



Briefing Paper

Creation and First Trials of the Supreme Iraqi Criminal Tribunal

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Cover: Khartoum, Sudan, July 2005. Sudanese vendor in Omdurman Market reads newspaper coverage of the progress of genocide investigations against Saddam Hussein. Photo by Nigel Snoad.

I. INTRODUCTION

After months of speculation, the government of Iraq announced on September 5, 2005, that the long-awaited trials of Saddam Hussein and his close associates would open on October 19, 2005. Held by the Supreme Iraqi Criminal Tribunal (SICT) these trials will be of great importance to hundreds of thousands of victims of Iraq's former Ba'athist regime, while potentially offering hope to victims across the Middle East and North Africa (MENA) region who want to see an end to state-sanctioned impunity.¹

While the Tribunal represents one of the most significant efforts in recent decades to bring perpetrators of mass crimes to justice, it nonetheless faces enormous challenges. From its inception, there has been much concern that the process is being dominated by the U.S. government and that results will be seen as "victors' justice." The SICT's statute and legal procedures have undergone numerous changes, evoking considerable uncertainty about the end product. Political actors have sought to interfere with the process, and their potential to do so has been strengthened by some provisions of the revised statute of October 2005. The Iraqi judiciary is struggling to renew itself after 30 years of dictatorship and is expected to try international cases, despite only brief exposure to international norms. Underlying these concerns, the security environment continues to deteriorate as ethnic and religious differences become increasingly polarized.

The trials are likely to have strong bearing on both short-term Iraqi politics and the long-term development of the Iraqi state. If conducted fairly, domestic trials could:

- Assist Iraq's emergence from a history of severe political violence and grave human rights abuses;
- Signal a clean break with former official criminal behavior and indicate that perpetrators are no longer untouchable;
- Strengthen the new state's legitimacy by publicly fulfilling its obligations to victims and their families; and
- Create an unequivocal and detailed public record of events.

Whether the Tribunal is capable of delivering trials that meet these standards is far from certain. Despite its dedicated personnel, the Tribunal's independence should remain under scrutiny. Its activities have been greatly hampered by the current security situation, which has slowed its work and shrouded many of its activities in secrecy. The SICT should, as a matter of urgency, develop a proactive media and outreach strategy if the Iraqi public is to understand and support its work.

¹ The tribunal was originally named the Iraqi Special Tribunal (IST); in Arabic, *al mahkama al jana'iyya al iraqiyya al mukhtassa did al jara'im al insaniya*. The statute establishing it was later confirmed by Article 48 of the Transitional Authority Law. Rules of procedure were developed and amended several times but, in mid-2005, a revised statute and rules of procedure were brought to parliament. After a series of procedural problems, the new statute was promulgated as law 10 of 2005 on October 18, 2005. The tribunal was renamed in Arabic *al mahkama al jana'iyya al iraqiyya al 'uliya*, literally "The Supreme Iraqi Criminal Tribunal." The tribunal uses the English title the "High Iraqi Tribunal" or HIT.

This paper gives an overview of the Tribunal's creation and development, as well as major challenges it faces as the first trials open, including:

- Its ongoing susceptibility to political pressures, which may cast doubt on its independence;
- The inordinate influence of the U.S. government, which has already negatively affected public perceptions of its legitimacy and may affect evidence presented at trial;
- The question of whether the Tribunal, which will largely apply Iraqi domestic procedures within the civil law context, will be fair, consistent, and duly respectful of international fair trial standards, particularly in relation to the accused;
- Determining how witnesses will come forward and be adequately protected within an exceedingly poor security environment; and
- Relaying and explaining trials to the public.

The International Center for Transitional Justice (ICTJ) recommends that the trials strictly adhere to international standards throughout the process, thus addressing some of the concerns of critics regarding the Tribunal's legitimacy and independence. Ensuring that the defense is properly able to mount its case will go a long way towards illustrating the court's capacity to operate independently of political pressure. The court must also vigorously pursue a coordinated strategy for its media and public outreach programs. By doing so, the court will address the concerns of victims and the Iraqi public—most of whom will of course never have the chance to be present in the courtroom—by keeping them regularly updated and informed about the progress, goals, and functioning of the court and the trials. The public must not feel that the Tribunal is an opaque process, unconnected to their lives. Lastly, the court must ensure necessary protections for those who testify, which will also increase public confidence in the work of the court.

The ICTJ has been involved in Iraq since mid-2003 and has followed the Tribunal's establishment closely. It has also held a number of meetings with senior officials of the Tribunal, some of which serve as a basis for this paper.

II. BACKGROUND: CRIMES OF THE FORMER REGIME

Since Iraq became independent from British rule in 1932, it has experienced eleven coups, five constitutions, seven international armed conflicts, and repeated internal uprisings.² These changes of power were usually accompanied by political violence, televised sham trials, and speedy executions.

When a small group of Ba'athist military officers seized power in July 1968, their initial acts fit this well-established pattern, but their regime endured longer and was more repressive than any

² Baghdad was the center of the Abbasid caliphate from 750 C.E. until it fell to the Mongols in 1258. It was ruled by successive Mongol and Turkic dynasties and briefly fell under Persian control. It became part of the Ottoman (Turkish) empire in 1555; the Ottoman provinces of Mosul, Baghdad, and Basra correspond closely to the territory of contemporary Iraq. The British invaded and occupied the provinces during World War I, ending Turkish rule. They then ruled Iraq under a League of Nations mandate from 1920 to 1932, although Britain influenced (and intervened in) Iraqi politics until 1958. See Charles Tripp, *A History of Iraq*, Cambridge: Cambridge University Press, 2002.

of its predecessors. For more than 35 years, Saddam Hussein and his close associates built a complex, patronage-driven, and exceptionally violent state. Members of the Ba'ath leadership ruled by a system of "terror and reward," making widespread use of torture, extrajudicial executions, arbitrary detention, and forced disappearances to compel obedience and silence dissent across the country. Some 300,000 Iraqis remain missing. The criminal court system was trumped by a system of "special courts"; the death penalty was used routinely and extensively; and Ba'ath security networks and the terror they invoked permeated every aspect of daily life.³

Over and above these forms of vigilant repression, Hussein's rule was characterized by savage campaigns of violence against Iraq's ethnic and religious communities, to which no group was immune. In the north, this included:

- Deliberately destroying, between 1977 and 1987, nearly 5,000 Kurdish villages and forcibly removing their inhabitants;
- Using bombardments, including chemical weapons, to kill thousands of Kurdish civilians;
- Storming the highlands of Iraqi Kurdistan during the "Anfal" campaign from February to September 1988 and rounding up and executing more than 100,000 Kurds, mostly men and boys; and
- Forcibly transferring ethnic minorities from the oil-rich region of Kirkuk, resulting in the eviction of more than 120,000 Kurds, Assyrians, and Turkomans since 1991, and their replacement by Arab families brought in from southern Iraq.

In the south, the Iraqi majority Shi'a population began stirring against its exclusion from institutions of political power. This coincided with the emergence of the Islamic Republic in Iran and the start of the Iran-Iraq War.⁴ Repression against the Shi'a included the expulsion of an estimated half a million people to Iran out of fear that they might support Iran during the war; the imprisonment or disappearance of between 50,000 and 70,000 civilians, usually men and boys, who were separated from their families before being executed; and the harsh suppression of the 1991 rebellion in the south, during which unknown thousands were detained or disappeared or summarily executed. When civilians, rebels, clerics, and army deserters fled into the southern marshlands, the Iraqi army bombarded the area, carried out forced displacements, and deliberately embarked on a massive drainage project aimed at facilitating military access to the marshes. Thousands of Marsh Arabs fled to Iran, and experts believe that the overall population of the area was reduced from an estimated 250,000 in the early 1990s to no more than 40,000 by 2003.

