Case Western Reserve Journal of International Law

Volume 39
Issue 1 *2006-2007*

2007

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I. INTRODUCTION

On April 7, 1993, Pierre-Richard Prosper, the U.S. Ambassador-at-Large for War Crimes, announced that the Iraqi government would assume primary responsibility for prosecuting the innumerable war crimes, crimes against humanity, and acts of genocide that Saddam Hussein committed during his three decades of bloody rule.[1] Human rights groups, who had hoped—and perhaps even expected—that Saddam would be tried by either an *ad hoc* or a hybrid international tribunal, immediately criticized the decision. Human Rights Watch, for example, argued that a domestic trial would be a mistake, noting that the Iraqi judiciary had been "deeply compromised" by years of Ba'ath Party rule and did not have the capacity to handle the complicated trials Saddam's crimes would require.[2] Amnesty International agreed, noting its long-standing concerns about Iraq's "widespread human rights violations relating to the criminal justice system."[3]

Such skepticism, it turns out, was fully warranted. Before the trial even began, the president of Iraq publicly announced that Saddam had "confessed" to his crimes.[4] One judge of the Iraqi High Tribunal (IHT) resigned

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[1] *See generally* Amnesty Int'l, *Iraq: Victims of Systematic Repression*, AI Index MDE 14/10/99, Nov. 24, 1999; HUMAN. RIGHTS WATCH, GENOCIDE IN IRAQ: THE ANFAL CAMPAIGN AGAINST THE KURDS (1993); *Charges Facing Saddam Hussein*, BBC NEWS, (July 1, 2004), http://news.bbc.co.uk/2/hi/middle_east/3320293.stm.

[2] Human Rights Watch, *Letter to U.S. Regarding the Creation of a Criminal Tribunal for Iraq*, April 15, 2003, http://www.hrw.org/press/2003/04/iraqtribunal041503ltr.htm.

[3] Amnesty Int'l, *Iraq: Ensuring Justice for Human Rights Abuses*, at 4, AI Index MDE/14/080/2003, Apr. 11, 2003.

[4] *See* John F. Burns, *For Saddam, Tribunal Finds Itself on Trial*, INT'L. HERALD TRIB. (Paris), Oct. 19, 2005, at 10.

because the government was undermining his independence,[5] and another was removed for being a member of the Ba'ath Party—a claim that not even the chief prosecutor believed, and which was later withdrawn.[6] The Tribunal added new charges against the defendants in the middle of trial.[7] A number of witnesses for the defense were prevented from testifying, and two who did testify were later beaten into recanting their testimony and charged with perjury.[8] The Tribunal flatly ignored defense motions, including one that sought disclosure of potentially exculpatory evidence.[9] The defense was not even given an authoritative version of the IHT Statute and Rules of Procedure and Evidence prior to trial.[10]

These criticisms, however, are only half of the story. A trial is only as fair as the substantive and procedural law that it applies; if either or both violate due process, a defendant's trial will be unfair no matter how decorously it is conducted. Indeed, in the context of a tribunal like the IHT, which is intended to hear multiple cases over a period of many years, the underlying substantive and procedural law is arguably *more* important than the fairness of any individual trial. Although trial conduct in general can be improved by appointing better judges, substantive and procedural reform requires legislative action, a slow and unpredictable process in the best of circumstances and one that may be nearly impossible in a political environment as troubled as Iraq's.

In the wake of Saddam's first trial, then, it is critical to ask whether the IHT's substantive and procedural law satisfies the requirements of international due process. As we shall see, in numerous important respects the answer to that question is an emphatic "no."

Before proceeding, two caveats are in order. First, this essay examines the IHT's substantive and procedural law solely in relation to the requirements of international due process; it does not compare them to the traditional requirements of Iraqi criminal law. Although the latter comparison is equally important, it requires an understanding of Iraqi criminal law that I do not possess. Suffice it to say here that many aspects of the IHT violate not only international due process, but also—as M. Cherif Bassiouni

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[5] *See* Human Rights Watch, *Judging Dujail: The First Trial Before the Iraqi High Tribunal*, at 41, Vol. 18, No. 9(E) [hereinafter Human Rights Watch, *Judging Dujail*] (Nov. 2006), *available at* http://hrw.org/reports/2006/iraq1106/iraq1106web.pdf.

[6] *Id.* at 39.

[7] *Id.* at 47.

[8] *See Hussein Witnesses Jailed*, CHI. TRIB., June 6, 2006, at A20.

[9] *See* Sinan Salaheddin, *Saddam's Defense Complains About Trial*, ST. PETERSBURG TIMES (RUSS.), June 13, 2006, http://www.sptimes.ru/index.php?action_id=2&story_id=17900.

[10] *See* Human Rights Watch, *The Former Iraqi Government On Trial*, at 14, Oct. 16, 2005, http://hrw.org/backgrounder/mena/iraq1005/iraq1005.pdf.

has eloquently pointed out—Iraqi criminal law's thoroughgoing positivism.[11]

Second, the fact that this essay focuses on the IHT's weaknesses should not be taken to mean that the Tribunal has no strengths. On the contrary, insofar as the IHT incorporates many of the best elements of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC), the Tribunal's substantive and procedural law represent a significant advance over some of the more problematic aspects of traditional Iraqi criminal justice.[12] The intent of this essay, therefore, is constructive as well as critical—not simply to identify problems with the IHT, but also to suggest ways in which its substantive and procedural law could be improved.

II. INTERNATIONAL DUE PROCESS

Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) provides that any person charged with a criminal offense is entitled to "a fair and public hearing by a competent, independent and impartial tribunal established by law."[13] A fair trial, in turn, is defined by Article 14(3) as one that guarantees a defendant, at a minimum, the following rights:

> (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
> (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
> (c) To be tried without undue delay;
> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
> (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

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[11] *See* M. Cherif Bassiouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal*, 38 CORNELL J. INT'L L. 327, 378 (2005).

[12] *See, e.g.*, Yuval Shany, *Does One Size Fit All? Reading the Jurisdictional Provisions of the New Iraqi Special Tribunal Statute in the Light of the Statutes of International Criminal Tribunals*, 2 J. INT'L CRIM. JUST. 338, 338–39 (2004).

[13] International Covenant on Civil and Political Rights, art. 14(1), *adopted* Dec. 19, 1966, 999 U.N.T.S.171, 6 I.L.M. 368 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; *cf.* Qanoon Al-Mahkamat Al-Jeena'eyyat Al-Eraqiyyat Al-Mukhtas [Statute of the Iraqi High Tribunal] art. 19, Oct. 18, 2005, *available at* www.law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf (Iraq).(guaranteeing all defendants a "just fair trial").

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
(g) Not to be compelled to testify against himself or to confess guilt.[14]

Article 14, in short, establishes the basic requirements of international due process. The Republic of Iraq ratified the ICCPR in 1971, obligating the government to ensure that all of its courts, including the IHT, "give effect to the rights recognized" by the treaty.[15]

What follows is a systematic comparison between the IHT's substantive and procedural law—which includes, by reference, the Iraqi Penal Code of 1969[16] and the Iraqi Code of Criminal Procedure[17]—and the requirements of Article 14. The essay will also refer, where appropriate, to the provisions of human rights conventions similar to the ICCPR, such as the European Convention on Human Rights; to illustrative international human rights instruments like the Basic Principles on the Independence of the Judiciary; and to the substantive and procedural law of the *ad hoc* tribunals and the ICC. The latter sources are not binding on Iraq, but are nevertheless indicative of how the ICCPR's more general provisions should be interpreted.[18]

III. SUBSTANTIVE LAW

There are two main problems with the substantive law applied by the IHT. First, because the Tribunal's temporal jurisdiction extends back to 1968, its subject-matter jurisdiction over war crimes and crimes against humanity likely violates the principle of non-retroactivity. Second, the vagueness of the domestic crimes included within the Tribunal's subject-matter jurisdiction violates the principle of specificity.

A. The Retroactivity Problem

Article 1 of the IHT Statute gives the Tribunal jurisdiction over, *inter alia*, crimes against humanity and war crimes committed between July 17, 1968, and May 1, 2003.[19] Both crimes are expansively defined: Article 12 prohibits all of the crimes against humanity contained in Article 7 of the

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[14] ICCPR, *supra* note 13, art. 14(3).

[15] *Id.* art. 2(2).

[16] Alwaqai Aliraqiya [The Official Gazette of the slamic Republic of Iraq], The Iraqi Penal Code, Sept. 15, 1969, No. 1778, unofficial English translation *available at* http://law.case.edu/saddamtrial/documents/Iraqi_Penal_Code_1969.pdf.

[17] Iraqi Code of Criminal Procedure, Law No. 23 of 1971, [hereinafter ICCP] *available at* http://www.law.case.edu/saddamtrial/documents/Iraqi_Criminal_Procedure_Code.pdf.

[18] *See* LAWYERS COMMITTEE FOR HUMAN RIGHTS, WHAT IS A FAIR TRIAL? A BASIC GUIDE TO LEGAL STANDARDS AND PRACTICE 2 (2000), *available at* http://www.humanrightsfirst.org/pubs/descriptions/fair_trial.pdf.

[19] *See* Statute of the Iraqi High Tribunal art. 1(2).

Rome Statute, omitting only enforced sterilization and apartheid,[20] while Article 13 prohibits all of the war crimes contained in Article 8 of the ICC Statute.[21]

Although the IHT deserves credit for its forward-looking approach to international criminal law, its decision to apply crimes against humanity and war crimes retroactively to 1968 is problematic. Article 15 of the ICCPR provides that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."[22] This non-retroactivity principle has long been considered one of the "cornerstone principles of criminal law" and is found in nearly all of the world's legal systems.[23] The principle is also specifically enshrined in Article 10 of the new Iraqi Constitution.[24]

Herein lies the problem: a compelling case can be made that at least *some* of the crimes prohibited by Articles 12 and 13 of the IHT Statute were not criminal under either international law or domestic Iraqi criminal law until the early 1990s.

1. Crimes Against Humanity

The primary problem with Article 12 is that it does not require a nexus between crimes against humanity and armed conflict,[25] thus permitting the Tribunal to prosecute such crimes even if they were committed during peacetime. Customary international law, however, did not "indisputably" criminalize peacetime crimes against humanity until the ICTY's *Tadic* decision in 1995. As Cassese says:

> It is probably with the 1968 Convention on the Non-Applicability of Statutory Limitations that the process of a gradual crystallization in international customary law of a rule proscribing crimes against humanity even in

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[20] *See* Ilias Bantekas, *The Iraqi Special Tribunal for Crimes Against Humanity*, 54 INT'L & COMP.L.Q. 237, 243 (2005).

[21] *See id.*

[22] ICCPR, *supra* note 13, art. 15(1).

[23] Bassiouni, *supra* note 11, at 373.

[24] Constitution of the Islamic Republican of Iraq, art. 19 (Ninth) [2005] ("Criminal law does not have a retroactive effect, unless it is to the benefit of the accused.").

[25] *Cf.* Statute of the International Criminal Tribunal for the former Yugoslavia, art. 5, May 25, 1993, 32 I.L.M. 1192 [hereinafter ICTY Statute], *available at* http://www.un.org/icty/legaldoc-e/basic/statut/statute-feb06-e.pdf. ("The International Tribunal shall have the power to prosecute persons responsible for the following crimes *when committed in armed conflict, whether international or internal in character*, and directed against any civilian population.") (emphasis added).

> time of peace was set in motion. This crystallization became indisputable after being established in 1995 by the Appeals Chamber of the ICTY.[26]

Prior to 1995, in other words, crimes against humanity were only illegal under customary international law when committed *during* an armed conflict, whether international or internal in character. Such crimes were also not criminal under domestic Iraqi criminal law prior to the enactment of the IHT Statute; the Iraqi Penal Code of 1969 did not recognize them.[27] The IHT, therefore, cannot prosecute a defendant for crimes against humanity committed during peacetime prior to 1995 without violating the principle of non-retroactivity.[28]

If this interpretation of Article 12 is correct, it has profound implications. Most obviously, it means that the Dujail trial as a whole was inva-

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[26] Antonio Cassese, *Balancing the Prosecution of Crimes Against Humanity and Non-Retroactivity of Criminal Law*, 4 J. INT'L CRIM. JUST. 410, 414 n. 5 (2006); *see also* Andrew Clapham, *Issues of Complexity, Complicity, and Complementarity: From the Nuremberg Trials to the Dawn of the International Criminal Court*, *in* FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 43 (Phillippe Sands, ed., 2003) (noting that "the Yugoslavia and Rwanda Tribunals have clearly established that crimes against humanity exist as self-standing crimes . . . that can be prosecuted even in the absence of an armed conflict"); Timothy L.H. McCormack, *Crimes Against Humanity*, *in* THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 184 (Dominic McGoldrick et al. eds., 2004) (noting that, "at least until the early 1990s, uncertainty about the need for crimes against humanity to be perpetrated in the context of armed conflict prevailed"); *cf.* Shany, *supra* note 12, at 344 ("[F]or the purposes of the IST, it is unclear whether, under pre-1990s international law, crimes against humanity did not require nexus to an armed conflict.").

