

REMEMBERING IRAQI HIGH TRIBUNAL AT THE DAWN OF THE NEW BIDEN ADMINISTRATION IN THE UNITED STATES

By: Anupam Jha*

INTRODUCTION

Close to almost two decades after the Second Gulf War in the year 2003 and a decade after the Arab uprising of 2011, global interest in events occurring in middle-east, such as deploying the coalition forces in Iraq, establishment of Iraqi High Tribunal, its role in the promotion of peace and security, rise of Islamic State of Iraq and Levant (“ISIL”), accountability for serious violations of international humanitarian law after withdrawal of U.S. forces, has not waned. At the dawn of new U.S. administration in 2021, these events must be more carefully examined, and policies must be made in light of those lessons learned. Different ethnic and religious groups of Sunnis, Shias, Kurds, Yazidis, Chaldeans, Turkmen and Assyrians lack a sense of national fraternity.¹ The government of Iraq is termed by many critics as “sectarian.”² When the coalition forces³ led by the U.S. used armed force in Iraq, it was believed that it would purge the country from a dictator who had been cruel and inhumane to his countrymen as well as any other person possessing weapons of mass destruction (“WMD”). Saddam Hussein, the then dictator-ruler of Iraq, was accused of waging war against its neighboring countries, Iran and Kuwait. He did not show any sympathy towards his own countrymen—particularly the religious sects of Kurds—nor towards Iran and Kuwait.

The high moral ground on which the coalition forces attacked Iraq was

* Professor, Law Centre-II, Faculty of Law, University of Delhi, New Delhi, India. I acknowledge the contribution of University of Delhi, University Grants Commission of India and the University of Kansas in the United States for granting me the Raman Fellowship to pursue my research interests and accomplish this work.

¹ See Tareq Y. Ismael & Max Fuller, *The Disintegration of Iraq: The Manufacturing and Politicization of Sectarianism*, 2 INT’L J. CONTEMP. IRAQI STUD. 443, 443–45 (2008).

² *Id.* at 443; see also Andrew Flibbert, *The Consequences of Forced State Failure in Iraq*, 128 POL. SCI. Q. 67 (2013); Ahmed K Al-Rawi, *The U.S. Influence in Shaping Iraq’s Sectarian Media*, 75 INT’L COMM’N GAZETTE 374 (2013).

³ This group consisted of the U.K., Australia, Poland, and local Kurdish ‘Peshmerga.’ See OPERATION IRAQI FREEDOM: DECISIVE WAR, ELUSIVE PEACE 1–8 (Walter L. Perry, Richard E. Darilek, Laurinda L. Rohn & Jerry M Sollinger eds., 2015).

shaken when some of the members of their own armed forces committed serious breaches of rules of engagement, and later the rules of occupation. Above all, the establishment of Iraqi High Tribunal ("IHT") in 2003, its quick selection of prosecutrix, the decision to hang Saddam and his close aids, the crimes committed by the coalition forces during Iraqi occupation and their non-accountability proved to be catalytic causes of domestic unrest. Most of the earlier Sunni veterans of Saddam era became enraged by the public execution and they have, as a result, joined hands with the Al-Qaeda ("AQ") and the Islamic State of Iraq and Syria ("ISIS") against the new political regime dominated by the Kurds and Shias.⁴ Since 2003, it is estimated that around 4,800 members of U.S. led coalition armed forces, and almost 180,000 Iraqis died in the fighting (majority of them Sunnis).⁵ On the cost of the Iraq war there is no unanimity, as according to one source, the cost is estimated to be about 800 billion USD, others suggesting higher.⁶ Insurgency hit the country after the Syrian Civil War and the so called "Arab Spring."⁷ In light of these recent events, I evaluate the brutal atrocities committed during Saddam Hussein's regime, the role of IHT in meting out justice to the victims of Saddam's inhumane acts, the crimes committed by the coalition forces during their stay in Iraq and the possible acts of inhumanity committed by the fundamentalist forces after the withdrawal of coalition forces. It also examines whether the establishment of IHT established a universal paradigm of international criminal law and justice. Lastly, the lessons for the new administration in the U.S. are highlighted, and it is urged that this administration formulate policies in Iraq in a better way.

In doing so, this article is divided into six parts. The first part deals with "Serious Breaches of international humanitarian law ("IHL") and international criminal law ("ICL") by Saddam Hussein's Regime." It examines the results of Saddam Hussein's aggressive acts against Iran and Kuwait and the use of illegitimate means of warfare. The second part deals with "Grave Breaches of Norms during Gulf War II and Allied Occupation." In this part, the breaches of international obligations on the part of both sides of the conflict are examined.

⁴ Hussain Abdul-Hussain & Lee Smith, *On the Origin of ISIS*, HUDSON INST. (Sept. 2, 2014), <https://www.hudson.org/research/10584-on-the-origin-of-isis> [<https://perma.cc/6CUT-4TRJ>]; see Patrick J. Ryan, *Revisionist Islam*, AMERICA (Nov. 12, 2014), <https://www.americamagazine.org/issue/revisionist-islam> [<https://perma.cc/4J7H-P5LR>].