Iraqi forces also committed multiple violations of international humanitarian law during the Iran-Iraq War and the Iraqi occupation of Kuwait,⁵ including the alleged use of chemical weapons in indiscriminate attacks, summary executions, torture, rape, forced disappearances, collective punishment, and large-scale appropriation of property.⁶

³ See Middle East Watch, *Human Rights in Iraq*, New Haven: Yale University Press, 1990; Human Rights Watch *Justice for Iraq: A Human Rights Watch Policy Paper*, December 2002 Available at <http://www.hrw.org/backgrounder/mena/iraq1217bg.htm>

⁴ The war lasted from 1980 to 1988.

⁵ This occupation lasted from 1990 to 1991.

The violent nature of the former regime was well known prior to the U.S.-led invasion of March 2003. During the 1990s, Iraqis, international groups, and the United Nations (UN) gathered a wealth of evidence of the regime's crimes. Several groups campaigned to hold its leaders accountable before an international tribunal, but all failed to find political traction with states.⁷ For example, efforts of Human Rights Watch in the early 1990s to hold the regime accountable for the crimes of the Anfal Campaign by lodging a case at the International Court of Justice, failed to find a state sponsor.

III. ESTABLISHMENT OF THE TRIBUNAL

Plans to bring top-level Iraqi perpetrators to justice have gone through at least three phases: (1) the buildup prior to the U.S.-led invasion of March 2003; (2) the approximately eight months following the fall of the Ba'ath regime in April 2003; and (3) a final phase from March 2004 to the present, with Iraqi officials undertaking analytical, logistical, and advisory support from the Regime Crimes Liaison Office (RCLO).

A. Prior to the Fall of the Regime

The first phase was dominated by the U.S. government and Iraqi expatriates. It stimulated much concern about lack of domestic ownership and possible perceptions of "victors' justice" both domestically and internationally. Prior to the U.S.-led invasion, a working group of State Department officials and Iraqi exiles had discussed a series of possible transitional justice initiatives.⁸ Although the working group suggested a variety of possible forms for a tribunal, from the outset U.S. officials emphasized a preference for a domestic Iraqi process, announcing even before the fall of Baghdad that they intended to institute an "Iraqi-led" process.⁹

For several reasons, this announcement perpetuated international unease. In light of general opposition to the war, some expressed the fear that the U.S. was using the regime's human rights abuses as a subsidiary justification to go to war. Despite evidence that many Iraqis actually favored domestic prosecution, many outside the country questioned the motivation behind the U.S. government's support for this, given its long-established opposition to the creation of the International Criminal Court. Others suspected that U.S. support for an 'Iraqi-led' process was

⁶ See, e.g., UN Commission on Human Rights E/CN.4/RES/1991/67, "Situation of human rights in Kuwait under Iraqi occupation," and Human Rights Watch, "Iraq and Occupied Kuwait," *Human Rights Watch World Report 1990*.

⁷ The UK organization Indict (www.indict.org.uk) and the UN Commission on Human Rights (CHR) are prominent examples. The CHR mandated the position of Special Rapporteur on Iraq in 1991. The Special Rapporteurs' reports provided crucial public information on Iraqi government acts and laws. Government bodies also obtained evidence, including the U.S. State Department, the U.S. Senate Foreign Relations Committee, and a special U.S. Department of Defense team focused on Iraqi war crimes during its occupation of Kuwait. See Human Rights Watch, "Iraq," *Human Rights Watch World Report 1993*, available at www.hrw.org/reports/1993/WR93/Mew-04.htm#P230_105786.

⁸ See Report of the Working Group on Transitional Justice in Iraq and the Iraqi Jurists' Association, *Transitional Justice in Post-Saddam Iraq: The Road to Re-Establishing Rule of Law and Restoring Civil Society, A Blueprint*, March 2003, copy on file at the ICTJ. The working group reportedly first met in mid-2002 and released its plan at the US Institute of Peace on May 21, 2003.

⁹ See U.S. Department of Defense Briefing, "Geneva Convention, EPW's and War Crimes," April 7, 2003, available at www.defenselink.mil/transcripts/2003/t04072003_t407genv.html.

motivated by the desire to maintain sole control over the process. Furthermore, many scholars, governments, and nongovernmental organizations (NGOs) feared that after 35 years of severe repression and executive influence, the Iraqi judicial system simply lacked the technical capacity to hold trials of such magnitude. Regardless of the obvious skills and dedication of many Iraqi judges and lawyers, it was widely feared that the trials would fail without some form of international involvement and/or support.

B. April–December 2003

The second phase began after the fall of the Ba'ath regime in April 2003. International perceptions of the commitment of the Coalition Provisional Authority (CPA) to effective transitional justice mechanisms were shaken by the failure of coalition forces to safeguard sensitive documents and mass graves during the first weeks and months of their occupation. Once the war had begun, any plans previously developed by the State Department working group were essentially shelved. However flawed the previous plans might have been, they nonetheless might have offered some useful guidance for a transitional justice program in Iraq.

Coalition planning for a judicial mechanism was initially carried out by the Pentagon's Office of Reconstruction and Humanitarian Assistance, then by the Crimes Against Humanity Investigations Unit (CAHIU) of the Office of Human Rights and Transitional Justice of the Coalition Provisional Authority. The CAHIU was charged with supporting the Tribunal's investigation and operational endeavors while local capacity to undertake the work could be developed.¹⁰

U.S. and UK officials consulted within the Iraqi legal and nascent NGO community on these issues from April to July 2003. When the CPA announced the creation of the Iraqi Governing Council (IGC) on July 13, 2003, the council set up a four-person commission to plan for trials, assisted by Salem Chalabi, nephew of prominent politician Ahmed Chalabi.¹¹ The involvement of these individuals gave rise to further concerns about politicization of the process. From July to late September, Salem Chalabi and others began to draft the statute, based on a pre-existing model statute prepared by legal expert Cherif Bassiouni. The process—unlike those of other recent mechanisms to prosecute international crimes—was hurried and opaque. The CPA and IGC failed to respond to several requests from international human rights groups, including the ICTJ, to see and comment on the draft statute. Once established, the IST did share early drafts of its Rules of Evidence and Procedures with the ICTJ and other NGOs. The ICTJ understands from SICT staff that comments from human rights organizations were reviewed and some points incorporated.

¹⁰ Tom Parker, "Prosecuting Saddam: The Coalition Provisional Authority and the Evolution of the Iraq Special Tribunal," *Cornell International Law Journal*, Vol. 38, No. 3, Fall 2005.

¹¹ Members were Judge Wa'el Abd al Latif, Judge Dara Nur al Din, Ahmad Shya'a al Barak, and Naseir al-Chadirchi. The senior commission staff member was Salem Chalabi, a U.S.-trained lawyer who formerly worked at an international commercial law firm. United States Department of State, Interim Report on Plans for the Prosecution of Saddam Hussein and His Top Associates for Genocide, Crimes against Humanity and War Crimes, Aug. 14, 2003, copy on file at the ICTJ. The IGC was created by Coalition Provisional Authority Regulation Number Six of July 13, 2003, available at www.iraqcoalition.org/regulations/20030713_CPAREG_6_Governing_Council_of_Iraq_.pdf.

Another key concern was the CPA's and IGC's lack of formal consultation mechanisms with the Iraqi people, including the hundreds of thousands of victims and their families who were rapidly organizing themselves. Such consultation could have lent the drafting process greater legitimacy and been a valuable educational and informational tool for the Iraqi public.