[27] *See* Bassiouni, *supra* note 11, at 373 (noting that the IHT "borrowed the definition of the crimes of genocide, crimes against humanity, and war crimes from the ICC Statute articles 6, 7, and 8, which are not contained in the 1969 Iraqi Penal Code").

[28] *Cf.* Bantekas, *supra* note 20, at 241–42 ("[T]he application of the concept of crimes against humanity... as formulated in the latter part of the 1990s to events taking place in the late 1960s until the early 1990s, may offend the jus cogens principle prohibiting the employment of retroactive criminal legislation."). Bassiouni suggests that this conclusion might be avoided for crimes against humanity that have counterparts in Iraqi criminal law: "An alternative approach to avoiding a violation of the principle of legality is to divide . . . crimes against humanity... into several lesser crimes that are usually found in most domestic criminal codes, including the 1969 Criminal Code and the 1940 Military Penal Law . . . . Accordingly, it would be appropriate to refer to these crimes, which are defined in Iraqi law, and to rely on them as elements of" the various crimes against humanity. Bassiouni, *supra* note 11, at 376. Bassiouni admits, however, that such a "substantive justice" interpretation of the principle of legality is more difficult to defend for crimes against humanity than for war crimes, because the former have never been included in a specialized convention binding on Iraq. *Id.* at 375. It is also not clear whether the substantive justice approach to the legality principle is still valid; although that approach was embraced by the Nuremberg Tribunal, Cassese argues that strict legality has replaced substantive justice as the foundation of the principle. *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 143 (2003). If Cassese is correct, the Iraqi Penal Code's failure to prohibit "crimes against humanity" as an independent category of crimes would be dispositive. *See id.* at 143.

lid, because all of the charges against Saddam and his co-defendants involved crimes against humanity committed in peacetime prior to the 1990s.[29] And it also means that, going forward, the Tribunal can only charge defendants with two categories of crimes against humanity: (1) those that were committed at any time during an armed conflict and (2) those that were committed during peacetime after 1995.

2. War Crimes

A similar retroactivity problem affects Article 13. Paragraphs 3 and 4 of Article 13 criminalize serious violations of Common Article 3 of the Geneva Conventions and other "serious violations of the laws and customs of war" even when committed in an "armed conflict not of an international character."[30] But as Roman Boed has pointed out:

> Until the establishment of the two United Nations tribunals, the ICTR and the ICTY, the customary law position on individual criminal responsibility for serious violations of humanitarian law during internal armed conflicts . . . [was that] such acts were not considered to be criminal on the international plane.[31]

Bill Schabas agrees—and notes that "[u]ntil the adoption of Security Council Resolution 955 creating the Rwanda Tribunal, it was widely believed among specialists in international humanitarian law that the very concept of war crimes in non-international armed conflict did not exist."[32] Indeed, no less an authority than the International Committee of the Red Cross took the position that, prior to the creation of the ICTY, "the notion of war crimes [was] limited to situations of international armed conflict."[33]

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[29] *See* Indictments of Saddam's Co-Defendants *in* SADDAM ON TRIAL 266, 266–82 (Michael P. Scharf & Gregory S. McNeal eds., 2006).

[30] *Compare* Statute of the Iraqi High Tribunal, arts. 13(3)&(4); *with* Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. Paragraph 3 does not use the expression "serious violations of Common Article 3," but the content of the paragraph, as well as the fact that it otherwise follows Article 7 of the ICC Statute, makes clear that it is referring to such violations. Statute of the Iraqi High Tribunal, art. 13(3).

[31] Roman Boed, *Individual Criminal Responsibility for Violations of Article 3 Common to the Geneva Conventions of 1949 and of Additional Protocol II Thereto in the Case Law of the International Criminal Tribunal for Rwanda*, 13 CRIM. L. F. 293, 299 (2002); *see also* Bantekas, *supra* note 20, at 241–42 ("[T]he application of the concept of . . . internal conflict war crimes, as formulated in the latter part of the 1990s to events taking place in the late 1960s until the early 1990s, may offend the *jus cogens* principle prohibiting the employment of retroactive criminal legislation.").

[32] William Schabas, *Prosecutor v. Akayesu*, II ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, 1994–1999, cmt. at 550 (2001).

[33] *See* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 559 (1995) (citation omitted).

If this interpretation is correct, the principle of non-retroactivity prohibits the IHT from prosecuting a defendant for war crimes committed during an internal armed conflict prior to 1994, because war crimes were no less foreign to Iraqi criminal law than crimes against humanity prior to the enactment of the IHT Statute.[34] This limitation would not affect the Dujail trial, which involved only crimes against humanity. But it does mean that, in future trials, the Tribunal can only charge defendants with two categories of war crimes: (1) those that were committed at any time during an international armed conflict; and (2) those that were committed in an internal armed conflict after 1994.

B. Vagueness of Domestic Crimes

In addition to war crimes, crimes against humanity, and genocide, the IHT has jurisdiction over three domestic Iraqi crimes: (1) "intervention in the judiciary or the attempt to influence the functions of the judiciary"; (2) "[t]he wastage or squander of national resources"; and (3) "[t]he abuse of position and the pursuit of policies that were about to lead to the threat of war or the use of the armed forces of Iraq against an Arab country."[35] Those crimes are not contained in the Iraqi Penal Code,[36] nor are they defined in the IHT Statute.[37] Instead, they are based on Iraq's Law No. 7 of 1958. Law No. 7, however, does not define the three domestic crimes[38]—which means that they clearly violate the principle of specificity that is a necessary corollary of the legality principle.[39] Cassese again:

> Under the principle of specificity, criminal rules must be as specific and detailed as possible, so as to clearly indicate to their addressees the conduct prohibited, namely both the objective elements of the crime and the requisite *mens rea*.[40]

Each of the domestic crimes "lacks precision and is too general to provide a safe yardstick for the work of the Tribunal."[41] Not only are they so vaguely worded that a perpetrator could not know in advance what conduct they prohibit,[42] neither the IHT Statute nor Law No. 7 specify the *mens rea* necessary for their commission.[43]

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[34] *See* Bassiouni, *supra* note 11, at 373.

[35] Statute of the Iraqi High Tribunal, art. 14(1)–(3).

[36] *See* Bassiouni, *supra* note 11, at 377.

[37] *See* Human Rights. Watch, *The Former Iraqi Government on Trial*, *supra* note 10, at 4.

[38] *Id.*

[39] *See* M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 179 (2003).

[40] Cassese, *supra* note 26, at 14.

[41] Prosecutor v. Kupreskic et al., Case No. IT-95-16-T, Judgment ¶ 563 (Jan. 14, 2000).

[42] *See* Andreas L. Paulus, *Peace Through Justice? The Future of the Crime of Aggression in a Time of Crisis*, 50 WAYNE L. REV. 1, 31–32 (2005) (noting that "the Iraqi crime [of

IV. PROCEDURAL LAW

Numerous aspects of the IHT's procedural law also violate international standards of due process. Some of those violations are created by the IHT Statute itself; others result from the fact that Article 16 makes the Iraqi Code of Criminal Procedure "an indivisible and integral part of the law."[44]

A. Pre-Trial

1. The Right to Counsel

As Christoph Safferling has pointed out, the right to counsel during the pre-trial phase of a criminal case is a critical element of international due process:

> [T]he safeguarding of human rights during the pre-trial stage is important because the whole inquiry is intended to determine the legal and factual basis for trial by obtaining evidence and preparing court procedure. The foundations for potential conviction are being laid here. It is a crucial stage for the suspect. . . . Therefore, already at this stage, the suspect must be assisted by legal counsel.[45]

It is not completely clear how early in the pre-trial process the right to counsel attaches. The ICCPR does not provide a definitive answer; it simply provides for counsel during "the determination of any criminal charge against" a person.[46] Based on his review of the relevant decisions by international and national courts, Safferling concludes that the ICCPR most likely requires counsel as soon as a suspect is questioned by the police at a

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aggression] is poorly drafted and outdated" and fails to "clearly define the *actus reus* of the crime.").

[43] *See* Statute of the Iraqi High Tribunal, art. 16. Although it draws heavily on the ICC, the IHT Statute does not contain a counterpart to Article 30 of the ICC Statute, which provides a default mental element of intent and knowledge for all crimes, "unless otherwise provided." *See id*; Nor, insofar as similar crimes exist at the international level—such as aggression—can the IHT give content to the domestic crimes by "resort[ing] to the relevant decisions of the international criminal courts." Article 17 of the IHT Statute does not allow such reference for Article 14. Article 17 does allow the IHT to refer to other Iraqi penal laws "[i]n case a stipulation is not found in this Law and the rules made thereunder," *id.* art. 17(1), but those laws—the Baghdadi Penal Law of 1919, the Penal Law No. 111 of 1969, and the Military Penal Law No. 13 of 1940—also fail to specify a *mens rea* for the domestic crimes.

[44] Statute of the Iraqi High Tribunal. Interestingly, the December 10, 2003 version of the IHT Statute provided only that the Tribunal "shall be guided by the Iraqi Criminal Procedure Law," implying that, in case of conflict, the Statute would take precedence. *See* IHT Statute (Dec. 10, 2003), art. 16. Had the current version retained that language, many of the problems discussed below might have been avoided.

[45] CHRISTOPH J. M. SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE 106 (2001).

[46] *See* ICCPR, *supra* note 13, art. 14(3).

police station, and categorically requires it once the suspect is arrested or detained.[47] The Basic Principles on the Role of Lawyers support the latter standard: Principle No. 5 requires governments to inform suspects of their right to counsel "upon arrest or detention."[48] By contrast, the ILC Draft Statute and the ICC Statute both guarantee the right to counsel even earlier, during *any* interrogation of a person suspected of having committed a crime, regardless of whether he has been arrested or detained.[49]

At a minimum, then, international due process requires that suspects be allowed counsel as soon as they are arrested or detained—and perhaps even earlier, during any kind of police questioning. Regardless of which standard is correct, the IHT's right-to-counsel provisions are inadequate. The IHT Statute and Rules guarantee counsel only in three situations: (1) when a suspect is questioned by the investigative judge[50] (2) after an investigative judge has ordered the suspect provisionally detained[51]; and (3) during arraignment.[52] Moreover, the Iraqi Code of Criminal Procedure does not entrust the power to detain and interrogate solely to the investigative judge;

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[47] *See* SAFFERLING, *supra* note 45, at 107.

[48] Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 27–Sept. 7, 1990, Basic Principles on the Role of Lawyers, Principle No. 5, available at http://www.unhchr.ch/html/menu3/b/h_comp44.htm [hereinafter Basic Principles on Lawyers].

[49] *See* Draft Statute for an International Criminal Tribunal, art. 26(6), 88 AJIL 140 (1994) *available at* http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1994.pdf [hereinafter ICC Statute] ("[a] person suspected of a crime under this Statute shall . . . (a) Prior to being questioned, be informed that the person is a suspect and of the rights . . . (ii) To have the assistance of counsel of the suspect's choice or, if the suspect lacks the means to retain counsel, to have legal assistance assigned by the Court."); Statute of the International Criminal Court art. 55(2), July 17, 1998, 37 I.L.M. 999 [hereinafter ICC Statute]. ("Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned... (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her.").

[50] IRAQI HIGH TRIBUNAL R. P. & EVID. 27(1)(a) [hereinafter IHT Rules], R. 27(1)(a) ("A suspect who is questioned by an Investigative Judge shall have the following rights of which he must be informed by the Investigative Judge prior to questioning in a language he speaks and understands . . . . The right to legal assistance of his own choosing, including the right to have legal assistance provided by the Defence Office if he does not have sufficient means to pay for it.").

[51] *Id.* R. 25(Third) ("The suspect shall be brought without delay, before the Investigative Judge who made the initial detention order, or before another Investigative Judge assigned by the Chief Investigative Judge. The Investigative Judge must be convicted [*sic*] that the right of the accused to counsel is respected.").

[52] Statute of the Iraqi High Tribunal art. 20(3) ("The Criminal Court shall read the indictment, satisfy itself that the rights of the accused are respected and guaranteed, insure that the accused understands the indictment, with charges directed against him and instruct the accused to enter a plea.").

on the contrary, the same powers can be exercised by a variety of different state actors—and can be exercised long before the investigative judge gets personally involved in the case.