⁵ *Total Violent Deaths Including Combatants, 2003-2013*, IRAQ BODY COUNT, <https://www.iraqbodycount.org/analysis/reference/announcements/5/> [<https://perma.cc/4X88-4PM7>].

⁶ See Jane Arraf, Andrew Bacevich, Zainab Salbi, Ahmed Fadaam & James Zogby, *The Iraq War is Over. Now What?* (Jason M. Breslow ed. 2013), <https://www.pbs.org/wgbh/frontline/article/the-iraq-war-is-over-now-what/> [<https://perma.cc/CCH2-QHBR>] for additional information. See also Linda J. Bilmes, *The Financial Legacy of Iraq and Afghanistan* 1-2 (Harv. Kennedy Sch. Fac. Rsch. Working Paper Series, Paper No. RWP13-006, 2013). For a discussion on the cost of the Iraq War, see Youssef Bassil, *The 2003 Iraq War: Operations, Causes, and Consequences*, 4 IOSR J. HUMANS. & SOC. SCI. 29, 29 (2012).

⁷ 'Arab Spring' refers to a series of rebellions by individuals and groups against tyranny and oppression in Tunisia, Egypt, Libya, Yemen, and Syria. For further details, see Jordan J. Paust, *International Law, Dignity, Democracy, and the Arab Spring*, 46 CORNELL INT'L L. J. 1, 1 (2013).

The third part deals with “Creation of IHT and Independence from Other Organs of State.” In this part, the contrast between the ideals and realities of IHT and the manner in which it was being run by the coalition forces for a long time has been examined. It further examines how the IHT was independent from other organs of the Government. Part Four deals with “Compromising Fair Procedure,” which examines whether the procedures set for the tribunal, were fair and reasonable. The fifth part deals with “Norms for International Criminal Court and IHT: Different Tunes?”. In the wake of the establishment of International Criminal Court, the norms of international criminal law have become universal. This part examines whether the norms laid down for the Iraqi tribunal were different from the universal norms. The sixth part deals with the question of accountability after 2006 and the lessons for the new U.S. administration. It examines whether the Iraqi government, formed after the complete withdrawal of the occupation forces, addresses the issue of justice for heinous crimes committed by the extremist groups or not.

I. SERIOUS BREACHES OF IHL & ICL BY SADDAM HUSSEIN’S REGIME

The Iraq of today has gained a notorious reputation as a place of inter-sect rivalries and the rise of ISIL, but that was not the case during the ancient times of its history. Major parts of this country were the place where the first known human civilization of the world, namely, Mesopotamian civilization, was recorded.⁸ The famous story of *Arabian Nights* is also set up in the backdrop of today’s Iraqi capital city of Baghdad. Many early cultures and cities—Sumeria, Akkadia, Assyria, Babylon, Ur, and Nineveh—were established in Iraq known as the “land of the two rivers of Tigris and Euphrates.”⁹ Its legal tradition goes back to one of the world’s oldest codifications, the Code of Hammurabi, promulgated some 3,770 years ago.¹⁰ The famous retaliatory rule, *inter alia*, of punishment was “[e]ye for eye, tooth for tooth, limb for limb” and was laid down in this Code.¹¹ In the late-medieval period of its history, the “Ottomans were responsible for the emergence of the Sunni Arabs [a major sect of Islam] as the dominant political community in Mesopotamia.”¹²

Transitioning into the modern period with the discovery of mineral oil and petrol in the early twentieth century, Iraq was indirectly administered after the First World War by Britain from 1922 to 1932 under the mandate of the League of Nations.¹³ Great Britain had obtained a good deal of oil concessions from Iraq

⁸ Laurie King-Irani, *Iraq: A Look Back*, 51 ORBIS 91, 93–94 (2007).

⁹ MICHAEL EPPLE, *IRAQ FROM MONARCHY TO TYRANNY* 1 (2004).

¹⁰ Claude Hermann Walter Johns, *Babylonian Law – The Code of Hammurabi*, in ENCYC. BRITANNICA, 1910–11 (11th ed.), <https://avalon.law.yale.edu/ancient/hammpre.asp> [https://perma.cc/4NK2-MRP5]; THE CODE OF HAMMURABI KING OF BABYLON. 10–97 (Robert Francis Harper trans., 2d ed. 1904).

¹¹ Johns, *supra* note 10.

¹² AHMED S. HASHIM, *IRAQ’S SUNNI INSURGENCY* 15 (Tim Huxley ed. 2009) (alteration in original).