In fact, the only initiatives that attempted to survey the wishes of the Iraqi population were organized by civil society organizations. One of these was conducted by the ICTJ in partnership with the Human Rights Center at the University of California at Berkeley in July and August 2003.¹² This study found that a broad cross-section of Iraqi society strongly believed the leadership of the previous regime should face trial for their acts, and that these trials should take place within Iraq and under Iraqi control. Respondents emphatically rejected the prospect of trials dominated by the international community or a foreign state. Above all, they wanted the trials to be fair, impartial, and able to withstand public scrutiny in Iraq and elsewhere. Respondents indicated a favorable attitude toward international advice and assistance if it would help ensure the fairness, integrity, and transparency of the trial process.¹³

C. December 2003–Present

On December 10, 2003, the CPA delegated authority to the IGC to create an Iraqi Special Tribunal.¹⁴ The statute was appended to the order and the judges were empowered to develop the rules of procedure. The Tribunal was empowered to try Iraqis and Iraqi residents for crimes against humanity, war crimes, and genocide, as well as for certain lesser crimes. However, under international humanitarian law, including the Geneva Conventions, occupying powers have limited powers to alter the legislation of the country they occupy.¹⁵ As such, the establishment of the IST by an occupying power raised serious questions about whether it was in compliance with international humanitarian law.

¹² See the International Center for Transitional Justice, *Iraqi Voices: Attitudes towards Transitional Justice and Social Reconstruction* May 2004, available at www.ictj.org/mena/iraq.asp (English) or www.ictj.org/arabic/report.html (Arabic).

¹³ A similar survey carried out in southern Iraq found that 98 percent of those questioned would like to see those responsible for human rights crimes during the previous regime punished. Seventy-seven percent favored a court process over nonjudicial punishments. See Physicians for Human Rights, *Southern Iraq: Report of Human Rights Abuses and Views on Justice, Reconstruction and Government*, Sept. 18, 2003, at 8, available at www.phrusa.org/research/iraq/docs/iraqsurvey.pdf (English only).

¹⁴ CPA Order 48, Delegation of Authority Regarding an Iraqi Special Tribunal, available at www.iraqcoalition.org/regulations/20040628_CPAORD_100_Transition_of_Laws_Regulations_Orders_and_Directives.pdf (English) and www.iraqcoalition.org/arabic/regulations/20031210_CPAORD48_IST_and_Appendix_A.Arabic_.pdf.

¹⁵ Iraqi criminal law did not include the offences of genocide, war crimes and crimes against humanity: by including them, the IST Statute effectively amended existing Iraqi criminal law. According to international humanitarian law (IHL), an occupying power is limited in the changes it can make to the penal laws of the country it occupies. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, Article 43; Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Article 64.) The occupying power's competence to introduce new penal provisions is limited to circumstances where it is necessary for their own security, and in the interests of the population. The ability of occupying powers to prosecute protected persons for acts committed before the occupation is also highly limited, although they may prosecute conduct prior to the occupation if it entails a breach of the laws and customs of war (Geneva IV Art. 70). These legal doubts as to the tribunal's validity were somewhat ameliorated in October 2005, when the (revised) statute of the Supreme Iraqi Criminal Tribunal was promulgated by the Iraqi Transitional Government.

The revised statute integrates the SICT into the domestic legal system and requires all future appointments to be made by the Higher Juridical Council.¹⁶ Some revisions increase possibilities for executive interference in SICT matters, for example by enabling the executive to transfer judges from the tribunal to the Supreme Judiciary Council, and by retaining problematic language on Deba'athification.¹⁷ Several politicians see the trials as a means to attain political advantage; the government has consistently pressured the Tribunal to open proceedings as quickly as possible and has made repeated prejudicial comments that call the court's independence into question. For example, court officials have complained internally about politically-timed leaks to the media regarding their work, unsubstantiated pronouncements about trial dates, and premature claims of evidence relating to Saddam Hussein's guilt. Others have sought to replace SICT personnel via the Deba'athification Council. It is likely that attempts to manipulate the trials for political purposes will increase in the period leading up to the December 2005 election.

IV. MAIN FEATURES OF THE SUPREME IRAQI CRIMINAL TRIBUNAL (SICT)

A. Jurisdiction

The Tribunal has jurisdiction over individuals residing in Iraq accused of committing genocide, crimes against humanity, or war crimes. The definitions of these crimes closely resemble those found in the Rome Statute of the International Criminal Court. They had not previously been incorporated into Iraqi law, even though Iraq is party to the Geneva Conventions and the Genocide Convention.¹⁸

The tribunal has jurisdiction over crimes committed in any location including outside the territory of Iraq. They must have been committed between July 17, 1968 (the date of the Ba'athist coup), and May 1, 2003 (the date that President Bush announced that combat operations had ended).

¹⁶ The council is a body in civil law countries mandated to regulate judicial affairs. Such councils may protect the independence of judges, but are frequently controlled by the Ministry of Justice or other executive bodies and can be a focus of executive interference in judicial affairs. Under the Ba'athist regime, the council was directly controlled by the executive. See Medhat al-Mahmoud, "The Court System in Iraq: A Descriptive Study of Legislation Regulating the Court System in Iraq," Baghdad, 2004, presented at the meeting on "Judicial System in Iraq: Reality & Prospects," Amman, Oct. 2-4, 2004. As at October 2005 the composition of the Higher Juridical Council was established by Article 45 of the Transitional Administration Law. It is composed of certain judges from the federal Supreme Court, federal Court of Cassation, federal Courts of Appeal, and each regional Court of Cassation. Its function is to supervise the federal judiciary, administer its budget, and nominate candidates to the federal supreme court. Articles 86 to 88 of the new Iraqi constitution of October 2005 establish a Higher Juridical Council but fail to specify its composition.

¹⁷ For example, article 4 (4) empowers the council of ministers to transfer judges from the tribunal to the Supreme Judicial Council for any reason. Article 33 requires that no member of the tribunal's staff can ever have been a member of the Ba'ath party, a standard much higher than that stipulated by regular Deba'athification procedures.

¹⁸ Iraq acceded on January 20, 1959, to the Convention on the Prevention and Punishment of the Crime of Genocide New York, December 9, 1948; it acceded to the Geneva Conventions of 1949 on February 14, 1956.

The Tribunal cannot hear complaints against non-Iraqi nationals, including coalition forces. Ordinarily, countries are entitled to hear all crimes committed on their territory and such territorial jurisdiction would be a part of domestic criminal jurisdiction as a matter of sovereignty. This exclusion in the Iraqi context has raised concerns about the independence of the court from the occupying power.

The SICT also has jurisdiction over individuals accused of a number of “political” offenses under Iraqi law, including:

- Attempts to manipulate the judiciary;
- Waste of national resources;
- Abuse of position; and
- Pursuit of policies leading to war against an Arab country.¹⁹

The court has primacy over all other Iraqi courts for cases under its jurisdiction. The powers of the president of the court have been strengthened and provisions permitting the participation of international experts have been weakened from previous drafts (see below).

B. Procedures Governing the Trials

Originally, both the statute and the Rules of Procedure and Evidence resembled those of other international tribunals, most notably the Special Court for Sierra Leone, but these have all been changed several times. With each draft of the rules, there has been an increased reliance upon the Iraqi Code of Criminal Procedure of 1971.²⁰ The result is an uncomfortable hybrid of both systems. In practice, the Tribunal’s procedures—in terms of how evidence is collected, the role of the investigating judge, the dominance of the trial judge, the role of documentary evidence, and other such matters—will closely resemble those applied in Iraqi criminal courts because this is the system with which the judges are most comfortable.

Of concern is the fact that many positive elements borrowed from international practice that were present in the original statute have since been stripped away. For example, the extent of pretrial disclosure to the defense remains unclear. In addition, the role of the defense may be diminished and it is not clear that cross-examination will be allowed to the same extent as it would within an adversarial system. The regime that will govern the admission of evidence is also unclear.

There are a number of other troubling procedural issues. Among them:

- The rules pertaining to the treatment of suspects and/or accused do not appear to provide adequate safeguards to detainees. The powers of detention provided for under Rule 44 are excessively broad and effectively treat a suspect as though he or she is an accused person

¹⁹ Statute of the Iraq Special Tribunal, Art. 1, 10–14. Promulgated December 10, 2003, as Appendix A of CPA Order 48. The crimes listed are taken from Law 7 of 1958, the year of the Iraqi revolution and overthrow of the British-controlled monarchy.