Critical, here, is the fact that Iraqi criminal procedure distinguishes between "[i]nvestigations conducted by the [p]olice"[53] and "the initial investigation" conducted by an investigative judge.[54] The police are the first government agents to investigate a crime, and one of their responsibilities is to "orally question the person about the accusation made against him."[55] They are also empowered to apprehend a suspect for delivery to the appropriate authorities.[56]

It is not clear whether the police are permitted to interrogate a suspect *after* they have arrested him. Nothing in the Code of Criminal Procedure requires interrogation to cease after arrest, however, and the Code specifically permits the police to "forbid those present to leave or move away from the scene of the offence until an official record has been made"—a limitation on the suspect's freedom that would almost certainly qualify as detention.[57] It is thus likely that the police are, in fact, permitted to continue to interrogate suspects after they have been arrested or detained—a clear violation of international due process, given that neither the IHT Statute and Rules nor the Code of Criminal Procedure require the suspect be provided counsel for those interrogations.

After a suspect has been arrested and delivered to the appropriate authorities, investigative responsibility shifts from the police to the investigative judge.[58] The IHT Rules would appear to guarantee the suspect the right to counsel during this new stage of the investigation; Rule 27 specifically provides that "[a] suspect who is questioned by an Investigative Judge

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[53] ICCP, *supra* note 17, ch. 3.

[54] *Id.* para. 51(A).

[55] *Id.* para. 43 ("When an investigating officer, within his area of competence as specified in paragraph 39 is informed or becomes aware that an offence has been committed in the presence of witnesses, he is required to notify the examining magistrate and the Public Prosecutor's Office of the occurrence of the offence, to go immediately to the place where the offence occurred, to take down in writing a statement from the victim of the offence, to orally question the person about the accusation made against him."). The ICCP defines "investigating officer" as, *inter alia*, a police officer, a police station commander, or a commissioner. *See id.*para. 39.

[56] *Id.* para. 41 ("Investigating officers are authorized within their areas of competence to inquire into offences and . . . to apprehend those who committed the offences and to deliver them to the appropriate authorities.").

[57] *Id.*, *but cf.* Florida v. Bostick, 501 U.S. 429, 435 (1991) (noting that, for Fourth Amendment purposes, "a seizure occurs when a reasonable person would believe that he or she is not free to leave").

[58] *See* ICCP, *supra* note 17, para. 51. The Code of Criminal Procedure uses the term "examining magistrate" instead of "Investigative Judge." *See, e.g.*, *id.*, para. 1(A) ("The initiation of criminal proceedings for an oral or written complaint is submitted to the examining magistrate.").

shall have . . . [t]he right to legal assistance of his own choosing, including the right to have legal assistance provided by the Defence Office."

Appearances, however, can be deceiving: Iraqi criminal procedure does not require investigative judges to question suspects themselves. On the contrary, Paragraph 51 of the Code explicitly permits them to delegate that responsibility to investigators: "[t]he initial investigation shall be conducted by examining magistrates *or by investigators acting under the supervision of examining magistrates*."[59] In the latter situation, Rule 27 does not apply—which means that investigators are free to question suspects in the absence of counsel.

It is possible, of course, that Rule 27 was intended to apply to both investigative judges and appointed investigators. That assumption, however, is questionable; the architects of the IHT could hardly have been unaware of the numerous provisions in the Code that specifically discuss the power of investigators, as opposed to investigative judges. Moreover, even if Rule 27 was simply poorly drafted, the fact remains that the letter of the IHT Statute permits uncounseled interrogations in situations where international due process plainly forbids them.

2. The Right to Silence

The IHT's right-to-silence provisions also fall short of international standards. Although Article 14 of the ICCPR does not specifically mention a right to silence, the European Court of Human Rights has consistently held that "there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure."[60] Moreover, as the European Court's generic use of the term "police questioning" implies, the right to silence likely attaches even *earlier* than the right to counsel, applying with equal force to questioning that takes place before the suspect is arrested or detained. Both the ILC Draft Statute and the ICC Statute explicitly state that the right to remain silent attaches as soon as a person is suspected of a crime.[61]

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[59] *Id.*, para. 51 (emphasis added).

[60] Murray v. United Kingdom 22 Eur. Ct. H.R. 26, 60 (1996); *see also* Saunders v. United Kingdom, 23 Eur. Ct. H.R. 313, 329 (1996) (noting the same right).

[61] *See* ILC Draft Statute, *supra* note 49, art. 26(6)(a) ("[a] person suspected of a crime under this Statute shall . . . Prior to being questioned, be informed that the person is a suspect and of the rights . . . (i) To remain silent, without such silence being a consideration in the determination of guilt or innocence."); ICC Statute, *supra* note 49, art. 55(2) ("Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned. . . . (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence.").

Like the right to counsel, the IHT guarantees the right to silence only during questioning by an investigative judge,[62] after arrest,[63] and at trial.[64] Those guarantees, however, do not satisfy international due process. First, and most important, the right to silence does not extend to pre-arrest interrogations that are conducted by anyone other than an investigative judge—and as we have seen, an investigative judge normally does not get involved in an investigation until the suspect is arrested.[65]

Second, although the IHT gives an arrested suspect the right not to answer questions asked by either an investigator or an investigative judge,[66] only investigative judges must *inform* the suspect of that right.[67] No such obligation is imposed on investigators.[68] That inconsistency, whether intentional or unintentional, violates international due process, which explicitly requires that suspects be informed of whatever rights they legally possess.[69]

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[62] *See* IRAQI HIGH TRIBUNAL R. P. & EVID. 27(First) ("A suspect who is questioned by an Investigative Judge shall have the following rights of which he must be informed by the Investigative Judge prior to questioning in a language he speaks and understands . . . (c) The right to remain silent. In this regard, the suspect or accused must be cautioned that any statement he makes may be used against him in court.").

[63] *See* ICCP para. 126 (providing that, following arrest, "[t]he accused does not have to answer any of the questions he is asked").

[64] *See* Statute of the Iraqi High Tribunal, art. 19(4)(F) ("In directing any charge against the accused pursuant to the present Law, the accused shall be entitled to a just fair trial in accordance with the following minimum guarantees . . . [t]he defendant shall not be forced to confess and shall have the right to remain silent and not provide any testimony and that silent shall not be interpreted as evidence of convection or innocence.").

[65] It is clear that, under the Rules, an investigative judge has the authority to be involved in any stage of an investigation. *See* IRAQI HIGH TRIBUNAL R. P. & EVID. 23.

[66] This is done via incorporation of the ICCP. Paragraph 126 of the ICCP, which gives arrested suspects the right to remain silent, is located in Section Five, "Questioning of the accused." Paragraph 123 of Section Five specifically provides that "[t]he examining magistrate *or investigator* must question the accused within 24 hours of his attendance." (emphasis added). *See* ICCP para. 123.

[67] *See* IRAQI HIGH TRIBUNAL R. P. & EVID. 27(1) ("A suspect who is questioned by an Investigative Judge shall have the following rights *of which he must be informed by the Investigative Judge* prior to questioning . . . .") (emphasis added).

[68] *Compare* ICCP para. 126 *with* IRAQI HIGH TRIBUNAL R. P. & EVID. 27 (mentioning an obligation to inform, in contrast to the Iraqi Code of Criminal Procedure).

[69] *See, e.g.*, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, Principle No. 13, U.N. GAOR, 43rd Sess., Supp. No. 49A, U.N. Doc. A/43/49 (Dec. 9, 1988) ("Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively, with information on and an explanation of his rights and how to avail himself of such rights.").

3. Record of Questioning

The IHT Rules provide that, when questioning a suspect, an investigative judge "may record that questioning by audio, video or via a court reporter."[70] Such recording is not required by international due process, even though a permanent record of questioning is the most effective way to deter interrogators from coercing suspects into confession,[71] a practice that is specifically prohibited by Article 14 of the ICCPR.[72] Nevertheless, the IHT compares unfavorably with the ICTY and the ICC, both of which not only require questioning to be either audio- or video-recorded—a court reporter is insufficient—but also impose other procedures designed to minimize the potential for coercion, such as requiring interruptions in questioning to be noted on recordings themselves, giving the suspect the opportunity to clarify his answers, and providing that at least one copy of the recorded interrogation be sealed in the presence of the suspect.[73]

4. The Powers of the Investigative Judge

Under the IHT's procedural law, the investigative judge is responsible for all of the critical decisions involved in the pre-trial process. In particular, the investigative judge initiates investigations,[74] questions suspects,[75] and decides whether suspects should be detained.[76]

From the standpoint of international due process, this concentration of investigative functions is problematic. First, it is arguably inconsistent with the suspect's absolute right[77] under Article 14 of the ICCPR to an "impartial tribunal"[78]—one in which the judges do "not harbor preconceptions

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[70] IRAQI HIGH TRIBUNAL R. P. & EVID. 28.

[71] *See* Daniel D. Ntanda Nsereko, *Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia*, 5 CRIM. L. F. 507, 526 (1994); *see also* SAFFERLING, *supra* note 45, at 130.

[72] *See* ICCPR, *supra* note 13, art. 14(3)(g) (guaranteeing a suspect the right "not to be compelled to testify against himself or confess guilt").

[73] *See* R. Proc. & Evid., International Criminal Tribunal for the Former Yugoslavia, R. 4, U.N. Doc. IT/32/Rev.20 (2001) [hereinafter ICTY Rules]; R. P & Evid. International Criminal Court, R. 112, U.N. Doc. ICC-ASP/1/3 (2002) [hereinafter ICC Rules].

[74] *See* Statute of the Iraqi High Tribunal art. 18(1) ("The Investigative Judge shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from the police, or governmental and nongovernmental organizations. The Investigative Judge shall assess the information received and decide whether there is sufficient basis to proceed.").

[75] *See id.*, art. 18(2) ("The Court Investigative Judge shall have the power to question suspects. . . .").

[76] *See* IRAQI HIGH TRIBUNAL R. P. & EVID. 24(First)(A).

[77] *See* González del Río v. Peru, (263/1987), 28 October 1992, Report of the HRC, vol. II, (A/48/40), 1993, at 20 ("the right to be tried by an independent and impartial tribunal is an absolute right").

[78] ICCPR, *supra* note 13, art. 14(1).

about the matter before them."[79] An investigative judge faced with the decision to detain a suspect he has personally investigated cannot be expected to have no preconceptions about the correct choice; allowing the suspect to go free would be tantamount to admitting that his investigation was inadequate. The IHT's procedural law thus provides the investigative judge with a powerful psychological incentive to justify his earlier investigation by ultimately deciding to detain.[80] At the very least, such a conflict of interest is incompatible with the *appearance* of impartiality, which Article 14 expressly forbids.[81]

Second, because the same investigative judge investigates and decides whether to detain, the IHT's standard for provisional detention is inadequate. The investigative judge is authorized to detain a suspect if he concludes that there is a "reliable body of evidence that can be relied on and which shows that the suspect *may have* committed a crime."[82] The ICC's standard is far more stringent: the Pre-Trial Chamber can only issue a warrant of arrest if it is satisfied that there are "*reasonable grounds to believe* that the person has committed a crime"[83]—a standard equivalent to probable cause.[84] The ICTY applies the same "may have committed" standard as the IHT, but with a critical difference: investigations are conducted by the Prosecutor, while decisions to detain are made by a Judge, thereby eliminating any possible conflict of interest.[85]

Third, and finally, the fact that the investigative judge can both interrogate and detain creates an unacceptable risk that he will use the threat of detention to coerce a suspect into confessing.[86] Indeed, that danger is particularly acute given that—as we shall see—the investigative judge can provisionally detain a suspect for up to ninety days without the possibility of appellate review.

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[79] Karttunen v. Finland, Communication No. 387/1989, ¶ 7.2, U.N. Doc. CCPR/C/46/D/387/1989 (1992).

[80] *See, e.g.,* David M. Sanbonmatsu et al., *Overestimating Causality: Attributional Effects of Confirmatory Processing*, 65 J. PERSONALITY & SOC. PSYCH. 892, 893 (1993).

[81] Statute of the Iraqi High Tribunal art. 14(1); *see also* Piersack v. Belgium, 5 Eur. Ct. H.R. 169, 180 (1982) (discussing the impropriety of a former prosecutor presiding as judge over a case in which he had a significant role in prosecuting).

[82] IRAQI HIGH TRIBUNAL R. P. & EVID. 24(Second)(A).

[83] ICC Statute art. 58.

[84] *See* BLACK'S LAW DICTIONARY (8th ed. 2004) (defining probable cause as "[a] reasonable ground to suspect that a person has committed or is committing a crime").

[85] *See* ICTY R. 42*bis* ("The Judge shall order the transfer and provisional detention of the suspect if the following conditions are met . . . (ii) after hearing the Prosecutor, the Judge considers that there is a reliable and consistent body of material which tends to show that the suspect *may have* committed a crime over which the Tribunal has jurisdiction.") (emphasis added).

[86] *See* Salvatore Zappalà, *The Iraqi Special Tribunal's Draft Rules of Procedure and Evidence: Neither Fish Nor Foul?*, 2 J. INT'L CRIM. JUST. 855, 862 (2004).