¹³ Daniel Silverfarb, *The Revision of Iraq’s Oil Concession, 1949-52*, 32 MIDDLE E. STUD. 69, 69 (1996).

and the neighboring Iran (hereinafter 'the Arabs'). They controlled not only the oil fields, but Britain also controlled its railways and air routes. It conciliated the Arabs by entrusting Iraq to Prince Faisal of Hashemite dynasty, a Sunni.¹⁴ However, this dynasty did not continue even for half a century and the control of Great Britain was substantially over after the Second World War. The Hashemite dynasty was toppled in 1958 by a bloody military *coup*. Thereafter, a spate of *coups* occurred in 1963 and 1968 with the tacit support of the erstwhile U.S.S.R. During the latter *coup*, Saddam Hussein, a Sunni Arab, was head of the security forces and was later elevated to become the Vice President. In 1979, he took over the presidency after Ahmed Hassan Al-Bakr resigned.¹⁵ He started to eliminate all opposition in his Ba'ath Party gradually by killing many of them and replacing them with his trusted relatives and other aides.¹⁶ He entrusted Ibrahim al-Tikriti—his half-brother—with running the intelligence service, the 'Mukhabarat.' To placate the Kurds and Shias, he offered some vital posts to them. For example, he placated the Kurds by giving the post of Vice President to Taha Muhie-eldin Marouf and later to Taha Yasin Ramadan al-Jizrawi.¹⁷

Saddam's Ba'athist regime was marked by wars of aggression against Iran in 1980, which lasted until 1988, and by occupation of Kuwait from August 1990 until February 1991. It is a well-known fact that the U.S. had supported Iraq in its war against revolutionary Iran.¹⁸ Even when it was alleged by Iran that Iraq had used chemical weapons in the war, the U.S. kept quiet and supported Iraq before the United Nations Security Council.¹⁹ Acquiescence by the U.S. emboldened Saddam Hussein to import chemicals which could be useful in the manufacture of chemical weapons. In fact, dual-use chemicals were supplied by many western nations, including some U.S. companies to Iraq.²⁰

One such case filed in the Dutch court reveals this fact in a clear way. In this case, a Dutch businessman was convicted of complicity in war crimes for shipping more than 1,100 tons of thio-diglycol (which is used to produce

¹⁴ CARLTON J.H. HAYES, *CONTEMPORARY EUROPE SINCE 1870* 493 (3d prtg. 1961).

¹⁵ Al-Bakr later died under mysterious circumstances. CHARLES TRIPP, *A HISTORY OF IRAQ* 213–14 (3d ed. 2007).

¹⁶ SAÏD K. ABURISH, *SADDAM HUSSEIN: THE POLITICS OF REVENGE* 170, 176 (2000).

¹⁷ Kurds were promised independence by Britishers according to Article 64 of the Treaty of Sèvres, 1920. This promise remained unfulfilled even when Saddam Hussein came to power. Taha Muhie-eldin Marouf and Taha Yasin Ramadan al-Jizrawi were prominent Kurdish leaders of the Ba'ath Party whom Saddam Hussein trusted. Vernon Loeb, *Hussein Defenders Seen As Hard Corps Loyalists*, WASH. POST (Nov. 17, 2002), <https://www.washingtonpost.com/archive/politics/2002/11/17/hussein-defenders-seen-as-hard-corps-loyalists/dcf7b047-d59f-4dfc-adb7-c4606dadf16a/> [https://perma.cc/QY49-ZHVE].

¹⁸ *Shaking hands with Saddam Hussein: The U.S. Tilts Towards Iraq, 1980-1984*, NAT'L SEC. ARCHIVE (Feb. 25, 2003), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB82/> [https://perma.cc/N46V-V6AT]; see MARK PHYTHIAN, *ARMING IRAQ* 32–53 (1997) for a deeper look at the United State's involvement with Iraq.

¹⁹ See *Chemical Warfare, 1983-1988*, BBC, http://news.bbc.co.uk/2/shared/spl/hi/middle_east/03/v3_iraq_timeline/html/chemical_warfare.stm [https://perma.cc/YFA2-DV65].

²⁰ Keith F. Girard, *Iraqi Terror: Made in the U.S.A.* (1990), reprinted in 76 BUS. & SOC'Y REV. 16, 16–17 (2001).

mustard gas) from a U.S. company to Iraq.²¹ Chemical weapons were used in the Iraq-Iran war and also in the *Al-Anfal* (the spoils of war) campaign in 1988 against the Iraqi Kurds under the leadership of Saddam Hussein and Ali Hasan al-Majid (nicknamed ‘Chemical Ali’).²² Several other cases, including some class action suits, have been filed in the U.S. itself recently against such companies which supplied the chemical thiodiglycol (TDG) to Saddam’s regime.²³ The *Al-Anfal* campaign resulted in killing thousands of Kurds and displacing around 200,000.²⁴ This campaign marks one of the most brutal actions in Iraq’s modern history and had a profound demographic, economic and psychological impact on the Kurdish area.²⁵

Other heinous crimes committed during Saddam Hussein’s regime which attracted wide international attention were *Al Dujail* and *Halabja* massacres during the *Al-Anfal* campaign in the fateful years of 1988. *Al Dujail* campaign was directed against the rebel Kurds of northern Iraq who had been sympathetic to Iran during the Iran-Iraq war and were struggling for their own Kurdish land, called ‘Kurdistan,’ under the competing leadership of Jalal Talabani and Masud Barzani. Saddam Hussein sent his cousin ‘Chemical Ali’ to the area with air and ground forces, as the area was vital to protect Iraq’s oil going into the hands of Kurd rebels. In that campaign, Saddam had even permitted the use of poisonous gases against not only the rebel Kurds, but also against the innocent local civilian population of the area. It is estimated that at least 50,000 people were killed during this campaign as many mass graves have been found as proof.²⁶