²⁰ Law on Criminal Proceedings With Amendments Number 23 of 1971, Decree Number 230 of the Revolutionary Command Council of February 14, 1971 (referred to subsequently as the Code of Criminal Procedure).

already indicted for an offense. Rule 46 gives insufficient recognition of the rights of a suspect during questioning by the investigating judges.

- There is no clause on inadmissibility of evidence taken under duress or in coercive circumstances.²¹ CPA amendments to the Iraqi Criminal Procedural Code prohibit such evidence, but it is unclear whether the Tribunal will consider itself bound by these amendments.
- The rights of the defense may fall short of international standards. They are formally protected by article 19 of the statute, which largely mirrors the international minimum fair trial guarantees contained in Article 14 of the International Covenant on Civil and Political Rights. However, the revised statute has deleted any reference to the accused's right to examine witnesses under the same conditions as the prosecution.
- Commentators are concerned that the standard of evidence required to convict should be clarified, and that the tribunal follow the example of recent international tribunals by using the standard of "beyond reasonable doubt."

Other potential problems highlighted by human rights observers include access to defense counsel and the fact that no lawyer-client privilege currently exists. Further specific concerns include the absence of clear rules governing disclosure, allowing *in absentia* proceedings, insufficient time limits to prepare the defense case, and excessive discretion of the court to enter into closed sessions, which may violate the right to a public trial. Notably, there are inadequate provisions for witness protection, including victims of rape or other sexual offenses.

Finally, the application of the death penalty is a cause of major concern for many international human rights groups and has led many governments and international organizations, including the UN, to conclude that they are unable to lend the Tribunal moral, technical, or financial support. (Others, such as the UK government, take a more nuanced position and are willing to assist in parts of the process that are not likely in themselves to result in the application of the death penalty). The judges themselves take the view that the imposition of the death penalty remains a matter for their discretion. The ICTJ opposes the application of the death penalty as a matter of principle and believes that its use will have negative consequences for respect for the rule of law and human rights in Iraq.

C. Composition

The composition of the SICT reflects the fact that it is a court functioning within a civil law system, as is the case in most countries of the MENA region. Although it was initially established as a "special court" outside of ordinary Iraqi judicial structures, recent changes to the statute have integrated it more into the judicial system.

The Tribunal is composed of investigating judges, a prosecutions department, trial chambers, and a cassation (appeals) chamber. These are supported by an administration department, including an information office, a defense office, and security and witness protection units.²²

²¹ CPA Memorandum 3 (Revised), Criminal Procedures. June 27, 2004. Available at http://www.cpa-iraq.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures_Rev_.pdf

²² Rule 14 and 30, revised Rules of Procedure and Evidence.

As of May 2005, the SICT's total staff reportedly stood at some 250 personnel, including 48 judges and 16 prosecutors.²³ The Tribunal is funded by an annual budget of US\$15 million from the Iraqi general budget. Tribunal staff members have said that this budget is insufficient and renders them vulnerable to government interference. The Tribunal receives significant technical assistance and advice from the RCLO, a unit operating from the U.S. Embassy in Baghdad. The U.S. annual budget for supporting Tribunal investigations, facilities, and proceedings is \$128 million, which far exceeds the SICT's own budget.²⁴

Tribunal activities and roles are divided by the following categories:

- *Investigative judges* are charged with investigating complaints and compiling a dossier that will be brought to trial. Such a dossier will contain incriminating as well as exculpatory evidence. Investigative judges have broad powers of fact-finding and investigation, including the power to issue subpoenas, arrest warrants, and indictments; to interview witnesses and gather documentary and physical evidence; and to seek expert advice. The defense (as opposed to the accused) has a right to be present while the investigative judge collects evidence or questions witnesses but may question witnesses itself only via the judge.²⁵
- The scope of the role of the *Prosecutor*—which, in the original conception, was more similar to that of the role of prosecutors in other ad hoc tribunals—is now somewhat unclear both before and during trial. Initially the statute referred to the prosecutor's "right to be involved in the investigative stages" of a case, in addition to prosecuting during the trial. This appeared to be an early effort to combine Iraqi criminal procedures and those of the international ad hoc tribunals.
- *Trial judges*, of which there are five in each chamber, preside over the trials and render a verdict. As investigations are completed, several trial chambers are expected to operate simultaneously. Under the inquisitorial or civil law system that will apply, the trial judges will play a much larger role than is common in the adversarial or common law system and will be in charge of controlling the presentation of evidence. The roles of prosecution and defense are reduced accordingly, although each may also bring additional evidence. Another major difference with the common law system is that the accused will not have a right to silence as such but can be asked to answer questions (although not necessarily under oath). A trial verdict may be appealed to the cassation chamber within 30 days (by either the prosecution or the defense).
- *Cassation judges*. Nine cassation judges will decide by majority rule whether to confirm, revise, or overturn the judgments of the trial chamber. The scope of appeals is larger than in many adversarial systems, to the point of changing the legal classification of the offense and reviewing the penalty accordingly.²⁶ Once the final ruling is confirmed, the current statute states that sentences must be carried out within 30 days.

²³ The original statute limited the number of investigative and trial judges and their length of service. These limits were removed in the revised statute of October 2005.

²⁴ See Report on Iraq Relief and Reconstruction, Section 2207, Oct. 2005, Appendix I, available at www.state.gov/p/nea/rls/rpt/2207/.

²⁵ Law on Criminal Proceedings with Amendments Number 23 of 1971, Decree Number 230 of the Revolutionary Command Council of Feb. 14, 1971, paras. 57 and 63(B).

²⁶ Law on Criminal Proceedings, paras. 243–276.

The head of the cassation chamber is the *president of the court*. The revised statute has significantly enhanced the powers of the president in a number of areas, giving him the power to appoint key non-judicial managers and an official spokesperson, and giving him control over requests from the chiefs of other chambers to seek the advice or services of non-Iraqi specialists.²⁷

As of October 2005, all judges appointed to the Tribunal were Iraqi nationals who were selected from a range of ethnic and religious groups and had been nominated by the government in consultation with the judicial council.²⁸ The reduction of any role for international judges has been a major change to the Tribunal statute; although last minute changes to the original statute made provision for international judges to be appointed if necessary, no such appointments were in fact made.²⁹ The language has now been altered to allow the appointment of international judges only to cases in which another state is a plaintiff.

Tribunal personnel serve at great personal risk. As of October 31 2005, five tribunal employees had been killed, as well as defense lawyer Sa'adun al-Janabi.³⁰ The identities of the majority of judges and staff have been kept anonymous. This secrecy has greatly affected the SICT's work, including its ability to conduct effective outreach.

After more than 30 years of dictatorship, it has been difficult for the SICT to recruit appropriate staff. One major difficulty has been the requirement to find judicial professionals of experience and integrity that were not tarnished by association with the former regime. The statute requires that no former members of the Ba'ath party can be appointed as judges. This requirement is far stricter than Deba'athification requirements elsewhere in government and may be unfeasible as a matter of practice. Political officials have made repeated attempts to dismiss Tribunal staff via the Deba'athification Council, as discussed below.

Another difficulty has been the Iraqi legal system's long isolation from major developments in international criminal law. Although Iraq has signed and ratified a number of relevant international treaties, provisions relating to these crimes were never incorporated into Iraqi law. Even Iraqi judges with long experience have had no training, or even exposure, to these norms. Several seminars and short training courses have been organized on international criminal law in London, the Hague, and the Gulf region, including by the U.S. Institute of Peace (USIP). There is also a more general lack of capacity and experience: while some judges have had previous judicial experience, most are lawyers elevated to the judiciary only after the fall of the Ba'ath

²⁷ The Supreme Iraqi Criminal Tribunal, Arts. 9, 10(9), and 11(7), Part Five Law No. 10 for the Year 2005.