Admittedly, it is unclear whether any of these problems rise to the level of an Article 14 violation; to date, no international court has addressed the potential conflicts associated with a judge who both investigates and decides whether to detain. That absence, however, likely reflects the fact that IHT practice deviates substantially not only from international practice, but from national practice, as well.[87] As Salvatore Zappalà notes, "[m]ost inquisitorial systems that originally provided for a similar power changed their procedural rules precisely on this matter, and conferred the power [to detain] on a different Judge . . . ."[88] France, for example, specifically amended its Code of Penal Procedure in 2000 to require different judges to investigate and detain.[89]

5. Review of Detention

According to Article 9(3) of the ICCPR:

> Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody."[90]

The IHT's rules regarding provisional detention violate Article 9. Rule 25 authorizes the investigative judge to provisionally detain a suspect for up to ninety days.[91] That decision is completely unreviewable: although Rule 24 provides that "[t]he suspect must be released if . . . [a] subsequent order issued by the Investigative Judge or the Iraqi Special Tribunal dictates as such,"[92] Rule 25 only permits the suspect to appeal a decision to extend provisional detention beyond 90 or 180 days; he cannot appeal *the initial decision to detain itself*:

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[87] *See, e.g.*, COMPARATIVE CRIMINAL PROCEDURE 117 (John Hatchard et al. eds, 1998) (noting that, in Germany, the prosecution investigates while the pre-trial judge decides whether to detain); EUROPEAN CRIMINAL PROCEDURES 402 (Mireille Delmas-Marty & J.R. Spencer eds., 2004) (noting that, in Italy, the prosecutor who investigates must ask a judge to order pre-trial detention).

[88] Zappalà, *supra* note 86, at 862.

[89] *See* JACQUELINE HODGSON, FRENCH CRIMINAL JUSTICE: A COMPARATIVE ACCOUNT OF THE INVESTIGATION AND PROSECUTION OF CRIME IN FRANCE 71 (2005) (noting that the amendment created a *juge des libertés et de la détention* because of the belief that "the independence of the [*juge d'instruction*] was compromised by her investigative function in the case.").

[90] ICCPR, *supra* note 13, art. 9(3).

[91] IRAQI HIGH TRIBUNAL R. P. & EVID. 25(First)(1) ("Initially no accused may be subject to a provisional detention period exceeding (90) days starting from the day following the suspect placement in any detention unit of the Iraqi Special Tribunal.").

[92] *Id.* at R. 24(Third).

> 1. Initially no accused may be subject to a provisional detention period exceeding (90) days starting from the day following the suspect placement in any detention unit of the Iraqi Special Tribunal. The period of detention may be extended, by subsequent order by the Competent Judge, for an additional (30) day period extendable for the same periods but may not exceed (180) days in total.
> 2. The extension for the period that to exceed (180) days shall be ordered by the Competent Judge after receiving the consent of the President.
> 3. The decisions mentioned *in paragraphs (first and second)* above are appealable.[93]

The IHT's "general rule," therefore, is that a suspect in pre-trial detention will remain in custody for at least the 90-day duration of the investigative judge's detention order. The suspect's only hope for relief is the possibility that the investigative judge will exercise his discretion and decide to release him.[94] Not only is that extremely unlikely, but it falls far short of complying with the ICCPR's injunction that a detained suspect "be brought promptly before a judge." Paragraph 111 of the Code, the relevant provision governing release, does not require the investigative judge to reconsider his decision at all, much less "promptly."[95] Moreover, the suspect does not have any right to present an argument for release—a basic requirement for pre-trial detention according to the European Court of Human Rights, if the legality of detention is not reviewed by a different authority than the one that makes the initial decision to detain.[96]

6. The Right to Prepare a Defense

Article 14(3) of the ICCPR provides that, "[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality . . . (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing."[97]

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[93] *Id.* at R. 25(First) (emphasis added).

[94] ICCP para. 111 ("The judge who issued the decision to detain the accused may decide to release him on a pledge, with or without bail, before the end of the period of detention . . . .").

[95] *See id.*

[96] *See* De Wilde, Ooms an Versyp v. Belgium, Judgment, 18 June 1971, Series A No. 12, ¶ 76 (holding that with regard to pre-trial detention, "an authority must provide the fundamental guarantees of procedure applied in matters of deprivation of liberty. If the procedure of the competent authority does not provide them, the State could not be dispensed from making available to the person concerned a second authority which does provide all the guarantees of judicial procedure").

[97] ICCPR, *supra* note 13, art. 14(3)(b).

Article 19 of the IHT Statute incorporates Article 14(3) nearly verbatim.[98] Nevertheless, a number of provisions in the Tribunal's Rules of Procedure undermine the effectiveness of the defendant's right to prepare a defense.

a. Pre-Trial Disclosure

According to IHT Rule 40, the Prosecutor is only obligated to disclose witness statements and inculpatory evidence to the defense forty-five days before trial.[99] No provision in the Rules, Statute, or Code permits the defense to seek disclosure at an earlier time. If the forty-five days proves inadequate, the defense's only remedy is to ask the Tribunal for a continuance, which it is under no obligation to grant.[100]

By imposing a fixed time limit on pre-trial disclosure, Rule 40 violates Article 14. In its General Commentary on subparagraph 3(b), the Human Rights Committee explicitly explains that what constitutes "adequate time" must be determined "on the circumstances of each case."[101] In practice, moreover, Rule 40 will nearly always cripple the defense:

> Trying an individual for crimes such as genocide, crimes against humanity and war crimes presents a special challenge to equality of arms. The resources required to investigate and prosecute these crimes are very substantial, and often require the cooperation and assistance of foreign governments and intergovernmental organizations. The prosecution of such cases—particularly command responsibility cases—may involve hundreds of witnesses and thousands of exhibits for the prosecution . . . .[102]

Saddam's trial is a case in point. The Dujail trial involved eight defendants, nearly ten different charges, more than thirty-six prosecution witnesses, and dozens of exhibits.[103] The complexity of the Dujail trial, moreover, pales in comparison to the complexity of the Anfal trial,[104] which Mi-

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[98] *See* Statute of the Iraqi High Tribunal art. 19(Fourth)(B) ("In directing any charge against the accused pursuant the present Law, the accused shall be entitled to a just fair trial in accordance with the following minimum guarantees . . . To have adequate time and facilities for the preparation of his defense and to communicate freely with counsel of his own choosing.").

[99] IRAQI HIGH TRIBUNAL R. P. & EVID. R. 40(First).

[100] *See id.* at R. 34(Second) ("At the request of either party . . . a Criminal court *may* issue such orders . . . as may be necessary for . . . the conduct of the trial.") (emphasis added).

[101] Human Rights Committee, ¶ 9, General Comment No. 13, , U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 11, 1994) [hereinafter General Comment].

[102] Human Rights Watch, *Former Iraqi Government*, *supra* note 10, at 12.

[103] *See, e.g.*, Michael P. Scharf & Gregory S. McNeal, *Show Trial or Real Trial? A Digest of the Evidence Submitted During the Prosecution's Case-in-Chief*, *in* SADDAM ON TRIAL 188, 188–195 (MICHAEL P. SCHARF & GREGORY S. MCNEAL, 2006).

[104] Largely due to the fact that the Anfal trial includes genocide charges, *see* Amit R. Paley, "As Genocide Trial Begins, Hussein Is Again Defiant," WASH. POST (Aug. 22, 2006), at

chael Newton has described as "an ambitious undertaking that would stretch the resources and capacity of almost any judicial body around the world."[105] Forty-five days to prepare such a case is wholly inadequate.

b. Extent of Disclosure

The Prosecutor's obligation to disclose the evidence it intends to use at trial is also not absolute. On the contrary, when disclosure "may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the general security interests of any State," a Judge sitting *ex parte* can permit the Prosecutor not to disclose that evidence to the defense.[106]

By themselves, the non-disclosure provisions of Rule 40 do not violate Article 14 of the ICCPR; international courts have consistently approved reasonable restrictions on a defendant's access to the Prosecutor's files,[107] and the ICTY's non-disclosure provision contains the same exceptions as Rule 40.[108] A critical problem arises, however, if the Prosecutor later decides to use the undisclosed evidence: *nothing in the Rules requires the Prosecutor to disclose that evidence to the defense before he uses it at trial.* This lacuna cannot be dismissed as an oversight: unlike Rule 40, Rule 43 permits non-disclosure of confidential information that "has been used solely for the purpose of generating new evidence,"[109] but specifically requires prior disclosure to the defense if "the Prosecutor elects to prevent as evidence any testimony, document or other material so provided . . . ."[110]

Because it permits such sandbagging, Rule 40 blatantly violates the defendant's right to "adequate . . . facilities for the preparation of his defence." The essence of that right, according to the Human Rights Committee, is "access to documents and other evidence which the accused requires to prepare his case.[111] Recognizing this, the ICC's non-disclosure provisions prohibit the Prosecutor from using previously undisclosed evidence at trial

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A10, which are particularly complex to defend. *See, e.g.*, RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE 143 (M. Cherif Bassiouni et al. eds., 2002) (noting that, in the *Krstic* case before the ICTY128 witnesses were heard and 1098 Exhibits were entered.").

[105] Michael A. Newton, *The Significance of the Anfal Campaign Indictment*, *in* SADDAM ON TRIAL 220, 220 (MICHAEL P. SCHARF & GREGORY S. MCNEAL, 2006).

[106] IRAQI HIGH TRIBUNAL R. P. & EVID. 43 R. 40(Second).

[107] *See* X v. Austria (7138/75), 5 July 1977, 9 DR 50.

[108] *See* ICTY R. 66(C). It is worth noting that the ICC permits non-disclosure only for reasons of confidentiality, *see* ICC R. 81(3), and national security, *see* ICC Statute art. 72.

[109] IRAQI HIGH TRIBUNAL R. P. & EVID. 43.

[110] *Id.* at R. 43(Third).

[111] General Comment, *supra* note 101, para. 9.

"without adequate prior disclosure to the accused."[112] The ICC's approach is sound: it is impossible for a defendant to defend himself against evidence that he doesn't know exists.[113]

c. Exculpatory Evidence

Although a defendant does not have the right to all of the evidence in the Prosecutor's file, he does have a right to any evidence that would tend to exculpate him.[114] As the European Court of Human Rights has noted, if the defendant is not made aware of exculpatory evidence, he cannot "present his case in conditions that do not place him at a disadvantage vis-à-vis his opponent," in violation of the principle of equality that is central to a fair trial.[115]

The IHT, however, does not require the Prosecutor to disclose all exculpatory evidence to the defense. Although Rule 42 seems to impose an unqualified disclosure obligation on the Prosecutor,[116] Rule 43 specifically exempts all exculpatory information provided to the Prosecutor *in confidence*:

> If the [Prosecutor] is in possession of information which was provided to it, on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin—*notwithstanding Rule 42*—shall not be disclosed by the [Prosecutor] without the consent of the person or entity providing the initial information.[117]

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[112] *See* ICC R. 81 (information relevant to ongoing investigations) & R. 82 (confidential information).

[113] That evidence, moreover, will likely be critical to the Prosecutor's case; the Prosecutor would not lightly decide to use evidence sensitive enough to qualify for non-disclosure under R. 40. Much of the surprise evidence introduced at the Dujail trial was extremely damning. *See* Human Rights Watch, *Judging Dujail*, *supra* note 5, at 49 (noting the Prosecution's tendency "to engage in 'trial by ambush,' in which incriminating documents were not disclosed to the defense until the day that the document was used in court.").

[114] *See* Zappalà, *supra* note 86, at 864 (noting that the obligation to disclose exculpatory evidence is a "perplexing" one," citing Rule 76).

[115] *See* Foucher v. France, 22209/93 [1997], ECHR 234, para. 34. This is especially true given that the exculpatory evidence will normally be in the Prosecutor's hands. *See* SAFFERLING, *supra* note 45, at 202 (noting that "[t]he investigating authorities are . . . equipped with investigative powers and are abetted by the whole state machinery. Their access to information and their methods of obtaining evidence are incomparably better than those on the defence side.").

[116] IRAQI HIGH TRIBUNAL R. P. & EVID. R. 42(Second) ("[T]he Prosecutor shall disclose to the defence lawyer the existence of evidence known to the Prosecutor which in any way tend to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of a prosecution witness or the authenticity of prosecution evidence. The Prosecutor shall disclose the grounds of the penalties continuously.").

[117] *Id.* at R. 43(Second) (emphasis added). The paragraph uses the word "tribunal" instead of "Prosecutor," but the next paragraph makes clear that the rule is addressed to the Prosecutor. *See id.*, R. 43(Third) ("If, after obtaining the written consent of the person or entity pro-

Rule 43, in other words, specifically provides that the Prosecutor's obligation to protect confidential information trumps his obligation to disclose exculpatory evidence, as indicated by its "notwithstanding Rule 42" language.