Halabja, a Kurdish town near Iranian border, experienced the brunt of Saddam’s efforts to silence all rebels organized by Kurd leaders Jalal Talabani and Masud Barzani. He permitted the use of poisonous gases—such as mustard gas, sarin, and VX nerve agent—on the rebels, and as a result even the civilians, who had no links with the Kurdish rebels, became its victims. In that campaign at least 5,000 people died.²⁷ Many regional scholars had referred to these incidents as ‘genocide’ committed by Ba’ath leadership against Kurds.²⁸ All

²¹ Alex Bollfrass, *Iran-Iraq Chemical Warfare Aftershocks Persist*, 37 ARMS CONTROL TODAY 27, 27 (2007).

²² *Public Prosecutor v. Frans Cornelis Adrianus van Anraat*, INT’L CRIMES DATABASE, <http://www.internationalcrimesdatabase.org/Case/178/Van-Anraat/> [https://perma.cc/R97P-QRYE].

²³ *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 389 (2011); see *Alarcon v. Alcolac, Inc.*, 488 S.W.3d 813, 816 (2016); *Coleman v. Alcolac, Inc.*, 888 F.Supp. 1388, 1394 (1995).

²⁴ See *Al Anfal*, INT’L CRIMES DATABASE, <http://www.internationalcrimesdatabase.org/Case/1233/Al-Anfal/> [https://perma.cc/H46M-CSY8]; *Introduction*, HUMAN RIGHTS WATCH, <https://www.hrw.org/reports/1993/iraqanfal/ANFALINT.htm> [https://perma.cc/TLJ7-69B8].

²⁵ PHEBE MARR, *The Saddam Hussein Regime*, in THE MODERN HISTORY OF IRAQ 199 (3d ed. 2012).

²⁶ HUM. RTS. WATCH, GENOCIDE IN IRAQ: THE ANFAL CAMPAIGN AGAINST THE KURDS 16 (1993).

²⁷ *Whatever Happened to the Iraqi Kurds?*, HUM. RTS. WATCH (Mar. 11, 1991), <https://www.hrw.org/report/1991/03/11/whatever-happened-iraqi-kurds> [https://perma.cc/9UR3-XZ4S].

²⁸ Refiq Siwani, *Zarawe-i-Enfal-u Enfal-I Kurd-u karigeriyekan* [The Anfal Concept, the Anfalization of the Kurds and Its Effects], *Hawar-i-Enfal* (2002); Marruf Omer Gul, *Cinosayd-I gel-I kurd leber rosnayi-I yasa-I taze-I newdewl eta-da*, [The genocide of the Kurdish people in the

these horrific events took place with the tacit support of the U.S. as the whole UN efforts to adopt a resolution against Iraq failed due to veto exercised by the U.S.²⁹ In these two campaigns, many experts have commented that grave breaches of IHL and ICL were committed by the Saddam Hussein led armed forces—such as crimes against humanity, war crimes, genocide and crime of aggression.³⁰ Remarkably, the atrocities were committed by Hussein's regime and the U.S. government shut its mouth to the incidents until the Iran-Iraq war. Only after Iraq-Kuwait war did the position of the U.S. change *vis-à-vis* the Iraqi government.³¹ If the U.S. had acted at that time and brought leverage of the UN's actions against Iraq, the audacious acts of Saddam could have been stopped. Inaction by the U.S. at that time encouraged Saddam, who exploited the situation to the hilt.

II. GRAVE BREACHES OF NORMS DURING GULF WAR II AND ALLIED OCCUPATION

September 11, 2001 marked a turning point in global and national consciousness of the United States' role in combating terrorism in the world.³² President George W. Bush's response in the aftermath of the Pentagon and the World Trade Centre attacks was to declare a "war against terrorism" and a "monumental struggle of good versus evil."³³ According to T.F. Tung, "[b]y not equating these 'acts of terror' with international criminal activity, but instead elevating them to the status of a 'war'," ³⁴ President George W. Bush set the United States as a nation against a small band of enemies located possibly anywhere.³⁵ In describing the global framework of the war on terrorism, the President labeled the enemy, in his 2002 State of the Union address, as a new "axis of evil" comprising Iran, Iraq and North Korea.³⁶

light of new international law] Amsterdam: Midiya (1997)

²⁹ See JOOST R. HILTERMANN, A POISONOUS AFFAIR: AMERICA, IRAQ, AND THE GASSING OF HALABJA 126–28 (2007).

³⁰ See generally Choman Hardi, *The Anfal Campaign Against the Kurds: Chemical Weapons in the Service of Mass Murder*, in FORGOTTEN GENOCIDES (René Lemarchand ed. 2011); see HANNIBAL TRAVIS, GENOCIDE IN THE MIDDLE EAST 389 (2010); Michael A. Newton, *The Anfal Genocide: Personal Reflections and Legal Residue*, 40 VAND. J. TRANSNAT'L L. 1523, 1527 (2007).