²⁸ Statute of the Iraq Special Tribunal, Dec. 2003, Art. 5(c). Under the revised statute, the judges and prosecutors will be appointed by the Higher Juridical Council, Art. 5(3).

²⁹ The model statute developed by Professor Cherif Bassiouni included provisions for the appointment of Arab jurists. These were deleted early in the official drafting process. Articles allowing/requiring international participation in original statute were: Article 4(d) (judges if deemed necessary by GOI); Article 6(b) and 6(c); Article 7(n) and 7(o); Article 8(j) and 8(k). These were added shortly before the statute was promulgated in December 2003. These requirements were substantially weakened in October 2005.

³⁰ For example on March 2, 2005, Judge Barwiz Mahmoud Marwani and his son (also a Tribunal employee) were shot and killed in Baghdad the day after the SICT completed its first investigation; employees of the accounting, press office and investigative departments have also been killed. Sa'adun al Janabi, a privately-retained defense lawyer, was abducted and killed on October 20 2005, the day after the tribunal opened its first session.

regime. Nonetheless, observers who have had contact with the judges note the majority display both a strong commitment to doing their best in spite of serious obstacles as well as a general consciousness of the Tribunal's importance and potential impact on the future of Iraq's judicial system. That being said, we should not underestimate the potential impact of enormous political pressures and the repercussions this could have on their capacities to work in a thorough and independent manner.

D. Court Administration

The appointment of a court administrator for the Tribunal has been politicized from the outset. Politicians have continually tried to influence the SICT's work by hiring and firing administrators. The first administrator, Salem Chalabi, is the nephew of Ahmed Chalabi, currently deputy prime minister and chairman of the National Deba'athification Council. Chalabi's appointment raised concerns that his uncle and his political allies would attempt to manipulate the Tribunal's proceedings. Following the appointment of an interim government in June, murder charges were brought against Salem Chalabi in August 2004; after his September resignation, the charges were dropped and the post was given first to Salem Chalabi's deputy, then to a person widely regarded as a loyalist of Prime Minister Ayad Allawi. He was dismissed a year later, in August 2005, when a second political battle surfaced for control of the court.³¹ The Deba'athification Council then led efforts to dismiss nine investigating judges who were allegedly former Ba'ath party members.

At the time of this writing, the administrator's duties were being carried out temporarily by a judge of the cassation chamber, but the lack of a professional administrator may hamper some of the Tribunal's functions, including issues of defense, outreach, and witness protection. By August 2005, a witness protection program had begun operating, but security challenges should have been addressed at an earlier date. The SICT still remained without an official full-time professional spokesperson; Chief Investigating Judge Ra'id Juhi was fulfilling this role and may continue to do so. The defense office had three lawyers available to assist indigent defendants, but had not assumed any greater role in ensuring equality of arms³² and was not operating with its desired complement of staff.

E. International Advisers

Although the original statute required that international advisers be appointed to assist the Tribunal, none had been appointed as of October 2005. Provisions to appoint international staff were further weakened by the revised statute of October 2005, and staff posts are now almost exclusively reserved for Iraqis. Although the SICT seems reluctant to involve non-national judicial advisors, it is also clear that few non-nationals have been willing to participate. For example, the UN does not allow its staff members to assist the Tribunal directly. As a result, international expertise and assistance have been largely provided by the US government through the RCLO, with some UK assistance. While this assistance has been vital, the fact that it has

³¹ Kathleen Ridolfo, "Iraq: Deba'athification Commission Backs Away from Tribunal Purge," *Agence France Presse*, July 29, 2005.

³² "Equality of arms" refers to the legal principle that every party to a case must be granted a reasonable opportunity to present its case under conditions that do not place it at substantial disadvantage in relation to its opponent. This includes equality in presenting arguments as well as evidence.

mostly come from the United States has exacerbated negative perceptions and raised serious questions about its independence.

The RCLO was created several months after the Tribunal statute was first issued in December 2003. Prior to its establishment, the CPA body responsible for coordinating transitional justice initiatives and consulting with Iraqis on prosecution efforts was also charged with supporting the IST's investigation and operational endeavors while local capacity could be developed to undertake the work.³³

A U.S. team of defense and justice officials led by Pierre Prosper, the Ambassador at Large for War Crimes Issues, visited Iraq in early 2004. During this mission, it became clear that neither the CPA nor the Iraqis had developed an effective plan for gathering or preserving evidence, nor identified enough Iraqi nationals able to implement such a plan. The U.S. Department of Justice took primary responsibility for supporting prosecution efforts shortly afterwards.

The RCLO was then founded in March 2004 to gather, organize, and assess evidence to be used in the trials. This office also assumed significant responsibilities for the training of Iraqi personnel and establishment of the court's physical infrastructure. Since its founding, the RCLO has grown swiftly and has had several changes of leadership. It currently operates out of the U.S. Embassy in Baghdad and has deep involvement in both practical and strategic aspects of the Tribunal's functioning, although it is unclear how extensively its staff may assist judicial personnel once the trials begin. The original budget of \$75 million rose to \$128 million in 2005, dwarfing Iraqi government spending on the SICT's activities.³⁴

V. PRE-TRIAL INVESTIGATION

Much is already known about the crimes of the former Iraqi regime. There is an abundance of relevant documentary evidence, surviving witnesses, and forensic evidence contained in some 300 mass graves. There may also be evidence arising from the interrogation or judicial questioning of some 100 former senior regime officials held in U.S. custody at Camp Cropper, near Baghdad Airport, and other locations.³⁵ According to news reports, by October 2005 the SICT had reportedly reviewed more than two million documents and interviewed 7,000 witnesses.³⁶

The primary types of evidence that may be used in the trials include:

³³ See Parker, *supra* note 11.

³⁴ Of the 2005 budget of \$128 million, \$29 million had been spent and \$72 obligated as of July 2005. *Section 2207 Report on Iraq Relief and Reconstruction*, Appendix I, "Investigations of Crimes Against Humanity" (Project Code 0500), released by the Bureau of Near Eastern Affairs, July 2005, available at www.state.gov/p/nea/rls/rpt/2207/jul2005/html/48780.htm.

³⁵ This figure reportedly includes some 42 individuals from the U.S. list of 55 "most wanted" Iraqis published prior to the March 2003 invasion, as well as some 60 high-ranking officials designated as High Value Detainees. See Bill Gertz, "Most Prisoners in Iraqi Jails Called Threat to Security," *Washington Times*, May 6, 2004.

³⁶ Andrew Wiese, "Saddam Trial First of Expected Dozen Prosecutions," *CTV Canada*, Sept. 30, 2005, www.ctv.ca/servlet/ArticleNews/story/CTVNews/20050930/saddam_trial050930/20050930/.

1. *Forensic evidence.* Following a mapping exercise, the CPA earmarked ten to twelve mass graves as criminal investigation sites based mainly on whether the sites were intact, represented key period of human rights abuses, and would yield evidence of crimes against humanity.³⁷ Exhumation plans and protocols were developed, but the process encountered numerous obstacles. The rapid deterioration of security toward the end of 2003 disrupted the work of nearly all international teams, causing many to leave early or cancel future work. Opposition to the death penalty further deterred international support. In early 2004, the RCLO assumed the main responsibility for exhumations of criminal investigation sites, enlisting the services of the U.S. Army Corps of Engineers to conduct the digs and undertake forensic analysis.

