

2008

Post-Conflict Justice in Iraq

Zakia Afrin

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/annlsurvey>



Part of the [Other Law Commons](#)

Recommended Citation

Afrin, Zakia (2008) "Post-Conflict Justice in Iraq," *Annual Survey of International & Comparative Law*: Vol. 14: Iss. 1, Article 3.
Available at: <http://digitalcommons.law.ggu.edu/annlsurvey/vol14/iss1/3>

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Annual Survey of International & Comparative Law by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

POST-CONFLICT JUSTICE IN IRAQ

ZAKIA AFRIN*

I. INTRODUCTION

It was just like another video from the extremists showing live beheadings of human beings. Perhaps it may have been a replica of one of the episodes of the Roman Empire when crowds enjoyed people being eaten alive by beasts in the Coliseum. Instead, the hanging of Saddam Hussein, the fallen ruler of Iraq, was an act of a special tribunal and an elected government. At 6 a.m. Iraqi time on December 30, 2006, when Muslims in many parts of the world were celebrating the most important holiday of their faith, Eid ul Fitr,¹ the Iraqi President was humiliated in front of the world and hung. For many, this is the picture of post-conflict justice in Iraq. I beg to differ. The final moments of Saddam Hussein are in no way representative of an otherwise impressive effort to pursue justice in post-conflict Iraq.

In the endeavor to create democracy based on the notion of a “Rule of Law,” perhaps the most daunting task of the Transitional Authority (TA)²

* Adjunct Professor of Law at Golden Gate University School of Law.

1. Popularly known as Eid, this is the most significant Muslim festival celebrated once a year after a month-long fast known as Ramadan.

2. The Coalition Provisional Authority (CPA), Iraqi Governing Council (IGC), Interim Government (IG) and Transitional Administration governed Iraq in the capacity of temporary

in Iraq had been the administration of justice. The traditional definition of justice, as discussed by Plato,³ can be adapted to a post-conflict situation. Paul Van Zyl, the executive secretary of the Truth and Reconciliation Commission of South Africa, solicits a very broad and moving definition of justice:

*"...beyond focusing purely on the conduct of perpetrators, to include the needs of victims and the imperative to reform state institutions to ensure that human rights abuses does not recur."*⁴

This definition contemplates two aspects of justice:

1. Retributive and restorative justice leading to a peaceful future.⁵
2. Repairing and enhancing the judicial system.

In a post-conflict situation, the second approach is usually given less attention.⁶ The first approach is criticized by many scholars as part of the ongoing debate that evolves around the notion whether seeking justice in a post-conflict situation is an impediment to peace.⁷ In the case of Iraq, however, the expectation of retributive justice was undisputed among the population. At the same time, the role of the occupiers required compliance with international obligation to restore law and order, which translated into restoring and enhancing the judicial system. Thus, in post-conflict Iraq, justice meant holding Saddam's government liable for its thirty-five years worth of atrocities against Iraqi citizens and

government from May 2003 to 2006 after a US led occupation force ousted the government of Iraq and form the UN recognized Transitional Authority of Iraq.

3. In his 'The Republic' Plato discusses the notion of justice through conversation between Socrates and his interlocutors. Plato's own arguments may be summarized to mean justice as the task of society according to one's natural abilities. Plato, *The Republic* (360 BC).

4. For Paul Van Zyl's analysis of the Velasquez Rodriguez Judgment at 4 Iner-Am. Ct. H. R. (Ser.C) 1988 defining justice see Paul van Zyl, *Unfinished Business: The Truth and Reconciliation Commission's Contribution to Justice in Post-Apartheid South Africa*, in *Post-Conflict Justice* 745-46 (M. Cherif Bassiouni ed., 2002).

5. Retributive justice seeks to inflict punishment on the offenders for violations of law whereas restorative justice puts major emphasis on the harm committed to human relationships and aims to achieving social harmony in the aftermath of a conflict. Restorative justice may include Truth and Reconciliation Commissions.

6. As Cherif Bassiouni observed, "major western powers find it more politically congruent to their interests to establish ad-hoc post-conflict justice systems which are essentially focused on the past and without much regard for justice capacity building of national systems" M. Cherif Bassiouni, *Post Conflict Justice* xvii (M. Cherif Bassiouni ed., Transational Publishers Inc. 2002).