³¹ K.T. Thomas, *The U.S., Iraq and Oil Politics*, 67 PROC. INDIAN HIST. CONG. 901, 905 (2006–2007).

³² See generally PHILIP BOBBITT, TERROR AND CONSENT (2008); PARAG KHANNA, THE SECOND WORLD (2008); FAREED ZAKARIA, THE POST-AMERICAN WORLD (2008).

³³ *Text of Bush's Act of War Statement*, BBC (Sept. 12, 2001), <http://news.bbc.co.uk/2/hi/americas/1540544.stm> [<https://perma.cc/FR2K-3UXG>].

³⁴ Though not a formal declaration of war, a joint resolution was passed nearly unanimously by Congress (with one dissenting vote in the House), three days after 9/11, which authorized the President "to use all necessary and appropriate force . . . in order to prevent any future acts of international terrorism against the United States." Toy-Fung Tung, *Just War Claims: Historical Theory, Abu Ghraib, and Transgressive Rhetoric*, in INTERNATIONAL CRIMINAL JUSTICE 33, 35 n.6 (George Andreopoulos, Rosemary Barberet, James P. Levine eds., 2011).

³⁵ *Id.* at 35.

³⁶ George W. Bush, President, U.S., 2002 State of the Union Address (Jan. 29, 2002) (transcript available at <https://www.washingtonpost.com/wp-srv/onpolitics/transcripts/sou012902.htm>)

Joseph R. Biden, the Chairman of the Committee on Foreign Relations for the then Democratic-majority U.S. Senate called for a meeting which set ground for the war against Iraq in 2002. The ‘Hearings to Examine Threats, Responses, And Regional Considerations Surrounding Iraq’ had several notable oppositions to war, however comments from the Chairman steered the committee in the opposite direction. “In my judgment, President Bush is right to be concerned about Saddam Hussein’s relentless pursuit of weapons of mass destruction,” Biden said, “and the possibility that he may use them or share them with terrorists.”³⁷ He said that such resolution would be a march to peace and security.³⁸ On October 11 2002, seventy-seven senators of the U.S. Congress approved the then-President George W. Bush’s sweeping request to authorize military action against Saddam Hussein. Joe Biden, now president, was one of those 77 senators.

The decision to attack Iraq was a consequence of September 11th attacks. Iraq was linked with possessing WMDs³⁹ and it was feared that Saddam Hussein would likely to give WMDs to Al-Qaeda.⁴⁰ President Bush put it in a speech delivered in 2003 in Fort Hood, Texas:

The Iraqi regime has used weapons of mass destruction. They not only had weapons of mass destruction, they used weapons of mass destruction. They used weapons of mass destruction in other countries, they have used weapons of mass destruction on their own people. That’s why I say Iraq is a threat, a real threat.⁴¹

“Operation Iraqi Freedom”(euphemism for Iraqi invasion), or the second Gulf war of 2003 between the coalition forces (consisting of the U.S., U.K., Spain, Portugal, Australia, Denmark, the Netherlands, and Poland) and Iraq lasted just for twenty-one days from March 20 to April 9.⁴² Saddam Hussein’s long rule over Iraq came to a sudden end as he could not offer strong resistance, although the coalition forces feared the possibility of the use of WMDs.⁴³ As a result, the coalition forces established themselves on firm footing quickly and decided to occupy Iraq for a considerable time so that the transition government,

[<https://perma.cc/FVB2-QYEZ>].

³⁷ *Hearings to Examine Threats, Responses, And Regional Considerations Surrounding Iraq*: 107-658 *Hearing Before the S. Comm. on Foreign Rels.*, 107th Cong. 4 (2003) (statement of Sen. Joseph R. Biden, Chairman, S. Comm. on Foreign Rels.).

³⁸ *See id.* at 25.

³⁹ Weapons of Mass Destruction mean principally nuclear weapons, though increasingly biological and chemical weapons

⁴⁰ Tung, *supra* note 34 at 36.

⁴¹ George W. Bush, President, U.S., President Rallies Troops at Fort Hood (Jan. 3, 2003) (transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2003/0120030103.html> [<https://perma.cc/C7QB-WSET>]).

⁴² JOHN KEEGAN, *THE IRAQ WAR* 2 (1st ed. 2004); See generally STEPHEN A. CARNEY, *ALLIED PARTICIPATION IN OPERATION IRAQI FREEDOME* (2011), https://history.army.mil/html/books/059/59-3-1/CMH_59-3-1.pdf (last visited Sept. 6, 2021) for a detailed look of all thirty seven countries apart of the coalition forces.

⁴³ 1 *THE U.S. ARMY IN THE IRAQ WAR* 248 (Joel D. Rayburn, Frank K. Sobchak eds., 2019).

favorable to U.S. and allies, could be formed. This occupation of Iraq lasted for nine long years when the troops of the coalition forces were gradually withdrawn starting in 2011.⁴⁴ However, the latest war and subsequent occupation of Iraq resulted in grave breaches of modern international humanitarian and criminal law. Many scholars of the subject have skirted around this issue and have focused upon the crimes committed only during Saddam Hussein's regime. In this section, I have attempted to examine the other part of the story which needs to be researched.

