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**INVESTIGATIVE INTEGRATION OF THE CODE OF THE HIGHER IRAQI
CRIMINAL COURT AND THE GENERAL PRINCIPLES OF THE IRAQI PENAL
CODE: BASIC OUTCOMES***

Ra'id Juhi al-Saedi[†]

INTRODUCTION

At the end of World War I, after the Ottoman Empire was defeated, Iraq was separated from the Ottoman State, allowing a new Iraqi state to appear in its modern shape with Prince Faisal Bin Al-Hussein (who was known as Faisal I) as king. In 1925, under King Faisal I's rule, the first Iraqi constitution, known as the Basic Iraqi Code of the Year 1925, was written.

Monarchy rule continued until 1958, but it was confronted by many revolutions and military coups, such as the revolt of Bakr Sidqi in 1936 and Rashid Aali Al-Kilani and the Free Officers' (Salahuddin As-Sabbagh and Fahmi Saeed) revolt in 1941. After that, on July 14, 1958, monarchy rule was toppled by a military coup led by the late Adbulkarim Kasem. Faisal Bin Ghazi (known as Faisal II) and many other members of the Royal family were killed during this coup.

After Kasem's coup, the Iraqi government changed from a monarchy to a republic based on the 1958 temporary constitution. This period was marked by different violent incidents, including attempts to kill the enemies of the government. In addition, members of the Ba'ath Party, including Saddam Hussein, attempted to assassinate Kasem.

Abdulkarim Kasem and his regime were removed from power in 1963. Interestingly, at that time whenever a group removed the preceding group, it would kill all of its members instantly, through either show trials or quick military executions.

After the removal of Saddam Hussein's regime in Iraq, there was a real need to establish the concept of superiority of the law in Iraq, instead of the superiority of killing. It was out of this need that the Iraqi High Tribunal was established.

* This commentary was adapted from the Judge's remarks at the Frederick K. Cox International Law Center symposium "To Prevent and to Punish: An International Conference in Commemoration of the Sixtieth Anniversary of the Negotiation of the Genocide Convention." The Conference drew renowned international law scholars to Case Western Reserve University School of Law in Cleveland, Ohio on September 28, 2007 to share their expert analysis of the origins of the Genocide Convention and its future potential. A webcast of the Conference is available at <http://law.case.edu/centers/cox/webcast.asp?dt=20070928>.

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THE FORMATION OF THE COURT AND THE INVESTIGATIVE PROCESS:

After the issuance of the Code of the Iraqi Special Tribunal in Article 1, and after the formation of the court and the appointment of its judges, the Code discusses the investigative process in Article 7. This section discusses the investigative process in general terms as part of the legal sections pertaining to the investigation of court magistrates, leaving the details to be worked out in the rules of procedure, which should have been prepared by the head of the court according to the regulations of Article 16 of the Code.¹

After the completion of the rules of procedure for the court, there was also a procedural difficulty in the reality of the investigative work, because the rules of procedure did not state clearly if the investigation should be based on the nature of the defendant or the nature of the committed crime. Because the basic principles of the penal code clearly stated that the investigative work should be based on the nature of the crime, and not on the nature of the defendant, and because there was no specific provision in the Code of the Court, general legal principles were utilized in the investigatory process. Thus, every defendant will be investigated and questioned for every crime that he or she committed, which means that he or she would be tried for crimes where the available evidence is enough to bring a case to the penal court.

This matter has made the court's job easy at one end and difficult at the other. The difficulty is found in the huge number of criminal cases, spanning over thirty-five years. Furthermore, there are thousands of people who would like to bring their case to court, especially after combining Article 1 with Article 10 in 2005, which, according to Article 22, now gives the victim's families the right to seek compensation.²

When investigating cases, the court keeps in mind the issues of complete justice and fairness, which means it would not only seek evidence as stated by the code, but it also investigates all elements of the crimes to see; for example, if the political approach adopted by the previous regime has established genocide. Thus, it was necessary to hear from everyone seeking redress for grievances and their witnesses to determine if the goal in attacking, killing, or suppressing these groups was to achieve their total destruction. The court also needed to determine if the reason for suppressing these groups was racial, ethnic, nationalistic, religious, or something else. Also, was the widespread attack a systematic approach of the previous regime towards these groups?