As of October 2005, three exhumations had been completed: Hatra, near Mosul in northern Iraq, believed to hold the remains of Kurdish victims of the Anfal campaign; Samawa, southeast of Baghdad, thought to be related to the Anfal campaign; and a smaller site in al-Amarah province that reportedly lacked remains. Exhumations have been complicated by high security costs, a dearth of qualified local personnel, and complaints of lack of outreach to victims' families. Some government officials and civil society representatives have told the ICTJ they stopped any communication with Tribunal officials after it became clear the exhumations focused solely on evidence gathering to the exclusion of humanitarian concerns in terms of the families' needs to locate their missing loved ones.

2. *Documentary evidence.* The Iraqi regime documented its acts in minute detail and archived these in central and local government ministries as well as the offices of intelligence and security agencies. The overwhelming challenge for investigators has been to organize and analyze the documentary evidence available after the fall of the regime. The quality of such evidence is vital to the SICT's proceedings: documents or remains that have been compromised or whose authenticity is doubtful can be challenged as inadmissible. The ability to challenge the admissibility of evidence is often a key tactic for defense counsel.

Because of the CPA's failure to safeguard government documents after the fall of the regime, sensitive documentation of possible evidentiary value is now held by a wide variety of political parties and civil society groups. Initial efforts to centralize such documentation, including via a governmental order that all such documents be handed in to the Ministry of Human Rights, met with little success. Some critics are concerned that the failure to protect these documents compromised the quality or completeness of documentary evidence obtained by Tribunal investigators.

In reality, CPA forces captured the bulk of documentation. Some 50 million documents were removed to Qatar and held for processing by the Iraq Survey Group, a coalition intelligence group mandated to look for evidence relating to alleged weapons of mass destruction programs. With exclusive rights to sift through the materials, fears have been expressed that the U.S. might control the type of evidence being made available to the SICT and in some cases even expunge or 'sanitize' relevant documents. There has been

³⁷ United States Agency for International Development, "Iraq's Legacy of Terror: Mass Graves," at 5.

no clarity of terms relating to how many of these documents have been made available to the SICT or the bases on which sensitive materials may have been withheld. As such, fears of losing crucial evidence are well-founded and could seriously complicate future avenues for victims — as well as obscure the roles of certain perpetrators.

There is also a concern that the Tribunal itself lacks the capacity to properly analyze the documentary evidence that is available and to use it to its full potential to show the systematic nature of the crimes.

Failure to protect vital documents may also have compromised efforts to trace the missing by obscuring information crucial to other transitional processes. In the long term, any relevant documentary evidence the Tribunal gathers should also be made available to other transitional processes, such as truth-seeking, vetting, or reparations programs, in Iraq. A highly selective and secretive handling of the documents will likely impede successful transitional processes, severely limiting other possibilities for truth or justice.

3. *Witness testimony.* Investigating judges, who have traveled widely within Iraq, will gather most witness and victim testimony. Some provision for witness protection procedures have been made in the statute and rules of evidence, and a protection program had reportedly begun operating in a limited manner shortly before the trial. But the continued lack of security and the delay in launching a witness protection program will likely have an impact on the effective handling of witnesses and their willingness to come forward. Further challenges to witness relocation and protection include the strength and extent of Iraqi social networks, as well as the size of the extended families and associated relocation costs.
4. *Admissions by the defendants themselves.* The Tribunal will be using evidence gathered directly from defendants. SICT officials have also reported that they will be using plea bargains or other agreements to encourage defendants to give evidence in the cases against other accused.³⁸

Some 100 high-ranking former officials were detained in U.S. custody in the course of 2003. The legal basis on which they were held and the circumstances of their detention were never clarified, raising concerns about the validity of statements taken while in custody. Originally held by coalition forces as prisoners of war, those under investigation were formally transferred to Iraqi custody on June 28, 2004, one day after the creation of the interim Iraqi government. Legally, their detention is sanctioned by the Iraqi Criminal Procedural Code, as amended by CPA Order 31, Section 6.³⁹ Practically, they are held in CPA facilities under Coalition control. Their unclear status will complicate the ability of the accused to challenge the legality of their custody, although they may still do so at trial.

³⁸ See Agence France Presse, “Iraqi Special Tribunal could cut plea bargains with Saddam henchmen,” July 3, 2004, Factiva Document Number AFPR000020040702e07200bf5.

³⁹ CPA Order 31, Modifications of Penal Code and Criminal Proceedings Law. 21 September 2003. Section 6 allows a judge to order a person suspected of an offense punishable by the death penalty to be held without bail until trial. http://www.cpa-iraq.org/regulations/20030921_CPAORD31.pdf

In terms of the admissibility of any statements they have already been given, much will depend on the circumstances in which they were questioned. In international criminal tribunals, all conversations between suspects and prosecutors have to be videotaped, and such conversations should not occur without a lawyer present. However, current Tribunal procedures do not automatically exclude evidence that may have been taken in contravention of international standards.

There is already reason to doubt that international standards have been respected. On July 1, 2004, 12 members of the former leadership appeared before the SICT's chief investigating judge. Defendants were reportedly informed of the accusations against them and questioned by the investigating judge on the basis of Articles 123–125 of the Criminal Procedural Code.⁴⁰ Defendants did not have legal counsel present, and although images of the event were televised (without sound), no full public transcript of proceedings exists. According to the Tribunal's then-administrator, "We wanted to demonstrate that the process is starting."⁴¹ The detainees shown and their most recent former positions were:

- Saddam Hussein al Majid, President
- Abed Hamid Mahmoud, Presidential secretary
- Ali Hassan al-Majid, Presidential adviser (relative of President)
- Aziz Saleh al-Numan, Ba'ath party head for western Baghdad
- Mohammed Hamza al-Zubaidi, Member, Revolutionary Command Council
- Kamal Mustafa Abdullah, Commander, Republican Guards
- Taha Yassin Ramadan, Vice President
- Tareq Aziz, Deputy Prime Minister
- Sultan Hashem Ahmed, Minister of Defense
- Watban Ibrahim Hassan al-Tikriti, Presidential adviser (relative of President)
- Barzan Ibrahim Hassan al-Tikriti, Director of Secret Police (relative of President)
- Sabir Abd al-Aziz al-Douri, Governor of Baghdad, Chief of Military Intelligence

Proceedings that have taken place pursuant to unclear legal procedures and televised for public impact contribute to a public sense that the trials are politicized and not held in accordance with strict fair trial standards. Moreover, concerns regarding the handling of evidence, defendant selection, and custody, including the involvement of CPA forces in these areas, may further affect this perception.

⁴⁰ Agence France Presse, "Transcript of first half of Saddam Hussein's appearance before tribunal," July 1, 2004, Factiva Document Number AFPR000020040702e0720086m. For a list of incidents related to the charges against the accused, see Agence France Presse, "Preliminary charges against 11 of Saddam's lieutenants and aides," July 2, 2004, Factiva Document Number AFPR000020040701e07100fid.

⁴¹ Agence France Presse, "Iraqi Special Tribunal could cut plea bargains with Saddam henchmen," July 2, 2004, Factiva Document Number AFPR000020040702e07200bf5.

VI. CASE SELECTION

Originally, members of the Iraqi Governing Council were reportedly eager for the SICT to process a wide series of cases. They ultimately agreed on a limited series of 10 to 15 trials focused on major events. Only the highest-level perpetrators were to be prosecuted by the Tribunal; other perpetrators were to be tried before regular Iraqi courts. The investigative strategy has thus prioritized several key instances of systematic abuse that were infamous and widely reported well before the U.S. invasion. It was thought that cases should focus on individuals immediately recognizable to the population and involve a selection of acts that showed the geographic and temporal spread of the regime's crimes.⁴²

The Tribunal's reliance on Iraqi criminal procedure has meant the indictments composed by the investigative judges concern separate incidents, each relating to a particular location or event. Thus, defendants may face several simultaneous trials in different trial chambers.

CPA advisers suggested the SICT not choose a case against Saddam Hussein as its first, but instead work from simpler to more complex prosecutions. This would enable the Tribunal to develop its practice, as well as to build a progressively more detailed picture of the Ba'athist chain of command, vital for determining whether leading individuals can be held individually criminally responsible for the regime's crimes.