Firstly, the legality of the Iraq war is itself questionable.⁴⁵ To the liberal internationalists, preserving the legal authority and moral credibility of the UN as the principal forum for ensuring peace and security remains paramount.⁴⁶ Unilateral action taken by an individual State or by a group of States with the self-proclaimed objective of ensuring international peace and security is not permissible, except for self-defense under the Charter of the UN.⁴⁷ To the neo-conservatives (hereinafter "neo-cons"), unilateral action is considered good and progressive for the reason that it does not prevent the principles of the UN to confront them.⁴⁸ Neo-cons have been the pushing force behind American President George W. Bush and British Prime Minister Tony Blair's unilateral acts on Iraq, even without the specific sanction of the UN Security Council.⁴⁹ They argue that the UN's Security Council permitted taking action against Iraq by its earlier resolutions in the aftermath of the First Gulf War and its violations by Iraq, in particular resolution relating to WMD.⁵⁰

Liberals have not accepted the arguments of neo-cons and they are critical of use of force in Iraq without UN assent.⁵¹ They deny that the use of force was essential even in the exercise of the right to anticipatory self-defense as the test laid down by the liberal institutions, like the International Court of Justice, for the use of force in anticipatory self defense was not satisfied.⁵²

⁴⁴ LLOYD J. AUSTIN, *THE IRAQ WAR 2003-2011: OPERATION IRAQI FREEDOM 2003 – OPERATION NEW DAWN 2011*, at 154-55 (2012).

⁴⁵ Thomas Mertens & Janine van Dinther, *Whose International Order? Which Law?*, 42 NETH. Y.B. INT'L L. 123, 125 (2011). *See also*, David Fisher & Nigel Biggar, *Was Iraq an Unjust War? A Debate on the Iraq War and Reflections on Libya*, 87 ROYAL INST. INT'L AFFS. 687, 687 (2011).

⁴⁶ WILLIAM SHAWCROSS, *ALLIES: THE U.S., BRITAIN, EUROPE AND THE WAR IN IRAQ* 218 (2004).

⁴⁷ U.N. Charter art. 2, ¶ 4 (prohibits the use of force against the territorial integrity and political independence of the State).

⁴⁸ *See generally* FRANCIS FUKUYAMA, *AFTER THE NEOCONS: AMERICA AT THE CROSSROADS* (2006); *see* PETER BEINART, *THE GOOD FIGHT: WHY LIBERALS – AND ONLY LIBERALS – CAN WIN THE WAR ON TERROR AND MAKE AMERICA GREAT AGAIN* 194 (2006).

⁴⁹ Mohammed Nuruzzaman, *Beyond the Realist Theories: "Neo-Conservative Realism" and the American Invasion of Iraq*, 7 INT'L STUD. PERSPS. 239, 247-48 (2006).

⁵⁰ John C. Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563, 567 (2003); *see also* S.C. Res. 660 (Aug. 2, 1990); S.C. Res. 678 (Nov. 29, 1990); S.C. Res. 1441 (Nov. 8, 2002).

⁵¹ Ronald C. Kramer & Raymond J. Michalowski, *War, Aggression and State Crime*, 45 BRIT. J. CRIMINOLOGY 446, 448 (2005).

⁵² IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 746 (7th ed. 2008); *see also*, The Caroline Case, 29 British Forces and Foreign Affairs Papers (1840-41) 1137-38; Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. (Nov. 6); *Iraq War Illegal, says Annan*, BBC NEWS (Sept. 16, 2004), http://news.bbc.co.uk/2/hi/middle_east/3661134.stm [<https://perma.cc/VW7C-4FX8>].

Amidst this debate between liberals and neo-cons, Willibrord Davids Inquiry Report was published in the Netherlands in early 2010.⁵³ Justice Davids, retired Supreme Court judge of the Netherlands, was the chairperson of the special committee of inquiry constituted by the Prime Minister of the Netherlands Jan-Peter Balkenende. His report clearly mentioned that the UN resolutions prior to the outbreak of war gave no authority to the invasion.⁵⁴ The report concluded that the wording of Resolution 1441 could not be reasonably interpreted (as the Dutch Government did) as authorizing individual Member States to compel Iraq to comply with the Security Council's resolution, without authorization from the Security Council. It did not justify the military support lent by the Dutch government to the U.S. and U.K. on the basis that the intelligence report was cross verified.⁵⁵ This report came at a time when Chilcot Inquiry Commission had begun in the U.K.⁵⁶ The findings of the Davids Commission caused serious implications for the U.K., as it raised questions about the use of intelligence about WMD. With regard to the information provided by the intelligence services and the international weapons inspection reports, the Davids Report had concluded that neither the AIVD (General Intelligence and Security Service) nor MIVD (Military Intelligence and Security Service) possessed any amount of independently sourced information about Iraq's WMD program.⁵⁷

Before constituting the Chilcot Inquiry Commission, the British government promised to protect America's interests by putting measures in place.⁵⁸ This inquiry was established in the year 2008 to provide the definitive verdict on the U.K.'s role in the 2003 war, covering critical questions over whether Prime Minister Tony Blair had legitimate grounds to go to war. The last hearing of the Committee was concluded in 2011. It is reported that the then Mr. Blair took the U.K. to war in support of the U.S. despite contrary advice tendered by Attorney General Lord Goldsmith.⁵⁹

⁵³ See generally Tanja E. Aalberts, *Forging International Order: Inquiring the Dutch Support of the Iraq Invasion*, 42 NETH. Y.B. INT'L L. 139 (2011).