Rule 43 is troubling, given that Rule 40 specifically permits a designated judge to order non-disclosure of information relevant to an ongoing investigation, national-security information, and information whose disclosure would be otherwise inimical to the public interest.[118] The first two categories of information will almost always satisfy the requirements of Rule 43: by definition, investigative information and national-security information are normally provided in confidence by a person or government entity. And it is reasonable to assume that any information in the amorphous third category will also normally be provided in confidence; how could the release of non-confidential information harm the public interest?

Rule 43, in short, significantly curtails the defendant's right to present a defense. Protecting confidential sources is important, but the need for secrecy cannot justify turning a blind eye to the conviction of an innocent defendant.[119]

7. Confirmation of Indictment

As we have seen, the fact that the investigative judge is responsible for initiating investigations, questioning suspects, and ordering suspects provisionally detained is arguably inconsistent with a defendant's right under Article 14(1) of the ICCPR to an "impartial tribunal." The investigative judge's powers, it is important to note, do not stop there: at the conclusion of the investigation, the investigative judge is also responsible for deciding whether a prima facie case exists against the defendant. If he concludes that it does, he then "prepare[s] an indictment containing a concise statement of the facts of the crime . . . and refer[s] the case to the criminal court."[120]

There is, of course, nothing unusual about a criminal-justice system that entrusts the power to investigate and the power to indict to the same government entity.[121] The IHT *is* unusual, however, in one critical respect:

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viding information under this Sub-rule (Second), *the Prosecutor* elects to present as evidence any testimony, document, or other material so provided . . . .") (emphasis added).

[118] *Id.* at R. 40(Second).

[119] *See* Salvatore Zappalà, *The Prosecutor's Duty to Disclose Exculpatory Materials and the Recent Amendment to R. 68 ICTY RPE*, 2 J. INT'L CRIM. JUST. 620, 626 (2004). The ICC, it is worth noting, better resolves the conflict between secrecy and fairness. When the defendant seeks to discover national-security information that the Court deems relevant and necessary to his defense, the Court retains the option to draw an inference "as to the existence or non-existence of a fact" instead of requiring disclosure. *See* ICC Statute, art. 72(7).

[120] Statute of the Iraqi High Tribunal, art. 18(Third).

[121] *See* SAFFERLING, *supra* note 45, at 174–78 (discussing the Anglo-American tradition and international practice).

the IHT Statute does not require the Tribunal to review the sufficiency of the indictment prior to trial. The relevant provision is Article 20:

> **First**: A person against whom an indictment has been issued shall, pursuant to an order or an arrest warrant of the investigative judge, be taken into custody, immediately informed of the charges against him and transferred to the Court.
> **Second**: The Criminal Court shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with this Statute and the Rules of Procedure and Evidence annexed to this Law, with full respect for the rights of the accused and due regard for the protection of the victims, their relatives and the witnesses.
> **Third**: The Criminal Court shall read the indictment, satisfy itself that the rights of the accused are respected and guaranteed, insure that the accused understands the indictment, with charges directed against him and instruct the accused to enter a plea.

Nothing in Article 20 requires—or even permits—the Tribunal to review prior to trial the investigative judge's conclusion that there is a prima facie case against the defendant. On the contrary, the Code of Criminal Procedure specifically delays confirmation of the indictment until *after the prosecution's case-in-chief.* Paragraph 167 of the Code says that the initial stage of the trial consists of identifying the defendant, hearing the testimony of the complaining witness, and examining the prosecution's evidence.[122] Paragraph 181 then provides, in relevant part:

> If it appears to the court, *after the aforementioned steps have been taken*, that the evidence indicates that the defendant has committed the offence being considered, then he is charged as appropriate, the charge is read to him and clarified and he is asked to enter a plea.[123]

Article 20 deviates substantially from the international tribunals, all of which require a Prosecutor's decision to indict a defendant be reviewed by an independent judicial body.[124] It also differs from the December 10, 2003 version of the IHT Statute, which specifically required the chief investigative judge to review the sufficiency of the indictment.[125] Either method is

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[122] ICCP para.167.

[123] *Id.* para. 181(c) (emphasis added).

[124] *See, e.g.*, ICTY Statute, *supra* note 25, art. 19(1) ("The judge of the *Trial Chamber* to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the *Prosecutor*, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.") (emphasis added); ICC Statute, *supra* note 49, art. 61 ("[T]he *Pre-Trial Chamber* shall hold a hearing to confirm the charges on which the *Prosecutor* intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.") (emphasis added).

[125] *See* Statute of the Iraqi High Triunal, art. 19(a) ("If the Chief Tribunal Investigative Judge is satisfied that a *prima facie* case has been established by the Tribunal Investigative

clearly superior: because the IHT no longer requires pre-trial judicial review of the investigative judge's decision to indict, the investigative judge is able to control every stage of the pre-trial process, from initiating the investigation to deciding whether the defendant will go to trial. That concentration of power is fundamentally inconsistent with Article 14(1)'s guarantee of an "impartial tribunal."

The IHT's practice of not confirming the indictment until after the prosecution's case-in-chief also undermines the defendant's interrelated Article 14 rights "[t]o be informed promptly . . . of the nature and cause of the charge against him"[126] and "[t]o have adequate time and facilities for the preparation of his defence."[127] Regarding the former, the Human Rights Committee has clearly stated that the defendant's right to be informed of the charges "arise[s] when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such."[128] In theory, the IHT honors that requirement: Article 20 not only requires the investigative judge to inform a defendant of the charges against him once he is taken into custody,[129] it also requires the Tribunal to read the indictment prepared by the investigative judge to the defendant once he is transferred to a detention facility.[130] As Paragraph 181 indicates, however, those charges are only provisional: not only does the Tribunal remain free to consider different or additional charges that appear to be supported by the evidence presented during the prosecution's case-in-chief, it is under no obligation to inform the defendant of the different and/or new charges until the prosecution's case-in-chief is complete. Indeed, as noted earlier, that is exactly what happened in the Dujail trial.[131] Paragraph 181 thus reduces Article 20's guarantee of the defendant's right to be informed of the charges against him to a virtual nullity.

Finally, the IHT's sanction of mid-trial confirmation is inconsistent with the defendant's right "[t]o have adequate time and facilities for the preparation of his defence." It is obvious that a defendant cannot prepare an adequate defense if the charges against him can change in the middle of a trial, *after* his counsel has cross-examined the prosecution's witnesses. Yet

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Judge, then he/she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed without prejudice.").

[126] ICCPR, *supra* note 13, art. 14(3)(a).

[127] *Id.* art. 14(3)(b).

[128] General Comment, *supra* note 101, ¶ 8.

[129] Statute of the Iraqi High Tribunal, art. 20(First).

[130] *Id.* art. 20(Third).

[131] The charging document read by the Tribunal on May 15, 2006 added at least one new charge against seven of the defendants, including enforced disappearance, and "other inhumane acts" deliberately causing severe suffering. *See* Human Rights Watch, *Judging Dujail*, *supra* note 5, at 43.

that is precisely what Paragraph 181's mid-trial confirmation of the indictment allows.

B. Trial

1. Trials in Absentia

Article 14(3)(d) of the ICCPR provides that "[i]n the determination of any criminal charge against him, everyone shall be entitled . . . [t]o be tried in his presence."[132] Despite the seemingly categorical nature of that right, the Human Rights Committee has said that trials in absentia may be held "exceptionally for justified reasons."[133] It is unclear what reasons are sufficient; the international criminal tribunals permit a trial to proceed in absentia only when a defendant has been repeatedly disruptive.[134]

Consistent with traditional Iraqi criminal procedure, the IHT permits trials in absentia. Once the Tribunal has received the defendant's case file from the investigative judge, it sets a date for trial and notifies the defendant of that date.[135] If the defendant absconds, the Tribunal instructs the police "to pin an arrest warrant at his home, publish the warrant in two local newspapers, and announce the warrant on radio or television."[136] The Tribunal then sets a new trial date that is no later than two months from the date the warrant is published.[137] At the end of that two-month period, unless the defendant has filed a written excuse for why he will not attend the trial, "a trial will take place in his absence"[138] according to normal trial procedures.[139] If the defendant is found guilty and does not appear within six months, the judgment will become final and have the same status as a judgment "in the

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[132] ICCPR, *supra* note 13, art. 14(3)(d).

[133] General Comment, *supra* note 101, para. 11. The UN Secretary General, it is worth noting, disagrees. *See also* SAFFERLING, *supra* note 45, at 243 (noting that the Secretary General has stated "in clear terms that no trial should be held in the absence of the defendant," because "he believes that such trials would be against Art. 14 ICCPR").

[134] *See, e.g.*, ICC Statute art. 20(a) (permitting trial in the absence of the defendant "[i]f the accused, being present before the Court, continues to disrupt the trial"). The ICTY permits the so-called "R. 61 procedure" whenever "within a reasonable time, a warrant of arrest has not been executed." ICTY R. 61(A). That procedure, however, is not a trial in absentia, because R. 61 does not permit the Trial Chamber to find the absent defendant guilty. *See* SAFFERLING, *supra* note 45, at 244.

[135] ICCP para. 143(A).

[136] *Id.* para. 143(C).

[137] *Id.*

[138] *Id.* para. 147(A) ("If the accused has absconded or is absent without legal excuse, despite his having been informed, a trial will take place in his absence.").

[139] *Id.* para. 149(A).

presence of the parties.[140] The maximum penalty, however, will be life imprisonment; the death penalty is not permitted for a conviction in absentia.[141]

If Article 14(3)(d) of the ICCPR permits trials in absentia only when the defendant disrupts or refuses to attend a court session, the IHT's provisions are unacceptably permissive. The Code only prohibits a trial in absentia when the defendant is able to present the Tribunal with an "acceptable" excuse for absence—an assessment that is left to the Tribunal's sole discretion.

It is possible, of course, that Article 14(3)(d) permits trials in absentia in a wider range of circumstances.[142] But even if it does, the IHT's procedural regime still violates international due process. According to the Human Rights Committee, "strict observance of the rights of the defence is all the more necessary" when a trial is held in the absence of the defendant.[143] In particular, the burden of proof must be on the Prosecutor to prove that the defendant did not appear because he was trying to evade justice,[144] and the defendant must be entitled to a new trial once he is located.[145]

The Code of Criminal Procedure does not provide a defendant with either of these procedural protections. First, according to Paragraph 146, the defendant is responsible for establishing cause for his absence; if he wants an extension of the trial date, he must "present a written excuse" to the Tri-

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[140] *See id.* para. 243 (providing that, after six months without an objection, "the verdict of guilty and the principal and subsidiary penalties will have the status of a judgement in the presence of the parties").

[141] *Id.* para. 248(1). Paragraph 248(1), it is important to note, conflicts with Paragraph 245 and Paragraph 247, both of which contemplate a defendant sentenced to death in absentia. *See id.* para. 245(D) (noting, with regard to the general time-limit for objecting to a conviction in absentia, that "[t]he exception to paragraphs A and B is in the case of the death sentence or a sentence to life imprisonment"), para. 247(A) ("When a person is arrested and sentenced in absentia to death or to a prison sentence . . ."). There is no obvious way to reconcile the different provisions, other than to suggest that the Code allows the defendant to be sentenced to death in absentia but not actually executed if he is located. That distinction makes some sense—it preserves the symbolism of a death sentence for a defendant who is never expected to be found while avoiding the unfairness that would inhere in carrying out such a sentence.

[142] *See, e.g.*, ARCHBOLD, INTERNATIONAL CRIMINAL COURTS: PRACTICE, PROCEDURE, AND EVIDENCE 350 (Karim A. A. Khan et al. ed. 2005) (2005) (noting that, notwithstanding the clear language of R. 80(B), the ICTY Appeals Chamber has held that illness can also justify a court proceeding *in absentia*).

[143] General Comment, *supra* note 101, para. 11.

[144] Colozza v Italy, 89 Eur. Ct. H.R. (ser. A) at para. 30 (1985) ("[A] person 'charged with a criminal offence'. . . must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to force majeure.").

[145] *Id.* para. 29 ("When domestic law permits a trial to be held notwithstanding the absence of a person 'charged with a criminal offence' . . . that person should, once he becomes aware of the proceedings, be able to obtain, from a court which has heard him, a fresh determination of the merits of the charge.").

bunal—and even then the Tribunal is under no obligation to accept the excuse.[146]

Second, although the issue is murkier, the Code does not appear to require that the defendant be re-tried once he is located. Paragraph 245 provides that once the convicted defendant re-appears, the Tribunal will "examine the case again in the light of the objection and will issue its judgement with the support of the judgement in absentia or will amend it or cancel it, on condition that it will be not judged more harshly than the sentence imposed in absentia."[147] Such appellate review, however, is not sufficient.[148]

If Paragraph 245 was the only provision in the Code governing convictions in absentia, the IHT's procedures would clearly violate Article 14(3)(d) of the ICCPR. Paragraph 247, though, confuses the issue; unlike Paragraph 245, it provides that when a defendant who is sentenced in absentia to "death or a prison sentence" re-appears, "his trial will resume and the court has the right to issue any judgement permitted under the law. Its decision will be subject to appeal by any other legal means."[149] The expression "trial will resume" could conceivably be interpreted to mean that the defendant must be given a new trial.

