ICTY.

That Statutes for both the ICTR and ICTY contain brief provisions dealing with sentencing, which state essentially that sentences should be limited to imprisonment (thereby tacitly excluding the death penalty, as well as corporal punishment, imprisonment with hard labor, and fines) and they also require that sentences take into account the "general practice" of the criminal courts in the former Yugoslavia or

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[232] William A. Schabas, *Sentencing by International Tribunals: A human rights Approach*, 7 DUKE J. OF COMP & INTER'L 461 [reproduced in the accompanying notebook 2 at Tab 61].

[233] 22 Trial of The Major War Criminals Before the Int'L Mil. Tribunal 524 (1946) [reproduced in the accompanying notebook 3 at Tab 75].

Rwanda, as the case may be.[234] The Rules of Procedure and Evidence adopted by the judges of the Tribunals, in accordance with the Statutes, provide more guidance in identifying some of the aggravating and mitigating factors that may be taken into account during the sentencing process.[235]

The Statutes of the ICTY and ICTR are annexed to decisions of the Security Council and as such are "subsidiary organs" created pursuant to Article 29 of the Charter of the United Nations. Therefore, they are binding upon all member of the United Nations, in accordance with Article 25 of the U.N. Charter.[236] Additionally, the Tribunals looked toward international human rights instruments to make certain penalties were in conformity with international human rights. For example provisions of the Universal Declaration of Human Rights[237] and the International Covenant on Civil and Political Rights (ICCPR)[238] have been specifically incorporated into the Statutes of the

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[234] ICTY Statute, *supra* note 124, at art.24 and ICTR Statute, *supra* note 143, at arts. 23, 24; *see also*, Schabas, *supra* note 229, at 468.

[235] International Tribunal of the Former Yugoslavia , Rules of Procedure and Evidence, U.N. Doc. IT/32 (1994), amended by U.N. Doc. IT/32/Rev.1 (1994), amended by U.N. Doc. IT/32 Rev.2. (1994), amended by U.N. Doc. IT/ 32/Rev.3 (1995) [reproduced in the accompanying notebook 2 at Tab 33] at Rule 100 states:

> In determining the sentence, the Trial Chamber shall take into account the facts mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as: (i) any aggravating circumstances; (ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction; (iii) the general practice regarding prison sentences in the courts of former Yugoslavia; (iv) the extent to which any penalty imposed by the any State on the convicted person for the same act has already been served.

International Criminal Tribunal for Rwanda Rules of Procedure and Evidence, U.N. Doc. ITR/3/Rev.1 (1995) [reproduced in the accompanying notebook 2 at Tab 34] Rule 100 is identical to the ICTY Rule 100.

[236]U.N. Charter, *supra* note 78, at Art. 25.

[237] Universal Declaration of Human Rights, *supra* note 39.

[238] ICCPR *supra* note 40.

ICTY and ICTR.[239] The ICCPR was ratified by Iraq on January 25, 1971 and came into force on March 23, 1976.

The Secretary General has indicated that penalties should always conform to international norms, stating that "it is axiomatic that the international tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in Article 14 of the International Covenant on Civil and Political Rights."[240] Other Articles of the ICCPR that should be followed include Article 7, 10 and 15.[241]Article 7 encompasses the notion of proportionality in criminal punishment, while both article 7 and 10, address either implicitly or explicitly the importance of rehabilitation, and finally article 15 prohibits retroactive crimes and punishment, stating the principle of *nullum crimen nulla poena sine lege.*

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[239] Article 21 of ICTY Statute and Article 20 of ICTR Statute are inspired from Article 14 of the ICCPR, dealing with fair trials.

[240] Report to the Secretary General, *supra* note 127, at para 106.

[241]ICCRP *supra* note 40;

Article 7

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 10

> 1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherend dignity of human person.
> 2. ***
> 3. the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation ***

Article 15

> No one shall be held guilty of criminal offences on account of any act or omission which did not constitute criminal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was commission of the offense, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

It has been long suggested that if international tribunals are guided by existing sentencing practices in the territory where the crime took place then the *nulla poena* principle is not offended. The concept of taking into account "general practice" of the state in which the crimes occurred before determining sentence, has been incorporated into both the ICTY at Article 24 (1) and Article 23 of the ICTR. Likewise, the Statute for the IST, in Article 24 states that "penalties imposed by the tribunal shall be those prescribed by Iraqi Law (especially Law Number 111 of 1969 of the Iraqi Criminal Code)..."[242]

Many scholars, however, see problems with relying on "general practices" of the respective state in determining sentences. First, none of the Statutes suggest a time frame for the appreciation of the "general practice." [243] Given the fact that the objective of the reference to "general practice" seems to be to allay suggestions of retroactivity, the period under consideration should be that prior to the adoption of the Statute. In the case of Yugoslavia, this caused problems since it was unclear whether the Statute for the ICTY was attempting to contemplate the general practice of Yugoslavia before its break-up or the general practice of its successor states.[244] In the case of Rwanda, there had been no functioning criminal courts since the outbreak of genocide in April, 1994, so this was not an issue.[245]

The Second issue of using "general practice" of the courts in the state where the crimes occurred, it that in most such countries, there are few if any useful precedents

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[242]IST Statute, *supra* note 1, at art. 24.