⁵⁴ Afua Hirsch, *Iraq Invasion Violated International Law, Dutch Inquiry Finds*, GUARDIAN (Jan. 12, 2010), <https://www.theguardian.com/world/2010/jan/12/iraq-invasion-violated-international-law-dutch-inquiry-finds> [https://perma.cc/XKB6-34T6].

⁵⁵ See generally Aalberts *supra* note 53; Mertens *supra* note 45.

⁵⁶ Simon Hooper, *UK 'seeks closure' on Iraq as Blair faces Scrutiny*, CNN (Jan. 29, 2010), edition.cnn.com/2010/WORLD/Europe/01/28/uk.iraq.inquiry.chilcot/index.html [https://perma.cc/GH5G-X88V].

⁵⁷ "Conclusions of the Committee of Inquiry on Iraq," Permanent Mission of the Kingdom of the Netherlands to the United Nations, <http://netherlandsmission.org/article.asp?articleref=AR00000874EN>; Afua Hirsch, *Iraq Invasion Violated International Law, Dutch Inquiry Finds*, GUARDIAN (Jan. 12, 2010), <https://www.theguardian.com/world/2010/jan/12/iraq-invasion-violated-international-law-dutch-inquiry-finds> [https://perma.cc/ZHN4-WCYX].

⁵⁸ *Wiki-Leaks Cable Reveals Secret Pledge to Protect U.S. at Iraq Inquiry*, GUARDIAN (Nov. 30 2010), <https://www.theguardian.com/world/2010/nov/30/wikileaks-chilcot-iraq-war-inquiry> [https://perma.cc/M6SH-7YZQ].

⁵⁹ James Cusick, *Chilcot Report Into Iraq Conflict Will Not Be Released Until 2014 as David Cameron Echoes Tony Blair with 'Moral Case' for War*, INDEPENDENT (Aug. 28, 2013),

Charges are leveled against the coalition forces that they used cluster bombs during the invasion of Iraq. During the initial invasion of Iraq in March and April 2003, the use of cluster bombs was widespread, even in the civilian areas. By their very nature, these bombs are indiscriminate weapons, not able to distinguish between civilians and combatants. A *U.S.A. Today* four-month study showed that the U.S. dropped or fired nearly 11,000 cluster bombs or cluster weapons during the invasion, containing between 1.7 and 2 million bomblets.⁶⁰ Britain used 2,000 more.⁶¹ On March 31, 2003, 48 people were killed, including many children, and more than 300 injured in a cluster bomb attack at *Al Hilla*, 80 kilometres south of Baghdad.⁶² A journalist from England reported from a Hilla hospital:

Among the 168 patients I counted, not one was treated for bullet wounds. All of them, men, women, children, bore the wounds of bomb shrapnel. It peppered their bodies. Blackened the skin. Smashed heads. Tore limbs . . . [A doctor reported that] 'All the injuries you see were caused by cluster bomb . . . The majority of the victims were children who died because they were outside.'⁶³

When the Office of the Prosecutor ("OTP") of the International Criminal Court received more than two hundred applications regarding commission of war crimes and crimes against humanity by the coalition forces in Iraq during the second Gulf war, it could not make any determination to proceed further for investigation into these crimes.⁶⁴ Non-determination of any grave breaches of IHL and ICL lowered the public image of OTP in view of the fact that the war correspondents witnessed *Abu Ghraib* prison abuse (2003-06) in Iraq committed by the coalition forces⁶⁵, Fallujah massacre (2004), Haditha massacre (2005), Operation Iron Triangle and its effects on civilians (2006).

In October 2003, pictures of U.S. military police forces scandalously mistreating Iraqi detainees at the *Abu Ghraib* prison near Baghdad were

<https://www.independent.co.uk/news/uk/politics/exclusive-chilcot-report-iraq-conflict-will-not-be-released-until-2014-david-cameron-echoes-tony-blair-moral-case-war-8788203.html> [https://perma.cc/3YUZ-8D2X]. See also REPORT OF A COMMITTEE OF PRIVY COUNSELLORS, THE REPORT OF THE IRAQ INQUIRY (2016).

⁶⁰ Paul Wiseman, *Cluster Bombs Kill in Iraq, Even After Shooting Ends*, GLOB. POL'Y F. (Dec. 16, 2003), <https://archive.globalpolicy.org/component/content/article/168-general/37793.html> [https://perma.cc/CN9W-GDN3].

⁶¹ *Id.*

⁶² Chris Doran & Tim Anderson, *Iraq and the Case for Australian War Crimes Trials*, 42 CRIME, L. & SOC. CHANGE 283, 290 (2011).