That interpretation of Paragraph 247, however, is ultimately unpersuasive. To begin with, the Paragraph does not specifically require a new trial; it provides only that the trial shall "resume." Given that Paragraph 247 only applies once a defendant has been convicted, resuming the trial could not involve more than the re-examination of the conviction required by Paragraph 245. Moreover, even if we read the two paragraphs as applying to different kinds of defendants—Paragraph 245 to defendants who object to their convictions within six months; Paragraph 247 to defendants who do not[150]—interpreting Paragraph 247 to require a new trial is illogical, because that would mean defendants who do not object to their convictions on time are entitled to a new trial, while defendants who *do* object are entitled only to appellate review.

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[146] ICCP para. 146 ("The defendant may present a written excuse if he does not attend, and his me [*sic*] of his relatives may present this report. If it is accepted by the court, another time is fixed for the trial, and the defendant and others connected with the case are given notification.").

[147] *Id.* para. 245(C).

[148] *See Colozza*, para. 30; *see also* SAFFERLING, *supra* note 45, at 243 (noting that "the entire trial has to be repeated from the beginning.").

[149] ICCP para. 247(A).

[150] Paragraph 247 does not mention the six-month window to object to the conviction, whereas Paragraph 245(C) applies only "if the objector attends and the objection is submitted within its legal time-limit." ICCP paras. 247, 245(c). This conclusion is suspect, however, because Paragraph 245(D) waives the provisions of subparagraph (A) and (B) if a defendant has been sentenced to death or life imprisonment, implying that such defendants must be treated as if they had objected to their convictions within the time-limit. *Id.* para. 245(D).

The most persuasive interpretation of Paragraphs 245 and 247, therefore, is that they require the same kind of judicial review for a defendant convicted in absentia. Paragraph 245 specifically requires appellate review, not a new trial, and Paragraph 247 is consistent with such review, even if it could be interpreted to require more. As a result, although the matter cannot be resolved definitively, it seems likely that defendants convicted in absentia are never entitled to a new trial—a specific violation of Article 14(3)(d) of the ICCPR.

2. Cross-Examination of Witnesses

Article 14(3)(e) of the ICCPR provides that "[i]n the determination of any criminal charge against him, everyone shall be entitled . . . to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."[151] Subparagraph (e) does not require all witness statements to be made in open court; a statement obtained during the pre-trial investigation can be used at trial, as long as the defendant was afforded an opportunity to cross-examine the witness at some stage of the proceedings. In the absence of that opportunity, however, admitting the witness's statements not only violates the defendant's right of confrontation, it deprives him of a fair trial.[152]

Despite Article 14(3)(e), the IHT allows statements by witnesses whom the defendant never had an opportunity to cross-examine to be used at trial. Paragraph 213(a) of the Code permits the Tribunal to base its verdict on the evidence "presented during any stage of the inquiry"[153]—which means, as Human Rights Watch has pointed out, that "everything contained in the dossier constitutes evidence, and the trial court is entitled to treat all witness testimony in the investigative dossier as having been given at trial."[154] If the defendant had the right to question the investigative judge's witnesses during the investigation, paragraph 213(a) would not violate his confrontation rights. But that is not the case. First, although Paragraph 57 of the Code gives a defendant and his counsel a general right to attend the pre-trial investigation, the investigative judge has the discretion to override that

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[151] ICCPR, *supra* note 13, art. 14(3)(e).

[152] *See* Delta v. France, 191 EUR. CT. H.R. (ser. A) at 16 (1990).

[153] ICCP para. 213(A).

[154] Human Rights Watch, *The Former Iraqi Government On Trial*, *supra* note 10, at 5. Although Paragraph 212 of the Code prohibits the Tribunal from basing its verdict on evidence that "has not been brought up for discussion or referred to during the hearing," ICCP para. 212, the Tribunal reads "the reports, investigations and other documents" into the record at the beginning of trial. *See id.* para. 167. During the Dujail trial, the IHT read the statements of twenty-three prosecution witnesses the defense had never been able to question into the record. *See* Human Rights Watch, *Judging Dujail*, *supra* note 5, at 49.

right "if the matter in hand so requires" [155] —a standard so vague that it defies definition.

Second, even when a defendant and his counsel are permitted to attend the investigation, they have no right to cross-examine witnesses. Paragraph 57 is explicit in that regard: "they shall not have the right to speak unless permitted to do so."[156] Moreover, although Paragraph 63 permits the defendant and his counsel to "make observations on evidence given and . . . ask for a witness to be questioned again, or for other witnesses to be questioned about other facts to which they refer," the investigative judge can deny any such request on the ground that it would be "impracticable or would delay the investigation unjustifiably or would pervert the course of justice"[157]—another discretionless standard.

Third, and finally, the IHT Rules do not cure the problems with the Code. As part of the investigative judge's obligation to collect exculpatory as well as inculpatory evidence, Rule 23 permits the defendant to "request an Investigative Judge to conduct any relevant and material witness interviews."[158] The Rule, however, does not require the investigative judge or the Tribunal to grant such requests[159]—and in any case, an interview conducted by an investigative judge cannot satisfy the defendant's right of confrontation, particularly given the limitations discussed above.

3. Self-Representation

Article 14(3)(d) of the ICCPR gives defendants the right to represent themselves at trial.[160] All of the international tribunals recognize that right,[161] and the Human Rights Committee has specifically held that a domestic statute that does not guarantee self-representation violates Article 14.[162]

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[155] ICCP para. 57(A) ("An accused person, a plaintiff, a civil plaintiff, a person responsible in civil law for the actions of the accused and their representatives may attend the investigation while it is in progress. The magistrate or the investigator may prohibit their attending if the matter in hand so requires, for reasons that he shall enter in the record, with the proviso that they shall be granted access to the investigation as soon as the need to prohibit their attendance ceases.").

[156] *Id.*

[157] *Id.* para. 63(B).

[158] IRAQI HIGH TRIBUNAL R. P. & EVID. 23(Third).

[159] *Id.* at R. 34.

[160] ICCPR, *supra* note 13, art. 14(3)(d) ("In the determination of any criminal charge against him, everyone shall be entitled . . . to defend himself in person.").

[161] *See, e.g.*, ICTY Statute art. 21(4)(d); ICC Statute art. 67.

[162] *See* Michael and Brian Hill v. Spain, Communication No. 526/1993, para. 14.2, U.N. Doc. CCPR/C/59/D/526/1993 (April 2, 1997), *available at* http://www1.umn.edu/humanrts/undocs/html/VWS526.htm.

Early versions of the IHT Statute guaranteed the right of self-representation. Article 20 of the December 10, 2003 version, for example, provided that a defendant had the right "to defend himself in person or through legal assistance of his own choosing."[163] The current Statute, however, removed that language—and the right of self-representation along with it.[164]

Given Slobodan Milošević's antics during his trial at the ICTY,[165] it is understandable that the IHT did not want to allow Saddam to represent himself at the Dujail trial. Categorically depriving all defendants of the right to self-representation, however, is an overbroad remedy that violates the ICCPR.

4. Qualifications of Appointed Defense Attorneys

In addition to protecting the right of self-representation, Article 14(3)(d) of the ICCPR provides that, "[i]n the determination of any criminal charge against him, everyone shall be entitled . . . to have legal assistance assigned to him . . . in any such case if he does not have sufficient means to pay for it."[166] That right, according to the European Court of Human Rights, imposes an affirmative obligation on a government to provide an indigent defendant with an *effective* attorney,[167] one that possesses the "experience and competence commensurate with the nature of the offence assigned" to him.[168] In other words, the more serious the charges against the defendant, the more experienced and knowledgeable the appointed attorney must be.

The IHT Statute guarantees all indigent defendants the right to counsel.[169] The Rules, however, only require the Defence Office to appoint attorneys who are "highly qualified"[170]—a vague standard that contrasts unfavorably with those imposed by the international tribunals. The ICTY, for example, requires appointed attorneys to possess "established competence in criminal law and/or international criminal law/international humanitarian law/international human rights law" and have "at least seven years of relevant experience, whether as a judge, prosecutor, attorney or in some other capacity, in criminal proceedings."[171] Similarly, the ICC requires appointed attorneys to have "established competence in international or

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[163] *See* Statute of the Iraqi Tribunal, art. 20(d)(4).

[164] *See id.* art. 19(Fourth)(D) (providing only that the defendant has the right "to use a lawyer of his own choosing").

[165] *See, e.g.*, Debra J. Saunders, *No Order in the Court*, S.F. CHRON. July 30, 2002, at A17.

[166] ICCPR, *supra* note 13, art. 14(3)(d).

[167] Artico v. Italy, 3 EUR. CT.H.R. 1, 15 (1980).

[168] Basic Principles on Lawyers, *supra* note 48, no. 6.

[169] Statute of the Iraqi High Tribunal, art. 19(Fourth)(D).

[170] IRAQI HIGH TRIBUNAL R. P. & EVID. 30(Fourth).

[171] ICTY R. 44(B).

criminal law and procedure, as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings."[172]

5. Protection of Defense Attorneys

An integral part of the right to counsel is the right to insist that the government protect defense attorneys from physical harm. The U.N. Basic Principles on the Role of Lawyers specifically provide that "[w]here the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities."[173]

Given that three defense attorneys were murdered during the Dujail trial,[174] it is obvious that the IHT has failed to adequately safeguard the "security of lawyers." Whether the murdered defense attorneys unreasonably rejected efforts by the IHT and Iraqi government to protect them is open to dispute.[175] What is not debatable, however, is that although the Statute and Rules require the IHT to ensure the safety of victims and witnesses, they neither require the Tribunal to protect the safety of defense attorneys[176] nor provide the defense with a formal mechanism to request that it do so.[177]

C. Judgment and Sentence

1. Burden of Proof

Although the IHT Statute provides that all defendants must be presumed innocent,[178] it does not specify the burden of proof necessary to convict. Paragraph 213 of the Code of Criminal Procedure, however, specifically permits conviction "based on the extent to which it is *satisfied* by the evidence presented during any stage of the inquiry or the hearing."[179]

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[172] ICC R. 22.

[173] Basic Principles on Lawyers, *supra* note 48, no. 18.

[174] *See* Human Rights Watch, *Judging Dujail*, *supra* note 5, at 21.

[175] *See generally id.*, at 20–24.

[176] *Cf.* Statute of the Iraqi High Tribunal, art. 21 ("The Criminal Court shall, in its Rules of Procedure and Evidence annexed to this Statue, provide the protection for victims or their relatives and witnesses and also for the secrecy of their identity.").

[177] *Cf.* IRAQI HIGH TRIBUNAL R. P. & EVID. 48(First) ("A Chamber may, on its own initiative, or at the request of either party, the victim or witness concerned, or the Victims and Witnesses Unit, order appropriate measures to safeguard the privacy and security of a victim or a witness, provided that those measures are consistent with the rights of the accused. A Chamber may order measures to protect a victim or witness before any indictment is confirmed or at any other time.").

[178] *See* Statute of the Iraqi High Tribunal, art. 19(2).

[179] ICCP para. 213(A) (emphasis added).

Paragraph 213(a)'s "satisfaction" standard[180] violates international due process. The Human Rights Committee has explicitly stated in its commentary on Article 14(2) of the ICCPR that "[n]o guilt can be presumed until the charge has been proved beyond reasonable doubt,"[181] and every international tribunal since the Nuremberg Military Tribunals[182] has employed a reasonable-doubt standard.[183]

At least one scholar has argued that the IHT's "satisfaction" standard is "the traditional standard which civil law judicial systems (like France and Holland) employ, and a phrase that . . . is functionally equivalent to the American 'beyond reasonable doubt standard.'"[184] That is incorrect. The Netherlands uses a "gained the conviction" standard that is higher than the IHT's "satisfied" standard, even if it does not actually require proof beyond a reasonable doubt. France uses an "intimate conviction" standard[185] that, according to the European Court of Human Rights, is functionally equivalent to proof beyond a reasonable doubt.[186] And most civil-law countries—including Germany,[187] Spain,[188] and Russia[189]—explicitly employ the "reasonable doubt" standard. By *any* civil law standard, therefore, the IHT's "satisfaction" standard is inadequate.

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[180] A representative of Human Rights Watch has suggested in a private conversation with the author that it is possible "convinced" is a better translation of paragraph 213 than "satisfied." If that is correct—and no official IHT source has claimed that it is—the Dutch standard cited below is arguably similar. Even so, the standard still differs from the standards used by other civil-law countries, most (if not all) of which use a reasonable-doubt standard or its equivalent.