7. Neil J Kritz, *Progress and Humility: The Ongoing Search for Post-Conflict Justice* (M. Cherif Bassiouni ed., 2002).

reconstructing the judicial system while also introducing the notion of an independent judiciary.

In this article, I analyze the TA's approach and initiative regarding post-conflict justice in Iraq. Describing the actions of the authority, I seek to answer three questions: first, did the statute of the special tribunal meet international standards? Second, did the trial of Saddam Hussein serve to satisfy the goals of post-conflict justice? Third, did the TA's actions associated with reconstructing the justice system comply with its mandate under international law?

II. ESTABLISHING THE SPECIAL TRIBUNAL FOR PROSECUTING SADDAM

"In the short span of ten years between 1992 and 2002, the values of international criminal justice have taken hold as an essential component of the international legal order."⁸

The world has truly come a long way since the days of the Nuremberg Trial,⁹ the first international criminal tribunal of its kind, criticized for its partiality and attitudes towards the victors. The establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY)¹⁰ and the International Criminal Tribunal for Rwanda (ICTR)¹¹ in the 1990s supported criminal liability for atrocities committed towards citizens by their own governments. Further, the tribunals also integrated the rules of fair trials, rights of the accused, compensation for the victims, and many other progressive features of international legal order.¹² The International Criminal Court (ICC) treaty,¹³ however, elevated

8. M. Cherif Bassiouni, *Post Conflict Justice* xvi (M. Cherif Bassiouni ed., Transnational Publishers Inc. 2002).

9. For a full overview of the Nuremberg Trials and available documents, please see http://nuremberg.law.harvard.edu/php/docs_swi.php?DI=1&text=overview (last viewed on March 21, 2008).

10. The International Criminal Tribunal for the former Yugoslavia (ICTY) was established by the UN through SC Res. 827 on May 25 1991 to prosecute the perpetrators of the Yugoslav war in 1991. For more information on the Court see International Criminal Tribunal for the former Yugoslavia, <http://www.un.org/icty/>.

11. International Criminal Tribunal for Rwanda (ICTR) was established by the UN through SC Res.955 of November 8, 1994 to prosecute the perpetrators of the Rwandan genocide in 1994. For more information on the Court, see International Criminal Tribunal for Rwanda, <http://69.94.11.53/>.

12. For example, both the ICTY and ICTR provide broad definitions of war crimes, crimes against humanity, rape and other sexual assaults.

13. The International Criminal Court, a permanent tribunal to prosecute genocide, crimes against humanity, war crimes and crimes of aggression was created by an international treaty in 2002. Independent of the UN, the current member of this court is 104. For more information on the Court see International Criminal Court, <http://www.icc-cpi.int/>.

international criminal law to a new, higher standard when it came into existence in 2002. Heralded as the first gender-sensitive legislation¹⁴ in international law, the ICC has strengthened the concept of international responsibility for domestic affairs of governments. This trend continues today with several tribunals set up to address post-conflict justice issues.¹⁵

In this backdrop, it was only natural that Iraq's fallen government had to face a special tribunal kind of justice for the killings of its own citizens.¹⁶ The first issue before the Transitional Authority was choosing a proper forum. Among the choices were an ICTY-type international tribunal, an East Timor-type combination of national and international tribunal, and an Iraqi tribunal created solely for the purposes of trying international crimes without any international influence.

Despite expectations of an international criminal tribunal from the NGO communities, the TA favored an Iraqi tribunal.¹⁷ The U.S. administration reportedly preferred the local institution so that the Iraqi people would feel more in charge of the events. Anything less than the death penalty for Saddam would not have likely been acceptable to the people though impossible under international standards.¹⁸ Tom Parker, the head of the Coalition Provisional Authority's (CPA) crimes against humanity unit, noted that after verifying the interest level in the different types of tribunals, the authorities preferred the idea of a national tribunal.¹⁹ He also argued that after a brutal sanctions regime, there was little interest of any UN involvement among the people. He failed to answer, however,

14. For a complete discussion see *Zakia Afrin and Amy Schwartz, A human rights instrument that works for women: The ICC as a tool for gender justice*, (Wilson, Sengupta and Evans Edited Defending our dreams: Global feminists voices for a new generation, Zed Books 2005).