[243] Schabas, *supra* note 229 at 476.

[244] *Id.* at 477.

[245] Schabas, *supra* 144.

similar to those cases likely to by heard by the tribunals. Yugoslavia which even defined distinct infractions for genocide and war crimes in its Federal Penal Code,[246] had no significant trials for genocide. In Rwanda, though various international criminal laws were ratified, none were implemented into the country's Code Penal. The situation is the same in Iraq, were the Geneva Conventions and the Genocide Convention were ratified, however never implemented in the federal penal code. The solution for Rwanda, and likewise for Iraq, is the recognition that both the Geneva Convention and the Convention against Genocide have become customary international law, and thus regardless of implementing legislation, all nations must still be bound by them.

In the absence of the appropriate laws concerning genocide, war crimes and crimes against humanity specifically, it may be appropriate to look to the underlying crimes of murder, rape and assault and the sentences imposed for them. In Yugoslavia, this was possible due to the fact that the legal system was organized and functioning, whereas in Rwanda, the exercise would be impossible due to lack of a structured legal system. In Iraq, the Statute would require the Tribunal to turn to the Penal Code of 1969 for crimes that did in fact exist under the Penal Code. However, for crimes that that "do not have a counterpoint under Iraqi law shall be determined by the Trial Chamber taking into account such factors of gravity of the crime, the individual circumstances of the convicted person and relevant international precedents."[247]

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[246] Criminal Code of the Socialist Federal Republic of Yugoslavia, Office Gazette of the Federal Republic of Yugoslavia, No. 44/1977, July 1, 1977, Chapter XVI: Criminal Acts Against Humanity and International Law. Available at http://pbosinia.kentlaw.edu/legal/criminalcode_fry.htm [reproduced in the accompanying notebook 2 at Tab 35].

[247] IST Statute, *supra* note 1, at art. 24 (e).

The flaw with basing sentencing on the underlying crimes, however, is that is failed to take into account the essential and fundamental aggravating circumstances, namely that the offenses before the ad hoc tribunals are crimes against humanity or war crimes and that the tribunals have been established to deal with inherently more serious crimes then the underlying crimes codified in national statutes. The question has been posed then, if the crimes are not the same, why should the sentence be the same?[248] One possible answer is that if both life imprisonment and the death penalty are available under the Iraqi penal code for the crime of murder, what harm does applying either of the two sentences to the IST, since at the end there can be no harsher penalty.

A possible solution to the concerns of using "general practice" is to treat the issue as instructive rather then binding on the tribunals in their sentencing determination. For Yugoslavia, where national law proscribed that the maximum sentence should be then twenty years or death, but since the ICTY prohibits the death sentence, following the "general practice" concept, would leave the Tribunal with a 20 year maximum sentence, regardless of the gravity of the crime. The ICTY deviated from the 20 year maximum; holding that like imprisonment was a fair alternative to the death penalty.[249] The ICTY, treated the provision of the statute as instructive rather then binding, thus allowing the ICTY to impose longer sentences, which ultimately made more sense in light of the prohibition of the death penalty.

The ICTY held in *Erdemovic*, in what is the most extensive consideration of sentencing principle by an international criminal court that "the Statute leaves no doubt

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[248]Schabas, *supra* note 229 at 481.

[249] *Id.* at 482.

that the reference to general practice arose because of concerns about the nulla poena principle. Nevertheless, the Trial Chamber refuses to apply the provision in the Statute in such a way as to give effect to the intent of its drafters, as this 'would mean not recognizing the criminal nature universally attached to crimes against humanity." [250] The Trial Chamber in *Erdemovic* concluded that:

> Reference to the general practice regarding prison sentences applied by the courts of the former Yugoslavia is, in fact, a reflection of the general principle of law internationally recognized by the community of nations whereby the most severe penalties may be imposed for crimes against humanity. In Practice, the reference means that all the accused who committed their crimes on the territory of the former Yugoslavia could expect to be held criminally responsible. No accused can claim that at the time the crimes were perpetrated he was unaware of the criminal nature of his acts and the severity of the penalties sanctioning them. Whenever possible, the international tribunal will review the legal practice of the former Yugoslavia *but will not be bound in any way by those practices in the penalties it establishes and the sentences it imposes for the crimes falling within its jurisdiction.* [251]

Clearly the ITCY did not strictly interpret the "general practice" language of the ICTY Statute,[252] an approach the IST should consider following since this provides much more room for the tribunal to adequately determine appropriate sentences.

ii. Mitigating and Aggravating and Other Circumstances

The IST Statute further states that when determining sentencing for crimes that do not have counterparts in Iraqi law, the trial chamber must take into account such factors

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[250] *Prosecutor v. Erdemovic*, ICTY, No. IT-96-22-T, Sentencing Judgment of Trial Chamber I, (Nov. 29 1996) at 38 [reproduced in the accompanying notebook 3 at Tab 80].