The Tribunal initially appeared to be following this strategy until mid-2005. However, during that time, government sources announced that Saddam Hussein would be added as a defendant in the first trial, the Dujail case. The SICT has faced intense political pressure to bring Hussein to trial as soon as possible. The Tribunal's official statements did not originally list Hussein as a defendant, raising concerns that the change of strategy was the result of political pressure. Tribunal officials have told the ICTJ that cases involving the Anfal campaign and the suppression of the Shi'a uprising of 1991 would be the next cases to come to trial.

Investigating judges also appear to have chosen a strategy of pursuing multiple separate trials based on different incidents. This approach may be easier for the Tribunal in the short term and could allow it to begin proceedings more quickly. Nevertheless, it may pose several risks in the long term. Trying cases separately may impair the court's ability to detect and analyze patterns of behavior and evidence. Proving patterns is a legal requirement for several international crimes, and can be crucial in tracing the responsibility of the most powerful actors, who frequently operate behind the scenes.⁴³

In doing so, the SICT may also miss the opportunity to present the cases in a way that describes to the Iraqi and international public the real nature of events as they happened; that is, as systematic violence and attacks organized at a high level. Echoes of this have already appeared in the media, as commentators struggle with the possibility that Hussein and his perpetrators may be convicted and capital punishment carried out for the Dujail case even before other cases have begun.⁴⁴ Trying many cases separately, rather than joining them, may also duplicate the work of

⁴² Tom Parker, *supra* note 11.

⁴³ A "pattern" is a set of events that, by their frequency, location, or nature, imply some degree of planning and centralized control. The use of patterns can help prove that a particular crime was part of a planned process.

⁴⁴ Nancy Youssef, "Saddam's Execution Could Outrun Justice," *Knight-Ridder*, Oct. 10, 2005.

investigators and prosecutors, is resource-intensive, drives up security costs and takes a greater degree of court time. The Tribunal should strongly consider joining similar cases.

The SICT should also frame its charges with care. Charges should ideally focus on the most serious charges against the former leadership, such as genocide, crimes against humanity, and war crimes. The Tribunal also has less serious charges it can bring against the defendants, such as corrupting the judiciary, which are also technically easier to prove. However, the SICT should resist the temptation to use the lesser charges as a quick and easy means to get a conviction if other means prove more difficult.

VII. THE DUJAIL CASE

The first to be tried will be the Dujail case, which was also the first investigation completed. According to the Arabic-language official government website, eight defendants are being charged with crimes against humanity under Articles 12(1) (a), (d), (e), and (f) of the Tribunal statute, corresponding to murder, deportation or forcible transfer, imprisonment, and torture.⁴⁵

Dujail is a primarily Shi'a village located 60 kilometers north of Baghdad.⁴⁶ It is alleged that Saddam Hussein was passing through Dujail on July/Tamuz 8, 1982, when local youths reportedly attempted to assassinate him by firing at his motorcade. Although the assassins were quickly killed by the President's guards, Hussein allegedly summoned his relative, Secret Service Chief Barzan al-Takriti, to exact retribution. Assisted by Ba'ath party officials, the army, the general security service, and the secret service, al-Takriti's actions allegedly resulted in the following actions:

- Arbitrary imprisonment of 148 villagers;
- Death after torture of some 46 villagers;
- Arbitrary execution of 96 villagers;
- Forcible transfer of 399 persons to the al-Liya desert camp in Muthanna province for four years; and
- Illegal confiscation and destruction of houses and agricultural land.⁴⁷

Although initial statements by the Tribunal did not name Saddam Hussein as one of the defendants, official Iraqi government media announcements have done so.⁴⁸ Journalists have reported the existence of evidence indicating a document signed by Saddam Hussein directly

⁴⁵ *Al muqbil li mahkama Saddam Hussein wa azlam nithamihi an jarima al dujayl*, accessed Oct. 1, 2005, from www.iraqigovernment.org; the numbering of relevant statute articles differs in English and Arabic versions of the statute: the Arabic numbering is Article 12 (First) ١٢.١. The figures and statistics differ from an older official Tribunal summary of the incident, found at www.iraq-ist.org/ar/cases/cases1/dujail.htm.

⁴⁶ Peter Beaumont, "Saddam: Witnesses for the prosecution," *The Observer*, Oct. 9, 2005.

⁴⁷ *Al muqbil li mahkama Saddam Hussein wa azlam nithamihi an jarima al dujayl*; "Iraqi TV Broadcasts Proceedings of Saddam Trial – Full Text" BBC Monitoring International Reports, 20 October 2005.

⁴⁸ *Id.* See also Iraqi Special Tribunal, "Investigation Into al-Dujail Crimes Concludes," Feb 26, 2005, available at www.iraq-ist.org/en/press/releases/0014a.htm, accessed Oct. 9, 2005.

ordering these crimes.⁴⁹ According to government statements, the defendants in the Dujail case and their former positions are:

- Saddam Hussein al-Majid President of the Republic
- Barzan Ibrahim al-Hassan al-Tikriti Chief, Secret Intelligence Service and relative of Saddam Hussein
- Taha Yasin Ramadan Deputy Prime Minister, later Vice-President
- ‘Awad Hamd al-Bandar al-S’adun Chief Judge, Revolutionary Court
- Abd Allah Kathim al-Ruwaid Senior Ba’ath Party Official, Dujail
- Mazhar Abd Allah Kathim al-Ruwaid Senior Ba’ath Party Official, Dujail
- ‘Ali Daim ‘Ali Ba’ath Party Official, Dujail
- Muhammad ‘Azawi ‘Ali Ba’ath Party Official, Dujail

VIII. FURTHER RECOMMENDATIONS ON THE TRIAL PROCESS

One study that examined four domestic prosecutions of international crimes concluded that fair and effective trials rested on four fundamental conditions:

1. A workable legal framework;
2. A trained cadre of judges, prosecutors, defenders, and investigators;
3. An adequate infrastructure (including courtroom and detention facilities); and
4. Most important, a culture of respect for the fairness and impartiality of the process and the rights of the accused.⁵⁰

As the Dujail trial opens, each of these conditions will be tested. With the passage of the revised statute and rules of procedure, the Tribunal legal framework will be in place and staff training ended. But important legal questions remain, such as how the Tribunal may avoid problems of retroactivity. In addition, the constant revisions of the statute and the last-minute additions of new crimes may lead to considerable legal uncertainty.

Furthermore, important staff positions remain unfilled and important logistical issues such as broadcasting, witness protection, and outreach are still unresolved. Some of these issues may be clarified further when the trial opens. Others, especially those listed below, will need to be monitored carefully as the trial progresses:

1. *Legitimacy.* The Tribunal’s legitimacy will depend heavily on perceptions of its independence. It will also depend on the quality and impartiality of proceedings. In essence, the SICT will have to satisfy three different constituencies:
 - The first and most important is the Iraqi population, which so far has had little information about the Tribunal but has strong and competing expectations about what it can deliver. It is imperative that the court develop a proactive, transparent, and thoughtful outreach strategy with the Iraqi public. This is the single best mechanism

⁴⁹ Peter Beaumont, *supra* note 48.

⁵⁰ Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Oxford: Oxford University Press, 2001, at 182–183.