15. Consider the case of Sierra Leone. After a ten year long bloody civil war, the government of Sierra Leone in agreement with the UN SC Res.1315 of 2000 set up the Special Court for Sierra Leone that combined both international and domestic legal traditions to prosecute serious violation of international humanitarian law. See The Special Court for Sierra Leone, <http://www.sc-sl.org/>.

16. The backdrop of international trend to hold governments responsible in special tribunals for violations of international criminal law.

17. M. Cherif Bassiouni, *Post Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal*, in 38 Cornell Int'l L.J. 328, 328-368 (2005) (detailed discussion on the process of choosing to establish an Iraqi tribunal as observed by the author in the capacity of director of International Human Rights Law Institute's reconstruction of legal education program funded by the USAID in Iraq).

18. *Id.* at 344.

19. Tom Parker, *Prosecuting Saddam: The Coalition Provisional Authority and the Evolution of the Iraqi Special Tribunal*, 38 Cornell Int'l L.J. 899, 899-907 (2005) (According to Tom Parker, as early as April 2003, OHRTJ began to reach out to Iraqi legal community and local human rights groups. By August 2003 report titled 'Iraqi Voices' from International Centre for Transitional Justice (ICTJ) and Human Rights Centre (HRC) at University of California at Berkeley, claimed overwhelmed support for a national tribunal to try Saddam).

why a court set up with the blessings of an occupier would be more acceptable than a recognized world institution.

The proposal for the tribunal initiated from CPA allies and the Governing Council. The Iraqi High Tribunal (IHT) which carried out the infamous trial of Saddam Hussein came into existence as the Iraqi Special Tribunal (IST) on December 10, 2003. The CPA authorized the IST statute (promulgated by the Governing Council) to “try Iraqi nationals or residents of Iraq accused of genocide, crimes against humanity, war crimes or violations of certain Iraqi law.”²⁰ In August of 2005, the national assembly of the Transnational Government revoked the IST and replaced it with the IHT. Unlike the IHT which drew mostly from Iraqi domestic law, the IST was set to utilize a combination of international and domestic criminal laws.

Per the ICC treaty, the IHT had jurisdiction over Iraqi citizens and residents accused of genocide, war crimes, and crimes against humanity from July 1968 through May 2003.²¹ The IHT also had jurisdiction over various crimes punishable under Iraqi criminal law.²² The inclusion of offenses mentioned in the 1958 Iraqi penal code, which lack transparent definitions, raised concerns over the potential of abuse for political purposes.²³ Any trial would have to be regulated by Iraqi criminal procedure, which derived its roots from civil legal traditions. According to the rules, an investigative judge would collect all the evidence and witness testimonies for use in the trial proceedings.²⁴

There are five judges in the trial chamber who decide on the appearances of the witnesses and the questions they answer.²⁵ After being presented with the documents collected by the investigative judge, witness testimonies, and prosecution and defense arguments, trial judges deliver a verdict and a written opinion on the case. The verdict may be appealed before the Appeals chamber of the IHT which consist of nine judges,

20. Coalition Provisional Order Number 48, http://www.iraqcoalition.org/regulations/20031210_CPAORD_48_IST_and_Appendix_A.pdf.

21. The Statute of the Iraqi Special Tribunal, Article 1, 11, 12 and 13, <http://www.iraq-iht.org/en/staute.html>.

22. *Id.* at Article 14.

23. In its October 16, 2005 briefing paper on *The Former Iraqi Government on Trial*, Human Rights Watch considers crimes mentioned in Article 14 as ‘political offenses and of a breadth and vagueness that makes them susceptible to politicized interpretation and application’ *The Former Iraqi Government on Trial*, A Human Rights Watch briefing paper, October 16, 2005 retrieved from <http://hrw.org/backgrounder/mena/iraq1005/> (Last visited April 16, 2007)

24. *Id.* at 3.

25. The Statute of the Iraqi Special Tribunal, Article 4.1, <http://www.iraq-iht.org/en/staute.html>.

including a President of the Tribunal.²⁶ According to the statute, judges, prosecutors, the principle defense lawyer of the accused, and all staff members of the IHT must be Iraqi nationals.²⁷ Non-Iraqi international law experts may be appointed in an advisory capacity to assist judges and prosecutors in matters of international legal issues.²⁸

The IHT granted an impressive set of rights to the accused, including equality before the law, presumption of innocence until proven guilty, and a fair trial. Armed with international criminal law elements and promise of a fair trial, the IHT was hailed as an exemplary domestic institution to try war crimes and similar government entities. The Saddam trial generated a great deal of interest among international legal experts who waited keenly to witness the advancement of international criminal law in a domestic forum.