[251] *Id.* at para 40.

[252] Rwanda, following the lead of ICTY, has noted that the reference to sentencing practice in Rwanda is not mandatory, and merely a guide for the ICTR. See *Prosecutor v. Kambanda*, ICTR, Case No. ICTR-97-23-S, Judgment and Sentence, 4 September 1998, *reprinted in* at 37 ILM 1411, para. 23 [reproduced in the accompanying notebook 3 at Tab 78] .

B. Sentencing guidelines for Iraqi Special Tribunal

Though the Statute for the IST does not address the issue of sentencing guidelines for the IST judges, such guidelines should be established in order to provide consistency across trials conducted in different trail chambers. Furthermore, sentencing guidelines are customarily how Iraqi has dealt with sentencing of defendant in the Iraqi Criminal Code.[258] Such guidelines may also be helpful in determining sentences for international crimes which do not have penalties established under Iraqi national law. Though, the IST Statute refers to "instrumental precedents" as a factor to be considered in sentencing in such cases, but experts regard these precedents as too inconsistent to be useful as guides.

First the IST must establish separate sentencing proceedings from the trial proceeding, which is especially important in the death penalty context due to the different kinds of witnesses and evidence needs in those phases.[259] Separation will also enable the judges to consider the sentences more dispassionately.[260] Since the terms of the current Iraqi law as reference in the IST statute, include capital punishment, unlike the statutes for the ICTY, very specific guidelines for imposition of the death penalty should be imposed. Such strict guidelines will provide for fair and consistent application of the death penalty across the IST. For example, a unanimous, rather then a usual majority, vote of IST judges should be required for the imposition of the death penalty.

VI. CONCLUSION

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[258] Most sentences under Iraqi Criminal Code, are enumerated within the code itself, thus little if any variation is allowed under the national criminal law, see IST Statute *supra* note 1.

[259] Building the Iraqi Special Tribunal, United States Institute of Peace, Special Report, vol.122, July 2004 [reproduced in the accompanying notebook 4 at Tab 108]

[260] The Special Court for Sierra Leone employs such a separation, but the ICTY and ICTR do not.

The Iraqi Special Tribunal is the latest tribunal to deal with an age-old problem of persecuting serious humanitarian crimes when national and international law lags behind in its codification of such crimes. The principle of *nullum crimen sine lege* has served as a shield, protecting against the absolute power of governments. The principle was only first seen used defensively at Nuremberg in an attempt by the defendants to escape responsibility for crimes against humanity, war crimes and the crime of aggression. The Tribunal was quick to disregard any such argument, based on its finding that the crimes were based on treaties signed by Germany and Japan and firmly established in customary international law well before the war. Though the defendants at Nuremberg may have had a faint chance of success of using the principle as a defense, any accused committed such offenses after Nuremberg, was clearly well informed that crimes against humanity, war crimes and genocide had become part of customary international law, binding on all nations.

Fifty years after Nuremberg, the world once again faced the acts of genocide and crimes against humanity in the former Yugoslavia and the African nation of Rwanda. Using international customary law, treaty obligations and national domestic law, the tribunals were able to satisfy the demands of the principle of legality. Both tribunals, likewise provided legal precedent to the world that Crimes of Genocide, war crimes and other crimes against humanity were well established in international law and that such laws would be enforced. The tribunals also provided guidance as to how to provide penalties for crimes that were not necessary incorporated into national domestic law, without violating the *nulla poena sine lege* principle.

With the creation of the Iraqi Special Tribunal, we will be sure to once again hear the cry of the principle of legality used as a defense to charges of genocide and war crimes. Yet, with such a vast amount of legal precedent to draw from, and Iraq's own treaty obligation over the past fifty years, the principles of legality should be decisively settled.

APPENDIX ONE

WAR CRIMES	Year Established As Customary International Law					
	1907	**1928**	**1946**	**1949**	**1977**	**2003**
	Ban on Forced Labor, Making improper use of flag of truce	Ban of use of Asphyxiating Poisonous or Other Gases and Biological weapons	Murder, Ill Treatment, Deportation, Slave Labor, Killing of Hostages, Plundering of Public or Private property, Wanton Destruction of Cities	Torture, Willful Killing, Excessive Destruction, Compelling POWs to serve in forces hostile to self Unlawful Confinement, Deportation, Taking Hostages	Use of Environment in armed conflict Use of Human Shields, Protection of Environment during war, intentionally directing attacks against civilian population, or civilian objects,	Use of Child Soldiers
	Hague Convention	[1]Protocol on Prohibition on use of Gases	London Charter, reaffirmed by U.N. GA Resolution	Geneva Conventions	[2] ENMOD [3]Protocol I	S.C.S.L
	International Instrument					

[1] Protocol for the Prohibition of the Use of Asphyxiating, Poisonous, or Other Gases and of Biological Methods of Warfare.

[2] 1977 Convention on Prohibition of Military or any other Hostile Use of Environmental Modification Technique.

[3] Protocol Additional to the Geneva Convention of 12 Aug, 1949 and relating to the Protection of Victims of International Armed Conflicts.