[181] General Comment, *supra* note 101, ¶ 7.

[182] *See, e.g.*, United States of America v. Ernst von Weizsaecker et al., XIV, TRIALS OF WAR CRIMINALS BEFORE THE MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW. No. 10, 314 (1950) ("Ministries Case") (noting that "the Tribunal has undeviatingly adhered to the proposition that a defendant is presumed innocent until proved guilty beyond a reasonable doubt.").

[183] *See, e.g.*, ICC Statute art. 66(3); ICTY R. 87(A); Special Court for Sierra Leone, R. of Proc. & Evid., at R. 87(a) (March 7, 2003) (amended May 29, 2004).

[184] Michael P. Scharf, *Did the Dujail Trial Meet International Standards of Due Process? in* SADDAM ON TRIAL 162, 164 (Michael P. Scharf & Gregory S. McNeal, 2006).

[185] C. PR. PEN. § 353 *available at* http://195.83.177.9/upl/pdf/code_34.pdf. ("The law asks only one question which sums up your entire duty. Do you have an intimate conviction?"). Italy uses a similar "definitive conviction" standard. *See* Thomas V. Mulrine, Note, *Reasonable Doubt: How in the World Is It Defined?*, 12 AM. U. J. INT'L L. & POL'Y 195, 221 (1997).

[186] *See* Barberá, Messegué and Jabardo v Spain, 11 E.H.R.R. 360, para. 77 (1988).

[187] *See, e.g.*, Decision of November 6, 1998 (German Supreme Court), 19 StV, at 5–7 (noting that, to convict, "a measure of confidence suffices which is sufficient according to life experience and excludes only reasonable doubt").

[188] Stephen C. Thaman, *Spain Returns to Trial by Jury*, 21 HASTINGS INT'L & COMP. L. REV. 241, 354 (1998) (noting that Spain uses a reasonable-doubt standard).

[189] Stephen C. Thaman, *The Resurrection of Trial By Jury in Russia*, 31 STAN. J. INTL. L. 61, 124 (1995) (noting that Russia uses a reasonable-doubt standard).

2. Sentencing Discretion

A critical aspect of the principle of legality is the idea that criminal penalties must be established by law—*nullum poena sine lege*.[190] The *nullum poena* principle is enshrined in Article 15 of the ICCPR[191] and in Article 19 of the Iraqi Constitution, which provides that "there is no crime or punishment except by a stipulation."[192]

As Bassiouni has pointed out, Article 24 of the IHT Statute violates the *nullum poena* principle.[193] The Article provides, in relevant part:

> **Third**: The penalty for crimes under Articles 11, 12, 13 shall be determined by the Criminal Court, taking into account the provisions contained in paragraphs fourth and fifth . . .
>
> **Fifth**: The penalty for any crimes under Articles 11, 12, 13 which do not have a counterpart under Iraqi law shall be determined by the Court taking into account such factors like the gravity of the crime, the individual circumstances of the convicted person, guided by judicial precedents and relevant sentences issued by the international criminal courts.[194]

There is most likely no *nullum poena* problem for those war crimes and crimes against humanity that have "a counterpart under Iraqi law," such as unlawful detention, torture, and rape[195]; the structure of Article 24 implies that the sentences for those crimes should be determined by reference to their domestic counterparts, which do impose specific penalties.[196] The IHT Statute does not, however, stipulate the penalties for any of the other war crimes, crimes against humanity, or genocide; determining the appropriate sentence is left to the discretion of the judges, guided only by—note the non-mandatory language—judicial precedents and international sentences.

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[190] *See* Bassiouni, *supra* note 11, at 373.

[191] ICCPR, *supra* note 13, art. 15(1).

[192] [The Constitution of the Islamic Republic of Iraq], art. 19(Second) [2005]. Full text of English translation by the U.N. Office of Constitutional Support approved by the Iraqi government is available at http://www.washingtonpost.com/wp-dyn/content/article/2005/10/12/AR2005101201450.html.

[193] *See* Bassiouni, *supra* note 11, at 378 ("The delegation of legislative power by the IST to the judges to determine penalties for crimes under Articles 11 through 13 of the Statute expressly conflicts with the principle that there can be no penalty without an expressed provision in the law.").

[194] Statute of the Iraqi High Tribunal art. 24.

[195] *See* Bassiouni, *supra* note 11, at 376–77 (listing the crimes contained in Articles 11, 12, and 13 that have domestic counterparts).

[196] *See, e.g.*, [Penal Law No. 111 of 1969] STS 251/88, para. 421 (Iraq) (establishing penalties for unlawful deprivation of liberty) unofficial English translation available at http://law.case.edu/saddamtrial/documents/Iraqi_Penal_Code_1969.pdf.

Such discretion, according to the Human Rights Committee, specifically violates the *nullum poena* principle.[197]

3. Scope of the Death Penalty

The IHT's discretion to determine the sentence of any crime under Article 11, 12, of 13 also runs afoul of the ICCPR's restrictions on the use of the death penalty. Although the ICCPR does not categorically prohibit capital punishment,[198] it does provide that a "sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant."[199] The category of "most serious crimes" is a narrow one, limited to "intentional crimes, with lethal or other extremely grave consequences."[200]

Article 24 of the IHT Statute specifically authorizes the Tribunal to impose any of the penalties prescribed by the Iraqi Penal Code,[201] including death.[202] That authority extends to all of the crimes contained in Article 11, 12, or 13.[203] Many of those crimes, however, clearly do not involve the lethal or otherwise grave consequences that would qualify them as "the most serious"—forcible pregnancy,[204] imprisonment in violation of the norms of international law,[205] denying a protected person a fair trial,[206] attacking civilian objects,[207] pillaging,[208] and so on.

4. Death Penalty for International Crimes

Although the argument is more speculative, it is worth noting that the IHT may violate international due process by permitting the death penalty at all. According to Article 6 of the ICCPR, death-eligible crimes must have been punishable by death "in accordance with the law in force at the

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[197] *See* Human Rights Committee, Concluding Observations, Democratic Peoples' Republic of Kampuchea, CCPR/CO/72/PRK (2001), ¶ 14.

[198] *See* ICCPR, *supra* note 13, art. 6.

[199] *Id.* art. 6(2).

[200] Human Rights and the Administration of Justice, G.A. Res. 39/118, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc.A/39/700 (1984).

[201] Statute of the Iraqi High Tribunal art 24(First).

[202] [Penal Law No. 111 of 1969] STS 251/88, para. 25(1) (Iraq) (establishing penalties for unlawful deprivation of liberty) unofficial English translation *available at* http://law.case.edu/saddamtrial/documents/Iraqi_Penal_Code_1969.pdf.

[203] *See* Statute of the Iraqi High Tribunal art. 24(Third).

[204] Statute of the Iraqi High Tribunal art.12(First)(G).

[205] *Id.* art. 12(First)(E).

[206] *Id.* art. 13(First)(F).

[207] *Id.* art. 13(Second)(B).

[208] *Id.* art. 13(Second)(Q).

time of the[ir] commission."[209] In other words, if a crime did not carry the death penalty when it was committed, a national court cannot sentence a defendant to death because a subsequent change in the law made the crime death eligible—a limitation that reflects the ICCPR's general prohibition on retroactive sentencing increases.[210]

The problem is that, *strictu sensu*, Iraqi criminal law did not criminalize war crimes, crimes against humanity, or genocide prior to the creation of the IHT,[211] much less punish them with death. That is why Article 24 refers to "crimes under Articles 11, 12, 13 which do not have a counterpart under Iraqi law"[212] and Article 14 gives the Tribunal jurisdiction over any domestic Iraqi crime if it "finds a default in the elements of any of the crimes stipulated in Articles 11, 12, 13."[213] As a result, because the IHT Statute was enacted subsequent to the Tribunal's temporal jurisdiction, no war crime, crime against humanity, or act of genocide could ever have carried the death penalty in Iraq under the "law in force at the time of its commission." Imposing the death penalty for those crimes would thus seem to violate Article 6 of the ICCPR.

This argument, of course, depends upon reading the expression "law in force" to refer only to the *national* law in force at the time the crime was committed. If the expression refers to both national law and international law—along the lines of Article 15 of the ICCPR[214]—the retroactivity problem disappears, because international law clearly allowed the death penalty for war crimes, crimes against humanity, and genocide prior to July 17, 1968, the earliest date of the IHT's jurisdiction over those crimes.[215] It is unclear which interpretation is correct; no court seems to have addressed the issue. A comparison of the grammatical structures of Article 6 and Article 15, however, appears to support the more restrictive interpretation: although both focus on the law in force at the time a crime was committed—Article 6 in terms of sentence; Article 15 in terms of criminalization—Article 15 specifically expands that law to include "national or international law," while Article 6 does not.[216] According to the traditional canon of interpretation

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[209] ICCPR, *supra* note 13, art. 6(2).

[210] *See id.* art. 15 ("Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.").

[211] *See* Bassiouni, *supra* note 11, at 373–74.

[212] *See* IHT Statute art. 24(Fifth).

[213] *Id.* art. 14(Fourth).

[214] *See* ICCPR, *supra* note 13, art. 15(1) ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.").

[215] *See, e.g.*, William Schabas, *War Crimes, Crimes Against Humanity, and the Death Penalty*, 60 ALBANY L. REV. 733, 737 (1997).

[216] *Compare* ICCPR, *supra* note 13, art. 6(2) ("[S]entence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission

inclusio unius est exclusio alterius, therefore, Article 6 should not be read to include international law.

D. Appeals

Article 6 of the ICCPR provides that "[a]nyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases."[217] Under the IHT Statute, however, condemned defendants have no such right: Article 27 specifically provides that "[n]o authority, including the President of the Republic, may grant a pardon or mitigate the punishment issued by the Court."[218]

It is worth noting that, in its present form, Article 27 actually represents a step *backward* from earlier versions of the IHT Statute. The December 10, 2003 version, for example, provided that "[s]entences shall be carried out by the legal system of Iraq in accordance with its laws"[219]—a critical difference, because Paragraph 286 of the Code, which the current Article 27 supercedes, specifically gave the president the power to commute a death sentence or pardon the condemned defendant.[220]

V. JUDICIAL INDEPENDENCE

Art. 14(1) of the ICCPR guarantees all defendants "a competent, independent and impartial tribunal established by law." To be independent and impartial, a tribunal must be both structurally and practically autonomous from the Executive; as the Human Rights Committee noted in *Bahamonde v. Equatorial Guinea*:

> "[A] situation where the functions and competences of the judiciary and executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent

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of the crime.") *with id.* art. 15(1) ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.") (emphasis added).

[217] *Id.* art. 6(4).

[218] Statute of the Iraqi High Tribunal art. 27(2).

[219] The Statute of the Iraqi Special Tribunal, Dec. 10, 2003, art. 27 (Iraq), *available at* http://www.cpairaq.org/human_rights/Statute.htm.

[220] *See* ICCP para. 286 ("If the Court of Cassation confirms the death sentence as issued, it will send the case file to the Minister of Justice, who is responsible for passing it on to the President of the Republic to seek the necessary decree for carrying out the sentence. The President of the Republic issues the decree for carrying out the sentence, or for commuting it, or for pardoning the condemned person.").

> and impartial tribunal within the meaning of article 14, paragraph 1, of the Covenant.[221]

Three provisions of the IHT Statute are fundamentally inconsistent with the impartiality and independence of the Tribunal: (1) Executive transfer of judges; (2) judicial transfer of cases; and (3) disqualification of judges through de-Ba'athification.

A. Executive Transfer of Judges

Article 4(Fourth) of IHT Statute specifically permits the Presidency Council to remove a judge from the Tribunal "for any reason" whatsoever.[222] That authority, which is unreviewable,[223] obviously represents the kind of Executive ability to "control or direct" the Judiciary that the ICCPR prohibits. Indeed, the Basic Principles on the Independence of the Judiciary specifically provide that "[j]udges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties,"[224] and that "[t]he assignment of cases to judges within the court to which they belong is an internal matter of *judicial* administration."[225]

Even worse, Paragraph 4 was clearly included in the Statute *in order* to give the Iraqi government control over the IHT. The government claims that the paragraph is necessary to prevent biased judges from presiding over the Tribunal.[226] That claim, however, is unconvincing. Earlier versions of the Statute did *not* give the government the power to remove judges at will,[227] and Rule 8 has always permitted "any party" to a trial to "file a request to the cassation panel, boosted by a legal evidence, for the disquali-

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[221] Bahamonde v. Equatorial Guinea, Communication No. 468/1991, 10 Nov. 1993, CCPR/C/49/D/468/1991, ¶ 9.4; *see also* Basic Principles on the Independence of the Judiciary, No. 4 available at http://www.unhchr.ch/html/menu3/b/h_comp50.htm [hereinafter Basic Principles on Independence] ("There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision.").

