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The Iraqi Special Tribunal under International Humanitarian Law

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The creation of the Iraqi Special Tribunal in December 2003 by Iraqi authorities who were at the time under the legal occupation of the Coalition Provisional Authority marked the emergence of a new form of internationalized domestic tribunals. The Iraqis succeeded in incorporating the full range of modern crimes into their domestic codes alongside some carefully selected domestic offenses, while amending domestic procedural law in some key ways to align the process with established international law related to the provision of full and fair trials. The subsequent investigations and the beginning of trial proceedings generated major debates about the legitimacy of such a domestic forum within the context of human rights norms and the law of occupation. In particular, there was a major strand of thought from outside Iraq that the most legitimate and appropriate forum would have been an international process under the authority of the United Nations. This article examines the arguments made by the Iraqis who demanded a domestic process based on their inquisitorial model, setting them in the broader context of the emerging trends in international criminal law. Through a detailed and unique analysis of the provisions of human rights law and underlying Iraqi procedural law, it criticizes the arguments made by some that assume the illegitimacy of the tribunal under established international norms. The article provides the most detailed explanation of the law of occupation as it emerged following World War II to conclude that the establishment of the Tribunal as an independent court, and its subsequent validation by sovereign Iraqi domestic authorities, was completely valid and proper. The overarching theme of the article is that the imposition of artificial standards and the complete revocation of the preexisting Iraqi judicial structures would have created a process deemed wholly illegitimate by the Iraqi people and judiciary that would have undermined the establishment of the rule of law in Iraq. The author's personal interactions with the

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judges serve to support the conclusion that the Tribunal is capable of serving as the doorway through which the detailed body of international criminal law is introduced to the broader Arabic speaking world.

Key words

complementarity, genocide, war crimes, crimes against humanity, international humanitarian law.

I. Introduction

The people of Iraq have a legal and moral right to build a structure for the prosecution of the leading figures in the Ba'athist regime. More to the point, the judges who have risked their lives to build the rule of law in Iraq should rightfully expect the support and encouragement of the world rather than a cautious and lukewarm assurance that the civilized peoples of the world wish them the best. I was involved in the conceptual development and drafting of the Statute for the Iraqi Special Tribunal (IST), and have subsequently spent many hours with the judges and investigators of the court as they prepare to undertake their important work. I have gained a deep respect for the legal ethos and professional courage of the members of the Iraqi bar who have risked their lives and those of their families to serve the Iraqi people. My experience has convinced me that the creation of the IST is not only warranted under the existing structure of international law, but accords with the highest aspirations of those who purport to believe in the rule of law.

The creation of the IST was borne of necessity after the fall of Saddam Hussein's regime. The exercise of punitive criminal accountability pursuant to domestic laws is at the heart of our understanding of what it means to have a society built on the rule of law, which in turn makes it the *sine qua non* of true sovereignty. This principle is so essential that the pursuit of justice often becomes a focal point for the military forces deployed to a society where the legislative and judicial systems have become corrupted, replaced, or have simply collapsed under the weight of tyranny.¹ Assuming its proper role on behalf of the Iraqi people, the Interim Iraqi Governing Council made the creation of an accountability mechanism for punishing those responsible for the atrocities of the

¹ See Michael A. Newton, *Harmony or Hegemony? The American Military Role in the Pursuit of Justice*, 19 CONN. J. INT'L L., 231 (2004).