III. TRIAL OF SADDAM HUSSEIN

Saddam Hussein's government was infamous for the systematic killing of political dissidents. It is estimated that between 1968 and 2003, the Iraqi government was responsible for the murder of 500,000 Iraqis.²⁹

The first case in front of the Tribunal was the Dujali case, where Saddam and other members of his regime were accused of killing 148 Shias in Dujali in 1982. Among the most criticized issues of the Saddam trial were legitimacy, fair trial, capital punishment, and execution.

The legitimacy of the previous IST was harshly criticized by Bassiouni, a leading expert in the field on international criminal law. Mentioning the CPA's illegal invasion of Iraq he stated:

*No norms or precedents exist in international law for an occupying power, the legitimacy of which is in doubt, to establish an exceptional national criminal tribunal.*³⁰

Bassiouni predicted that as soon as the tribunal would be repromulgated by a national legislative authority, the legitimacy problem would be solved. It can be argued that the IHT was indeed promulgated by the elected national assembly, thus perfectly legitimate in the legal sense.

26. *Id.* at Article 4.2.

27. *Id.* at Article 28 and 22.4.

28. *Id.* at Article 9.2, 10.9, and 11.7.

29. M. Cherif Bassiouni, *Post Conflict Justice in Iraq: An Appraisal of the Iraqi Special Tribunal*, 38 Cornell Int'l L.J. 330, (2005).

30. *Id.* at 359.

However, this argument seems problematic as the election of the national assembly was administered during a period dominated by the CPA and the occupation. In its Appellate Chamber opinion, the IHT tried to answer the question of legitimacy, as put forth by the accused, by pointing out that the court was created by an elected government that garnered the support of 78% of the Iraqi population.³¹ Nevertheless, the tribunal, as an initiative of the transitional government, will most likely always have the “legitimacy stigma” attached.

Another criticism of the court again draws on the issue of sovereignty. The visible involvement of the CPA authorities and US officials was subsequently met with the argument that the tribunal could not act without the United States’ influence. Bassiouni argues that the visible role of the US was due to the fact that experts from the US Department of Justice, who, in March of 2004, arrived to gather evidence to be used in the trial and to train the judges and prosecutors of the tribunal, did not have adequate knowledge of the Iraqi legal system and the legal culture of the region.³² Whatever the reason may have been, the US involvement continued until the end of the trial, thereby damaging the perceived independence of the court

Apart from the execution of the death penalty, the Tribunal was criticized from two different aspects. First, the retention of the death penalty, which contradicted a well-established anti-death penalty rule of international law was, at the very least, questionable. Despite CPA’s dissatisfaction with this choice, the Governing Council and later on the Interim administration, insisted on retaining capital punishment consistent with the existing Iraqi penal code. Tom Parker also argued that such decisions are the prerogative of the sovereign. Though it is tempting to believe in the superiority of the sovereign, this argument cannot be given weight as it would justify, in the name of sovereignty, all state-sanctioned human rights abuses that violate international legal standards.³³

Second, according to one view, the death penalty was carried out in violation of the Iraqi code of criminal procedure which allows an

31. Appellate Chamber Opinion of IHT, December 26 2006. An unofficial English translation of the opinion, available at, http://law.case.edu/saddamtrial/documents/20070103_dujail_appellate_chamber_opinion.pdf.

32. M. Cherif Bassiouni, *Post Conflict Justice in Iraq: An Appraisal of the Iraqi Special Tribunal*, 38 Cornell Int’l L.J. 330, 346 (2005).

33. For example, many states do not ratify International Covenant on Civil and Political Right (1976) or Convention on the Elimination of All Forms of Discrimination Against Women (1979) claiming that it would jeopardize their sovereign right to regulate legal affairs in a country.

additional 30 days after the first appeal for the convicted to request a correction of errors in judgment.³⁴ In rebuttal, Professor Scharf pointed out that the provision of the tribunal requiring execution within thirty days of the Appeals Chamber's decision prevailed over any domestic law, as it was a special court independent of the domestic court system.³⁵ Though both arguments have merits, Professor Scharf's point must prevail in this case.