- the court can use to ensure it is supported, not criticized, by the people whom it is meant to serve.
- The second is the general public of the wider Middle East. In a region scarred by severe human rights violations, the Tribunal potentially represents the first good-faith attempt to bring powerful perpetrators to justice for their crimes. However, there are strong regional sensitivities about the Iraq war, the role of U.S. and Coalition forces, and the U.S. role in the MENA region. The SICT needs to demonstrate its independence of U.S. and other policies, particularly since defense counsel have indicated that these arguments will play a major role in the defense. The SICT should actively seek to widen its funding and support base beyond that which is provided by the USA.
 - The third is the international community itself, which created the legal framework that now allows Ba'athist leaders to be held accountable for their crimes. Rebuffed during the early stages of planning, the international community and the Tribunal are seemingly now at a standoff. This stalemate needs to be broken so that the SICT can benefit from international expertise and free itself from the perception that it is too dominated by U.S. policy
2. *Fairness.* The Tribunal faces a myriad of questions and concerns about its statute and rules of evidence and procedures. Some arise as a result of lack of clarity or even conflicts in translation, but many relate to real concerns about the ability of the tribunal to apply fair trial standards. The Tribunal should begin trials by showing that it will strictly and meticulously adhere to international fair trial standards – particularly with regard to the rights of the defense. Any failure to adhere to fair trial standards may well be interpreted as proof that the Tribunal is acting in bad faith.

The Tribunal's conspicuous failure to observe international standards would increase its isolation and undermine its long-term legacy domestically and abroad. It would also lessen the possibility that the international community would assist it or other Iraqi accountability or transitional justice initiatives.

3. *Security and timing.* The Tribunal's development has been strongly affected by Iraq's deteriorating security situation. Judges and SICT staff fear for their safety; the identity of almost all court officials has remained hidden; and despite several commitments to openness and transparency, at the time of this writing there is still real doubt as to how much of the proceedings will be made public. Investigation and other logistics have become far more cumbersome and costly. For example, the pace of forensic investigations has been seriously affected even as the costs have skyrocketed. At the same time, the Tribunal will also have to guard against the temptation to use security concerns as a convenient blanket to excuse procedural irregularities or difficulties in public outreach. The SICT will have to be inventive in devising ways to maintain openness and conduct outreach in these circumstances: other courts in similar situations have proven themselves able to do so. It also has the responsibility to establish meaningful programs for the protection of witnesses, including by concluding agreements for relocation outside Iraq.

Many commentators see a close relationship between the timing of the Tribunal's actions and Iraq's overall security situation. Many Iraqis are pressing for the trials to be held swiftly and feelings are running high. Some political figures believe a quick move to trial and punishment will publicly signal the end of the Ba'athist regime, deterring any insurgent forces who wish for a return to the previous order. It is also possible that poorly handled trial may inflame the situation, raising accusations of bias and diminishing the development of Iraqi trust in post-Ba'athist institutions.

If the security situation deteriorates further, there may be a point of diminishing returns at which the SICT simply cannot conduct high-quality investigative work or a meaningful trial process at its current location or with current operating procedures. The Tribunal would be well advised to have a contingency strategy, including benchmarks of standards beyond which it will not operate. A closed trial, where the identities of all participants remain secret and the evidence is presented in private, will not achieve the key goals of justice for the victims and accountability for perpetrators.

4. *Transparency and Outreach.* One of the great advantages of a domestic prosecution of international crimes is that the court is close to the people who care about it most, but this also presents a challenge. The large universe of Iraqi victims ideally will be able to follow the court proceedings closely and the drama of the trials will help to publicly establish the record of suffering. Victims are more likely to feel that the court represents them and responds to their needs. However, proximity alone does not mean that Iraqi citizens will feel the court is transparent and accountable, nor does it mean they (and others) will automatically understand Tribunal proceedings or strategy. Complex legal proceedings are easily open to misinterpretation and, if not well managed and clearly explained, could fuel sectarian divisions as people allege bias in favor or against particular ethnic, political, or geographical groups. No matter how impartial the proceedings, the Tribunal must develop an effective media and outreach strategy. It cannot rely on its actions being explained by osmosis, particularly because, for security reasons, ordinary Iraqis cannot physically access the place of trial and do not know the identity of the judges.

The Tribunal should take several steps to ensure effective outreach:

- Appoint a *permanent, professional spokesperson* as a matter of priority. Contrary to Article 9(9) of the revised statute or the current practice, this individual should not be drawn from among the Tribunal judges or prosecutors, as it would be highly inappropriate to comment to the media on matters in which he or she is currently exercising judicial functions.
- Decide and implement a clearly defined *media strategy*, including improving the website, issuing guidelines for journalists,⁵¹ and holding regular information and briefing sessions. At the moment, SICT communications appear reactive and ad hoc. The government and RCLO spokesperson have frequently publicized information that the Tribunal itself should have articulated. For political figures to announce information such as trial dates

⁵¹ One example of such information is the Journalists' Handbook developed by the International Criminal Tribunal for Rwanda, available at www.ictr.org/ENGLISH/handbook/index.htm.

and details gives the impression that the government, not the SICT, is in control of the process. The need for the Tribunal to control the regular flow of information to the media and general public will become even more urgent once trials begin.

- Decide and implement a *public outreach strategy*. The Tribunal must develop and deliver information explaining its goals, policies, and strategies not only to the media, but also to the public at large. It must ensure that the various roles of the staff are explained and represent the differing roles and perspectives of prosecution. It should also aim to give the public regular updates once the trials begin. Both media and public outreach efforts must be adequately funded from the core budget. The Tribunal should develop a strategy based on the specific challenges of Iraq's security and political environment, using the experience of other courts and tribunals as a possible source of ideas. For example, the Special Court for Sierra Leone is widely regarded as having an excellent outreach strategy despite a low budget and difficult operating environment.⁵²
 - Ensure that the SICT's *victim and witness protection units* are functioning adequately and that the Tribunal's approach to investigations and prosecutions remains sensitive to victims' needs. Victims participating as witnesses need to be educated about the legal process so they do not feel they have been ignored or exploited. The SICT will have to manage their expectations and update them regularly on the trial process and outcomes. Crucially, there must be adequate protections in place for those who testify, including special protections for women and children. Good practice requires that the court provide specialized support to victims and witnesses to ensure they are not further psychologically harmed by their participation in the trial.
5. *The Death Penalty*. While Iraqis, when surveyed, have expressed support for the application of the death penalty as the most appropriate form of punishment for those responsible for the most serious abuses, the ICTJ believes that breaking from that tradition is in an important symbolic way for Iraqis to create a more just and fair society in the future. The SICT, as well as the leaders of the new state of Iraq, should seek to lead by example and avoid using capital punishment.

IX. CONCLUSION

The Iraqi Supreme Criminal Tribunal faces many challenges as it begins trials of former President Saddam Hussein and his close associates. It faces an uphill battle to overcome problems around perceptions of its legitimacy, independence, and ability to withstand political pressures. A number of legal, administrative, and procedural issues remain unclear or need to be resolved, and the Tribunal is functioning in an environment of increasing violence and

⁵² The Special Court for Sierra Leone was created jointly by the government of Sierra Leone and the UN, and is mandated to try serious violations of international humanitarian law and the law of Sierra Leone committed since November 30, 1996. See <http://www.sc-sl.org>. The Special Court's outreach strategy has included (1) town hall meetings conducted by senior officials in every district, (2) an outreach team within the Court with enough staff to reach districts quickly, (3) regular interactive meetings with civil society, and (4) production of a wide variety of material that can be used in domestic outreach, including weekly video summaries of the Court's proceedings, which are distributed to each region by motorbike courier.

insecurity. These challenges are enough to test even the most sophisticated and well-established legal systems. The Tribunal would do well to focus on two key areas: fairness and outreach.

The trials should begin and continue in an atmosphere where international norms for fair trial are strictly adhered to, particularly the rights of the defense. In such circumstances, the Tribunal will go a long way toward overcoming concerns about independence and legitimacy, and concerns about lack of clarity in law and process may still be resolved through the court's practice. Perceptions of fairness link very much to transparency. The SICT should seriously internalize the importance of media and outreach and put in place a consistent strategy that demystifies the process, making it accessible to the population at large. If this happens, the Tribunal may overcome not only the problems associated with the above-mentioned perceptions, but also issues of transparency arising from the security situation.