¹ See Qanoon Al-Mahkama Al-Jeena'eyya Al-Iraqiyya Al-Aulea [Statute of the Iraqi High Tribunal] art. 16, Oct. 18, 2005, *available at* law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf (Iraq).

² See Statute of the Iraqi High Tribunal art. 22.

It was necessary to compare the words of the plaintiffs and their witnesses to the official documents and correspondence of both the regime and the defendants to determine their attitude towards these targeted groups. Thus, we had to check in more than seven million documents; this was not an easy job.

On the other hand, the easy part was that all of the evidence was collected only once. In addition, the investigation was happening at the same scenes where the crimes were committed, so it was easy to get to all the documents needed for the investigation.

INVESTIGATIVE PROCEDURES WITHIN THE CODE OF THE COURT AND IRAQI CRIMINAL PROCEDURE LAW:

The Code of the Court states the investigating magistrate will conduct the investigation; this is based on the second paragraph of section (8) of the code, and is confirmed by the rule (22) of the procedural rules.³ Also, the Code states that the judge should have a qualified staff that would provide the needed assistance.⁴ But the aforementioned statements of the Code do not refer to all of the specifics in the investigation that the investigating magistrate should do, such as opening graves, specifying procedures for examining human remains, and conducting investigations under the supervision of the investigating magistrate.

As a result of these insufficiencies, it was necessary to refer to the Code of Principles for Penal Trials because it covers such procedures.⁵ In addition, there were certain procedures stated in the Code of the Court, such as employing international experts, seeking the help of international organizations, and utilizing electronic means and resources to be able to execute all the investigative procedures.⁶ Therefore, we had to refer to the Code of Principles for Penal Trials many times, such as when we had to open the mass graves and remove the human remains.⁷ We resolved this issue on principle no. (71) of the Criminal procedure law, and when we sought the help of the international experts and utilized electronic resources, we based that on rules (2) and (23) of the Procedural Rules for the Collection of Evidence.⁸

³ See Statute of the Iraqi High Tribunal art. 8; RULES OF PROCEDURE & EVIDENCE OF THE IRAQI SPECIAL TRIBUNAL [IRAQI R. P. & EVID.] pt. 5, § 1, R. 22 (Iraq), *available at* http://law.case.edu/saddamtrial/documents/IST_rules_procedure_evidence.pdf.

⁴ See Statute of the Iraqi High Tribunal art. 8.

⁵ IRAQI CRIMINAL PROCEEDINGS [IRAQI CRIM. P.] paras. 40, 71 (Iraq), *available at* http://law.case.edu/grotian-moment-blog/documents/Iraqi_Criminal_Procedure_Code.pdf.

⁶ See Statute of the Iraqi High Tribunal art. 8.

⁷ IRAQI CRIM. P. para. 71.

⁸ IRAQI R. P. & EVID. at R. 2, 23.

This procedure of intermixing code provisions had a great impact on the ability to finalize the investigation conducted by the judges. The court utilized electronic resources and sought help from international experts for the first time in Iraqi legal procedures. In the past, there was not a code that allowed using electronic resources and the media to listen to the testimony of witnesses, or seeking help from international organizations. It was a good method to use electronic technology to be able to finalize investigative cases.

This intermixing of procedures made it easy to divide the regional area geographically, especially considering the jurisdiction of the regional court includes all of Iraq and, in some cases, areas outside of Iraq. Therefore, as some of the crimes were committed in a specific location, the area was geographically divided into three parts: the northern area, including the region of Kurdistan and Karkouk; the mid-furat area, including the provinces of the middle basin of the Euphrates river; and the southern area (including Baghdad), and offices were established in each part. Thus, all the court procedures were covered. The presence of the offices in these areas made it very easy for the plaintiffs and the witnesses to reach the court offices, and it increased the trust in the offices by the families of the victims, making them come forward with evidence to present it to the court. Thus, with the multiple offices it was easier to reach all the elements of the alleged crimes.