Besides these scholars, few international legal experts and human rights organizations kept a close watch on the Dujali trial. As fierce critics of the invasion of Iraq, these entities have sought a greater UN role in prosecuting Saddam Hussein, or at least for a court independent of US influence.³⁶ Human Rights Watch (HRW) reported that the US neither followed a transparent process of consulting Iraqis nor assessed Iraqi attitudes about justice and accountability.³⁷ Multiple requests from HRW and other human rights organizations to comment on the draft statute of the Tribunal were turned down. In a report entitled "Iraq: Dujali Trial Fundamentally Flawed" released on November 20, 2006, HRW also argued that the trial had enough serious procedural and administrative flaws to render it unfair and requested overturning the verdict.³⁸

Calling the trial deeply "flawed and unfair" Amnesty International's Middle East and North Africa Director said:

34. Professor Kevin Jon Heller argues that according to Paragraph 266 of the Iraqi Code of Criminal Procedure "the convicted person... may request the correction of a legal error in the decision issued by the Court of Cassation, provided the request is submitted within 30 days, counted from the date a convicted, imprisoned or detained person is notified of the Court of Cassation decision" which means that after the Appeals Chamber rejected Saddam's plea, he had another thirty days to ask the court to correct its legal errors. As Rule 66 of the IHT Rules of Evidence and Procedure explicitly requires the judgment to be in accordance with the Code of Criminal Procedure, executing Saddam before the lapse of thirty days violated the IHT procedure..Michael P. Scharf, Gregory S. McNeal & Brianne M. Draffin, *A Teacher's Guide and Supplement to Saddam on Trial: Understanding and Debating the Iraqi High Tribunal* (2007).

35. Professor Michael P. Scharf further mentioned, "This was an important approach as the IHT Statute was written to import the rights enshrined in the International Covenant on Civil and Political Rights, and there were many provisions of the Iraqi Criminal Procedural Law of 1971 that were not consistent with those rights. The drafters thus intended the provisions of the IHT Statute to control."

36. Two of the most influential NGO's worldwide, Amnesty International and Human Rights Watch (HRW).

37. The Former Iraqi Government on Trial, A Human Rights Watch briefing paper, October 16, 2005 retrieved from <http://hrw.org/backgrounder/mena/iraq1005/> (Last visited April 16, 2007)

38. In the 97 page report, HRW reports procedural flaws in the trial including:

- Regular failure to disclose key evidence, including exculpatory evidence, to the defense in advance;
- Violations of the defendants' basic fair trial right to confront witnesses against them;
- Lapses of judicial demeanor that undermined the apparent impartiality of the presiding judge; and
- Important gaps in evidence that undermine the persuasiveness of the prosecution case, and put in doubt whether all the elements of the crimes charged were established.

Human Rights Watch, <http://hrw.org/english/docs/2006/11/20/iraq14589.htm>.

*“[Saddam Hussein’s] overthrow opened the opportunity to restore the basic right [to a fair trial] and, at the same time, to ensure, fairly, accountability for the crimes of the past. It is an opportunity missed and made worse by the imposition of the death penalty.”*³⁹

Amnesty International also voiced concerns about Saddam Hussein being denied his right to a defense attorney for the first year of the trial, the assassination of three defense lawyers during the trial, the resignation of a judge on grounds of partiality, and overall political interference by the US throughout the proceedings.⁴⁰

The IHT promised a fair trial for the accused. As a state party to the International Covenant on Civil and Political Rights⁴¹, the notion of a fair trial entails a handful of rights to Iraqis, including the right to an impartial tribunal and adequate time for the preparation of a defense.⁴² The worldwide media reported throughout the trial about the murders of the defense lawyers, boycott of the trial by lawyers, and open proclamations of the judges about the guilt of the accused well before the verdict was delivered. The mode of execution, where Saddam Hussein was seen being executed and taunted by executioners, was an unprecedented event in the history of criminal justice and further strengthened the claim of an unfair process of the Dujali trial.