[222] Statute of the Iraqi High Tribunal, art.4(Fourth) ("The Presidency Council in accordance with a proposal from the Council of Ministers shall have the right to transfer Judges and Public Prosecutors from the Court to the Higher Judicial Council for any reason.").

[223] *Cf. id.* art. 8(Eight) ("The decisions of the Investigative Judge can be appealed in cassation before the Cassation Panel within fifteen days from the date of receipt of notification or from the date notification is considered received pursuant to law.").

[224] Basic Principles on Independence, *supra* note 221, no. 18.

[225] *Id.* no. 14 (emphasis added).

[226] *See* Human Rights Watch, *Removal of a Judge a Grave Threat to Independence of Genocide Court* (Sept. 19, 2006), *available at* http://hrw.org/english/docs/2006/09/19/iraq14229.htm.

[227] *See* Statute of the Iraqi High Tribunal (Dec. 10, 2003), art. 5.

fication of a Judge"[228]—a motion that the cassation panel must decide in three days.[229] The only difference between the two provisions is that, unlike Article 4(Fourth), Rule 8 entrusts the obligation to ensure unbiased judges to the judiciary itself. Article 4(Fourth) is only necessary, therefore, insofar as the Iraqi government believes that it should have the right to second-guess the IHT's control of its own judges—a blatant infringement on the Tribunal's independence.

B. Judicial Transfer of Cases

Equally problematic is Article 29 of the IHT Statute, which provides that "[a]t any stage of the proceedings, the Court may demand of any other Iraqi court to transfer any case being tried by it involving any crimes stipulated in Articles 11, 12, 13, and 14 of this statue, and such court shall be required to transfer such case upon demand."[230] Although the Basic Principles state that "[t]here shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision,"[231] Article 29 effectively gives the IHT the authority to revise *every* decision by *every* other Iraqi court for any reason whatsoever. That authority distorts the concept of judicial independence[232] beyond recognition.[233]

Article 29 is also antithetical to Article 14's guarantee of an "impartial" tribunal. The Basic Principles provide that "[t]he judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any

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[228] IRAQI HIGH TRIBUNAL R. P. & EVID. 8.

[229] *Id.*

[230] Statute of the Iraqi High Tribunal, art. 29(3).

[231] Basic Principles on Independence, *supra* note 221, no. 4.

[232] Article 14's guarantee of an independent tribunal normally concerns Executive interference, but its language is general enough to prohibit intra-judicial interference, as well. The same is true of the Basic Principles of the Independence of the Judiciary. As the Honorable Justice Michael Kirby has pointed out, "[o]ne aspect of judicial independence which is often overlooked is that judges must also be independent from each other. A proper system of judicial administration will provide for presiding judges and court officials to organize the business of the members of courts and tribunals efficiently, economically and justly as between different members." The Hon Justice Michael Kirby, address at the Human Rights Institute Conference in Hong Kong: Independence of the Judiciary—Basic Principle, New Challenges (June 12–14, 1998), *available at* http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_abahk.htm.

[233] This raises an additional question: namely, what happens when the IHT takes over a trial that is already in progress—or one that has already led to an acquittal? Are the pre-trial and trial decisions of the other court *res judicata* for the IHT? Does the acquittal trigger Article 30's *ne bis in idem* provisions? Or can the IHT simply try the defendant again, a second proverbial bite of the apple? Perhaps not surprisingly, Article 29 fails to address these questions.

reason."[234] It is difficult to imagine a more direct interference with a judge's ability to act impartially than the omnipresent threat that, at "any stage of the proceedings," the IHT can take the case away from him for any reason whatsoever—or even for no reason at all.[235]

C. *Disqualification of Ba'athists*

Article 33 of the IHT Statute provides that "[n]o person who was previously a member of the disbanded Ba'ath Party shall be appointed as a judge [or] investigative judge."[236] That provision infringes upon the independence of the IHT in two critical respects. To begin with, it represents yet another example of non-judicial control over the IHT, this time by the legislative branch.[237] Although the National De-Ba'athification Commission is supposed to "coordinate" its functions with the judiciary,[238] the mandatory language of Article 33 means that, in practice, the Commission can dictate the IHT's judicial roster—especially given that, in violation of the Basic Principles,[239] a judge removed for alleged membership in the Ba'ath Party is not entitled to either a fair hearing on the charges or independent review of the Commission's decision.[240]

Article 33 also undermines the independence of the IHT by creating an irrebuttable presumption that any judge who was a member of the Ba'ath Party is unable to fulfill his professional obligations. Basic Principle No. 18 provides that "[j]udges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their

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[234] Basic Principles on Independence, *supra* note 221, no. 2.

[235] *Cf.* Kirby, *supra* note 232 ("But in the performance of the central role of decision-making, a member of a court or tribunal will not be independent if he or she can be directed by a superior colleague on how to decide a matter. Nor will the judge enjoy independence of mind if he or she can be effectively removed from the performance of the judicial function by the simple expedient of rostering the judge off work.").

[236] Statute of the Iraqi High Tribunal, art. 33.

[237] The Constitution of the Islamic Republic of Iraq art. 131(First) (noting that the Commission "shall be attached to the Council of Representatives"), full text of English translation by the United Nation's Office of Constitutional Support approved by the Iraqi government *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/10/12/AR2005101201450.html.

[238] *See id.*

[239] *See* Basic Principles on Independence, *supra* note 221, nos. 17, 20. Although Principle 20 says that independent review is not required for decisions by the legislature in impeachment hearings or hearings of similar gravity, the De-Ba'athification Commission is a legislative commission, not the legislature itself.

[240] Indeed, Judge al-Hammashi was removed from the Dujail trial even though the De-Ba'athification Commission withdrew the allegations against him. *See* Human Rights Watch, *Judging Dujail*, *supra* note 5, at 39.

duties."[241] Although some Ba'athist judges may well be "unfit to discharge their duties" on account of their party membership, Article 33's categorical exclusion of former Ba'athists is unacceptably overbroad—as Bassiouni points out, "many Ba'ath party members were only registered as a matter of expediency and did not play an active role in the party,"[242] while others suffered at the hands of the Ba'athists despite their party membership.[243]

VI. RECOMMENDATIONS AND CONCLUSION

As its critics predicted, the IHT did not provide Saddam and his co-defendants with a fair trial. That failure is regrettable, but it is not surprising—a trial is only as fair as the law it applies, and this essay has shown that the Tribunal's substantive and procedural law violates international due process at every stage of criminal proceedings, from the earliest moments of the investigation to the final confirmation of a death sentence.

Given its many flaws, it is tempting to conclude that the IHT should be replaced by an *ad hoc* or hybrid tribunal, as a number of scholars have argued.[244] Such arguments, however, overlook the fact that Iraq has always insisted on trying those responsible for the atrocities committed by Saddam's regime in its domestic courts—and has every sovereign right to do so.

That said, there is no excuse for the IHT's systematic failure to provide defendants with the rights guaranteed by international due process—rights that are binding upon Iraq as a State party to the ICCPR. As the Dujail trial demonstrates, the IHT's substantive and procedural failings are not just hypothetical; in practice, they have combined to produce what can be most accurately described as bad political theater.

The real question, then, is not how to *replace* the IHT, but how to *improve* it.[245] Keeping in mind that "a *de facto* solution is not a substitution for a legislative solution, because what is controlling is the text of the Stat-

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[241] Office of the High Comm'r for Hum. Rts., *Basic Principles on the Independence of the Judiciary*, ¶ 18 (Dec. 13, 1985) *available at* http://www.unhcr.ch/html/menu3/b/h_comp 50.htm.

[242] Bassiouni, *supra* note 11, at 371 n.243.

[243] *Id.* at 371.

[244] *See, e.g.*, Shany,, *supra* note 12, at 345 ("The best way to overcome these schizophrenic tendencies would be for the Governing Council to generously use its power to appoint international judges and advisors, so as to bring about the internationalization of the IST and its transformation into a hybrid court."); Ryan Swift, *Occupational Jurisdiction: A Critical Analysis of the Iraqi Special Tribunal*, 19 N.Y. INT'L L. REV. 99, 136–37 (2006) (noting that the advantages of hybrid tribunals, "coupled with the problems associated with having Iraqis conduct these trials, lead to the conclusion that justice would be better served by a hybrid tribunal instead of the IST").

[245] *See* Bassiouni, *supra* note 11, at 388.

ute and not the de facto corrections that occured,"[246] the following changes to the IHT's substantive and procedural law are necessary:

A. Substantive Law

• Article 14 should be amended to clearly indicate the *actus reus* and *mens rea* required for each of the domestic crimes.

B. Procedural Law

• Ideally, Rule 27 should be amended to require the presence of counsel during any interrogation of a suspect, even prior to detention or arrest. At a minimum, the Rule should require counsel during any post-detention or post-arrest interrogation. Either way, the Rule should make clear that the right to counsel applies regardless of whether the interrogation is being conducted by the investigative judge or by an appointed investigator.

• Rule 27 should also be amended to guarantee a suspect's right to remain silent not only during questioning by an investigative judge, but during any interrogation by a law enforcement official. Moreover, the Rule should specifically require that suspects be informed of this right.

• Rule 24 should be amended to give the decision to detain a suspect to a judge other than the investigative judge who investigated the suspect. If that is too significant a reform, the detention standard should be raised from "may have committed" a crime to "reasonable grounds to believe" a crime was committed.

• Rule 25 should be amended to make clear that the Tribunal has the authority to review an investigative judge's initial decision to detain a suspect.

• Rule 40 should be amended to clarify that the Prosecutor cannot use evidence previously protected from disclosure at trial without sufficient advance notice to the defense.

• Rule 43 should be amended to require all exculpatory information be disclosed to the defense regardless of whether it was provided to the Prosecutor in confidence. In the alternative, the Rule should allow the Tribunal to draw exculpatory inferences from non-disclosure, along the lines of Article 72 of the ICC Statute.

• Article 20 should be amended to require the Tribunal to review the sufficiency of the indictment prior to trial, instead of after the prosecution's

[246] *Id.* at 381.

case-in-chief. If that is not acceptable, the December 10, 2003 version of the article should be restored, requiring the chief investigative judge to review the sufficiency of the indictment. In the latter case, the article should also make clear that the Tribunal cannot add new charges to the original indictment at the close of the prosecution's case-in-chief.

- A Rule should be added regarding trials in absentia that makes clear: (1) the burden of proof is on the Prosecutor to show that the defendant did not appear at trial because he was trying to evade justice; and (2) the defendant is entitled to a new trial once he is located.

- Rule 57 should be amended—or a new Rule should be added—to prohibit the Tribunal from basing its judgment on any statement by a witness that the defendant did not have an opportunity to cross-examine either prior to trial or in open court.

- Rule 30 should be amended, along the lines of ICTY Rule 44, to require all attorneys— appointed or otherwise—to possess competence in international criminal law and have significant experience in criminal proceedings.

- Article 21 should be amended to require the Tribunal to protect defense attorneys as well as victims and witnesses.

- Article 19 should be amended to clarify that the presumption of innocence requires the Prosecutor to prove the defendant's guilt either beyond a reasonable doubt or to the judges' "innermost conviction."

- Article 24 should be amended to provide specific penalties for the crimes contained in Articles 11, 12, and 13 that do not have domestic Iraqi counterparts.

- Article 24 should also be amended to permit the death penalty only for war crimes, crimes against humanity, and acts of genocide that were committed intentionally and led to the loss of life or other "extremely grave consequences."[247]

- The December 10, 2003 version of Article 27 should be restored, permitting the president of Iraq to exercise his traditional authority to commute a death sentence or pardon the defendant.

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[247] This recommendation presumes, of course, that the Iraqi government will continue to insist on its right to impose the death penalty, regardless of whether doing so violates Article 15 of the ICCPR's prohibition on retroactive penalties.

C. *Judicial Independence*

- Article 4 should be deleted, leaving Rule 8 as the sole method for removing a biased judge from the Tribunal.

- Article 29 should either be deleted or amended to make clear that disagreement with the decisions of another court does not justify the IHT assuming control of a case.

- Article 33 should either be deleted or amended to disqualify only those judges whose activities as members of the Ba'ath Party can reasonably be assumed to undermine their impartiality.

These suggestions are both significant and numerous. Given the damage that the Saddam trial has done to the IHT's legitimacy, however, they are necessary. The IHT should remain an Iraqi tribunal, but it must become one that respects basic norms of international due process. As Bassiouni has reminded us, "[l]egality should never be cast lightly aside, no matter how atrocious the violation or how abhorrent the violator."[248] The IHT is no exception.

[248] M. Cherif Bassiouni, *"Crimes Against Humanity": The Need for a Specialized Convention*, COLUM. J. TRANSNAT'L L. 457, 471 (1994).