THE INVESTIGATIVE PROCESS FOR REACHING THE CRIMINAL ELEMENTS IN THE AL-ANFAL CASE:

The presence of members of the investigating team at the crime scenes has helped lessen the difficulties associated with the investigations, especially since the members live and reside in Iraq. The main task was to find the common and relative factors in the chain of orders, starting from the highest and going to the lowest ranking chief. In examining these orders we sought various types of information, such as:

1. The reasons and goals behind the order from the highest levels, and to which group the order was directed.
2. Which group was being targeted by the order, and whether it was a civil or militant group.
3. What were the reasons for being targeted by this order, and are these reasons religious, racial, ethnic, nationalistic, or palpitation.
4. How clear and explicit the orders were coming from the highest ranking to lowest ranking chief.

All of these factors helped the investigation by potentially identifying the presence of a specific motive behind the crime of genocide. The factors also helped identify the specific trends and policies practiced by the regime towards the relevant group; thus, we would be able to identify the

available elements from the crime and reach a true legal description of the committed crime.

THE MOST IMPORTANT OUTCOMES OF THE INVESTIGATION:

Listed below are some of the simple conclusions based on the outcome of the works of the investigating judges and the court procedures.

Revealing the truth behind the committed crimes

Before March 19, 2003 many claimed that Iraq owned internationally forbidden weapons and that these weapons would cause great destruction for many people in the region. Because of this, such weapons needed to be removed from the hands of the ruling regime in Iraq, so that the regime would not use these weapons against the neighboring states and the people of the region. The main purpose of states and, more accurately, the main purpose of governments are to protect their people, and to preserve and provide peace and security for them. Additionally, one of the United Nations' major commitments and moral tasks is to protect the people from oppressive dictatorial regimes, which was clear in Yugoslavia, Rwanda, Sierra Leone, and lately in the case of the assassination of Brother Rafiq Hariri (former prime minister of Lebanon), and the assassinations of many others after him. Thus, there was the interference from Article 39 of the U.N. charter, which honorably calls for the maintaining and restoring of global peace and security and persecuting the criminals.⁹ From that, we can clearly see the huge task the United Nations has protecting people from dictatorial and oppressive regimes, and saving them from tyranny.

After all the court's investigations and the revelations of these investigations, we know that the former regime had killed large numbers of people—thousands or tens of thousands of its own people—and sent them to mass graves that were widely spread in the north, south, west, and east of Iraq.

With that in mind, I view the war, which was conducted by the United States and its allies against the former regime, as necessary. It was the international community's duty to protect the nations and their people—and the people of Iraq are among these people. Thus, the United Nations had to play a bigger role in Iraq from the beginning, especially in the area of the court.

Also, the removal of the previous regime and the establishment of the Higher Iraqi Criminal Court were great accomplishments in establishing democracy and respect for human rights. These accomplishments signify a

⁹ See U.N. Charter art. 39 (stating “[t]he Security Council shall determine . . . what measures shall be taken . . . to maintain or restore international peace and security”).

respect for human rights and the exposure of crimes that were committed by the previous regime against both the Iraqi people and the people of the whole region. These events are far from the philosophy of random killings and bodily executions that had accompanied the change of regimes in the Arab world.

The Development of the Legal Concepts in the Iraqi Society:

Because of the live broadcast of the court hearings and procedures, the court has helped develop socio-legal concepts in the country through the follow-up of its events, in addition to the legal coverage of its procedures by the legal experts and analysts. The court has also improved the concept of respecting human rights within the Iraqi society through the respect of the humanistic and legal rights of the defendants.

Sending a clear message as not to misuse authority and to use position and authority for the benefit of the country and the people and not the other way around, because of the existence of the Law.

Trying to eliminate, even partially, the philosophy of revenge and refer to the philosophy of the law instead.

Judge Ra'id Juhi