Apart from the above instances, in theory the tribunal met international standards for holding a fair trial.⁴³ The Dujali trial had a public hearing by an allegedly independent tribunal where Saddam Hussein exercised the right to retain defense counsel and call witnesses. Saddam Hussein was found guilty after all the evidence was considered and witnesses testified against him. His punishment was also consistent with the tribunal rules as well as the common practice of the country. The fact that Saddam Hussein was brought to trial without being arbitrarily detained or executed is in itself a triumph for the notion of the rule of law

39. Amnesty International, *Amnesty International deplors death sentences in Saddam Hussein trial*, <http://news.amnesty.org/index/ENGMDE140372006> (Nov. 5 2006).

40. See note 38, *supra*.

41. Iraq is a party to the International Covenant on Civil and Political Rights (ICCPR) G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976. Complete text can be found at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

42. The Statute of the Iraqi Special Tribunal, Article 14(1) (3)(a)-(g), <http://www.iraq-ihl.org/en/staute.html#>.

43. According to the UDHR (Article 10, 11), ICCPR (Article 14, 15) and ECHR (Article 6), the basic components of a fair trial include a fair and public hearing in an independent tribunal, presumption of innocence, and right to defense counsel.

in Iraq. The handling of the trial may have been unsatisfactory pursuant to today's human rights standards, but it cannot be simply labeled as an unfair trial.

IV. REPAIRING THE JUSTICE SYSTEM

*"The effective reconstruction of the justice sector requires a coherent approach that places equal emphasis on all its elements: police, prosecution, judiciary, and the correctional system."*⁴⁴

This statement, describing the reconstruction of East Timor and Kosovo, communicates the huge responsibility that the TA faced in Iraq. During political negotiations in a post-conflict environment, regular criminal activities do not necessarily cease. In the case of Iraq, there has been a significant escalation of looting, vandalizing, robbery, etc. The risk of losing valuable documents of the government or proof of abuses of the previous administration had also been high. A working criminal justice system was thus a priority from any point of view.

One of the pillars of the criminal justice system is policing. In the beginning of the occupation, the coalition forces began policing for the courts without knowing anything about the Iraqi legal system. Among their obstacles was the lack of Arabic language skill, which prevented them from collecting any information from the arrested individuals.⁴⁵ Also the procedural differences made it almost impossible for the CPA to administer policing functions properly. As one of the members of the Judicial Reconstruction Assistance Team (JRAT), a team created for assisting the CPA with the reconstruction of criminal courts in Baghdad, commented:

As far as the criminal justice system in Iraq, in March 2003 we knew it was supposed to run according to a civil law system based upon a French model codified by the Iraqi Penal code of 1969 and that criminal procedure was pursuant to the Criminal Procedure Code of 1972. What we did not know was how these laws were in fact followed."⁴⁶ To remedy many such functional problems, the CPA went about introducing

44. Hansjorg Strohmeyer, *Collapse and Reconstruction of Judicial System: The United Nations Missions in Kosovo and East Timor* 95 Am. J. Int'l L. 46, 48-93 (2001).

45. Captain Travis Hall, *From Autocracy to Democracy: The Effort to Establish Market Democracies in Iraq and Afghanistan*, 33 Ga. J. Int'l & Comp. L. 157, 157-169 (2004).

46. *Id.* at 159.

changes in the system. Several political offenses were suspended together with numerous procedural changes⁴⁷. Lack of expertise in few staff members were tackled by a three-tier approach in UNTAET. Mandatory week long training prior to appointments, ongoing trainings and monitoring through an international team of experts.⁴⁸

The challenges of reconstructing a judicial system in a conflict-ruined country are also limitless. A similar scenario is found in testimony from an East Timorese reconstruction team:

UNTAET staff members will never be able to forget the panorama of devastation that awaited them upon their arrival in East Timor: most public and many private buildings ruined and smoldering in the midst of what had once been towns and villages, now all but abandoned by their former inhabitants, cut off from transport and communication, and lacking a governmental superstructure.⁴⁹

One of the first priorities of that mission was to appoint judges and prosecutors who are free from conflicts of interest. The reconstruction team consisted of three East Timorese and two international experts and was led by an East Timorese of high moral standards. The Transitional Judicial Service Commission appointed candidates with the requisite expertise and political acceptance among the people.⁵⁰ In the absence of a working broadcasting system, the United Nations Transitional Administration in East Timor (UNTAET)⁵¹ staff distributed leaflets throughout the territory to invite applications from the citizenry.

47. CPA Order 7 of 9 June 2003 suspended many political offenses as well as capital punishment while Memo no 3 amended the code of Criminal Procedure to allow rights to accused previously unavailable under Iraqi law. For example, the right against self incrimination, the right to remain silent, the right to be represented by an attorney and others were introduced to the Iraqi legal system. See CPA/ORD/9 June 2003/07 and CPA/MEM/27 June 2004/03.

<http://www.iraqcoalition.org/regulations/index.html#Regulations>.

48. See note 43, supra at 55-56.

49. *Id.* at 50.

50. *Id.* at 53.

51. United Nation Transitional Administration in East Timor was established on 25 October 1999 to administer the territory, exercise legislative and executive authority during the transition period. It was succeeded by United Nations Mission of Support of East Timor 22 May 2002 after East Timor became an independent state. Complete description available at <http://www.un.org/peace/etimor/etimor.htm>.

The Iraqi reconstruction approach, on the other hand, turned out to be very different from any other similar cases of reconstruction. The differences in attitude may have been the result of an unclear mandate. Led by Ambassador L. Paul Bremer III, the CPA was created with the primary responsibility of reconstruction of Iraq. "The lack of an authoritative and unambiguous statement about how this organization was established"⁵² was never resolved. The mandate was to exercise powers of government temporarily during the transitional period. This included restoring conditions of stability and security, creating conditions for the Iraqi people to be able to determine their political future through restoration, and establishment of national and local institutions for representative government and facilitation of economic recovery, sustainable reconstruction, and development.⁵³ In its promulgated 12 regulations,⁵⁴ 100 orders, 17 memoranda and 13 public notices, the CPA exercised its authority as vested through the SC, sometimes going outside the sphere of its mandate. The true identity of such an institution may seem less important than its mission under the circumstances, but its long running effect is undeniable. Lack of a founding institution may have allowed the CPA officials, more specifically the Administrator, to evade accountability and face possible consequences for the mismanagement of issues.⁵⁵

Sharing his experience as CPA senior advisor to the Iraqi Ministry of Justice, John C. Williamson drew a comparison between the mandate under the United Nations Mission In Kosovo (UNMIK)⁵⁶ and the Iraq transitional authority.⁵⁷ In the case of UNMIK's justice agenda, justice and police powers were reserved to the United Nations, while management and control of the justice system was firmly within the control of the international community, much like in UNTAET. In the

52. L. Elaine Halchin, *The coalition Provisional Authority: Origin, Characteristics, and Institutional authorities*, CRS Report for Congress April 29, 2004 available at <http://www.fas.org/man/crs/RL32370.pdf>.

53. CPA/REG/16 May 2003/01 Section 1 Para 1.

54. The official CPA website defines 'Regulations' as instruments that define the institutions and authorities of the CPA; 'Orders' as binding instructions or directives to the Iraqi people that create penal consequences or have a direct bearing on the way Iraqis are regulated, including changes to Iraqi law; 'Memoranda' as expand on Orders or Regulations by creating or adjusting procedures applicable to an Order or Regulation; 'Public Notices' as the intentions of the Administrator to the public and may require adherence to security measures that have no penal consequence or reinforces aspects of existing law that the CPA intends to enforce.

55. The CPA was accountable to the Department of Defense of the United States. The UN or the Iraqi people had no authority over the institution thus no way of evaluating its performance.

56. United Nations Mission in Kosovo was established on 10 June 1999 to establish an interim civil administration in the war-torn province of Kosovo. Complete description available at <http://www.unmikonline.org/intro.htm>.

57. Daniel Bodansky, *Establishing rule of law in post conflict Iraq: Rebuilding the Justice System*, 33 Ga. J. Int'l. & Comp. L. 119, 229-244 (2004).

Iraqi situation, the mandate was very unclear and the CPA exercised full control over the system, instead of having the planned advisory role, in order to fill the power vacuum created by the fleeing of senior government officials.

Under the same ambiguous mandate, the TA went about introducing changes in the legal education system of Iraq.⁵⁸ They identified programs including improving the infrastructure of and materials available in libraries, changing outdated law school curriculums, organizing conferences about recent legal subjects, and introducing clinical legal education. Rather than concentrating on the immediate need, CPA went about changing the basic structure.

V. CONCLUSION

Considering the difficult environment in Iraq and cultural challenges faced by the TA at the beginning of its reconstruction effort, it must be hailed as a praiseworthy one. Even with its shortcomings and criticisms, the IHT can be considered as an important milestone for international criminal law. Though Saddam Hussein's trial was not a purely fair one, it also met many international standards and, as such, was not an unfair trial either. His conviction is likely to serve as a deterrent for many abusive governments around the world. International and regional experts may have played an important role in the judicial reconstruction that was essentially consistent with the mandate. In this context, I would like to present the following conclusions.

A. THE IRAQI TRIBUNAL MET THE INTERNATIONAL CRIMINAL PROSECUTION STANDARD

With its combination of international criminal law and Iraqi domestic procedure, this tribunal may serve as a model for other countries willing to deal with past violations of international humanitarian law. However, the tribunal still has some improvements to make. Abandoning the provision for capital punishment and allowing longer periods for appeal are a couple of issues that need to be revisited. Further, while the inclusion of international and regional experts added to the legitimacy of the court, the inherent problem of legitimacy of this court is precisely captured by Adel Safty:

58. Haider Ala Hamoudi, *Toward a Rule of Law Society in Iraq: Introducing Clinical Legal Education into Iraqi Law Schools*, 23 Berkeley J. Int'l L. 112, 112-136 (2005) (mentions that he went to Baghdad as a part of a team of educators sent by De Paul University's International Human Rights Law Institute (IHRLI) to reform and improve legal education).

“(The) Iraqi Governing Council has been appointed by the occupying power; it has not been elected by the people. In this sense, it cannot claim to be competent to render justice on behalf of the people of Iraq. Therefore, the criminal tribunal set up by the Iraqi Governing Council does not meet the test of “independence and impartiality.”⁵⁹

Whereas this court will have to carry the stigma even after being reestablished by the elected assembly for years to come, other countries may use the same model as a prerogative of sovereign power.

B. THE TRIAL OF SADDAM HUSSEIN DEVIATED FROM THE GOAL OF POST-CONFLICT JUSTICE

According to Bassiouni, post-conflict justice includes “how the nation responds to the systematic violations of the previous repressive regime, how it deals with the regime’s victims, and how it transforms yesterday’s tragedies into lessons for tomorrow that will enhance future deterrence and prevention.”⁶⁰ The need to address the violations of Saddam’s government was followed by establishing a Tribunal that drew upon international criminal legal jurisprudence, but fell victim to the conduct of some of the individuals involved. It is unfortunate that despite the potential to enhance social reconciliation and promote unity among Iraqi citizens, the trial of Saddam Hussein has served as an act of vengeance. Completely ignoring reparation for the victims, it only contributed to clashes between ethnic groups. Rather than addressing past wrongs, the trial created many of its own. Though it satisfied few fair trial requirements, the image of Saddam Hussein being taunted at his final moments is likely to stay in people’s minds as the legacy of the Tribunal. The trial failed to satisfy victims of the crimes as there was no initiative to address reparation or reconciliation issues. It also failed to offer justice to victims of Saddam’s other cruel campaigns, as he was executed before being held liable for all of his atrocities.

C. THE ROLE OF THE TRANSITIONAL AUTHORITY

While reconstructing the justice system, the TA acted within its authority, as it did not modify any fundamental provisions of law previously existing in the country. Though it suspended a few provisions

59. Danielle Tarin, *Prosecuting Saddam and Bungling Transitional Justice in Iraq*, 45 Va. J. Int’l L. 467, 493 (2005).

60. See note 15, *supra* at 335.

and introduced many new ones, it stayed within the recognized mandate by introducing fundamental changes in legal procedures, education, and judicial accountability which will ultimately better an independent judicial system.

In the end though, while the TA's efforts should not go unnoticed, neutral international assistance, a focused trial, and most of all, waiting for a duly elected government to set up the tribunal might have resulted in a better process for holding Saddam accountable. Iraq may have benefited from community courts or informal dispute settlement forums, as they have proved to be successful in many post-conflict environments.⁶¹ Truth commission and other reconciliation forums for victims both before the conflict and during the TA, would have served the true purpose of post conflict justice in Iraq.

61. Jennifer Widner, *Courts and Democracy in Post Conflict Transitions: A Social Scientist's Perspective on the African Case*, 95 Am. J. Int'l L. 64, 64-75 (2001) (a discussion of various African cases in which the community courts played positive roles in rebuilding the society).