⁶³ Anton Antonowicz, *Inside Babylon General Hospital*, COUNTERPUNCH (Apr. 3, 2003), <https://www.counterpunch.org/2003/04/03/inside-babylon-general-hospital/> [https://perma.cc/BQ2K-8AH3].

⁶⁴ Golzar Kheiltash, *Ocampo Turns Down Iraq Case: Implications for the U.S.*, GLOB. POL'Y F. (Feb. 2006), <http://teachers.colonelby.com/krichardson/Grade%2012/Carleton%20-%20Int%20Law%20Course/Week%2012/OcampoTurnsDownIraqCase.pdf> [https://perma.cc/6ZTE-H2PC].

⁶⁵ Eric Umansky, *How American Journalists Covered Torture After 9/11*, COLUMBIA JOURNALISM REV. (Sept. 7, 2014), https://archives.cjr.org/feature/failures_of_imagination.php [https://perma.cc/Q3JE-DRT7].

published all over the world. Another prisoner abuse report came from Camp Bucca, in south east Iraq, in 2003.⁶⁶ In the *Abu Ghraib* detention centre in Iraq all kinds of possible abuses of detainees by the coalition forces were committed, such as rape of female prisoners and torture of male detainees which may amount to war crimes.⁶⁷ Photographs of the soldiers of the U.S.'s 320th Military Police Battalion stationed inside *Abu Ghraib* torturing the detainees were not fully published, yet some of them, which were published, reflected the functioning style of the world's top professional army. According to several requests filed under U.S.'s Freedom of Information Act, it has been found that the torture techniques—such as waterboarding, use of dogs, hooding prisoners, etc.—were authorized by the commanders, who in turn were given permission by Executive Order by the Department of Defense.⁶⁸

The inquiry conducted by Major General Antonio Taguba confirmed these allegations leveled by Amnesty International and Human Rights Watch.⁶⁹ Those commanders and civilian officials, who were actually responsible for the torture, could not be convicted for the lack of sufficient evidence, except Colonel Karpinski whose rank was lowered and was reprimanded.⁷⁰ However, only eleven “rotten soldiers” were convicted with punishment in the U.S., out of which only one was sentenced to ten years in prison, while others were punished with small fines or small jail terms.⁷¹ Later, Karpinski commented in her book that she was kept out of the decision-making loop and that she was made a scapegoat.⁷² The commanders and civilian officials cannot be prosecuted by the International Criminal Court either because the United States has concluded many bilateral agreements providing immunity to their armed forces.⁷³ Such an impunity enjoyed by the violators of international humanitarian and criminal law is unwarranted, especially when they belong to those nations where there has been a predominance of responsible people, lawmakers, and enforcement personnel.

Torture techniques were also employed at Camp Bucca detention facility in southeast Iraq. Not only was the facility over-crowded with the detainees, but

⁶⁶ *Chronology of Abu Ghraib*, WASH. POST (Feb. 27 2006), <https://www.washingtonpost.com/wp-srv/world/iraq/abughraib/timeline.html> [<https://perma.cc/CMY5-ASVV>].

⁶⁷ *United States, The Taguba Report*, INT'L REV. RED CROSS, <https://casebook.icrc.org/case-study/united-states-taguba-report>.

⁶⁸ See James Ross, *Black Letter Abuse: The U.S. Legal Response to Torture Since 9/11*, 89 INT'L REV. RED CROSS 561, 567, 572, 587 (2007); See generally RYAN ASHLEY CALDWELL, *FALLGIRLS: GENDER AND THE FRAMING OF TORTURE AT ABU GHRAIB* (2012).

⁶⁹ U.S. DEP'T OF THE ARMY, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 9 (2004).

⁷⁰ *Bush Demotes Officer-in-charge of Abu Ghraib*, CNN (Mar. 6, 2005), edition.cnn.com/2005/U.S./05/05/abu.ghraib/index.html (last visited Sept. 6, 2021).

⁷¹ Josh Dougherty, *When Victimless Crimes Matter and Victims Don't: The Trial of Bradley Manning*, IRAQI BODY COUNT (Aug. 2, 2013), <http://www.iraqbodycount.org/analysis/beyond/bradley-manning-verdict/> [<https://perma.cc/R2SY-9DJ4>].

⁷² JANIS KARPINSKI & STEVEN STRASSER, *ONE WOMAN'S ARMY: THE COMMANDING GENERAL OF ABU GHRAIB TELLS HER STORY* 37 (2005).

⁷³ Rome Statute of the International Criminal Court art. 98, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute of ICC].

the military police stationed at the Camp-during interrogation—battered the detainees to the extent that one detainee’s nose was broken.⁷⁴ Some of the military personnel physically assaulted the detainees whom they were guarding, and some locked eight detainees in a cell that had been covered with pepper spray.⁷⁵ Six of these U.S. soldiers were charged for allegedly abusing the detainees, and seven others faced non-judicial punishments.

At another detention facility, Camp Cropper in Baghdad, where high value detainees were held, including Saddam Hussein, reports of torture surfaced.⁷⁶ The International Committee of the Red Cross (“ICRC”) alleged that Camp Cropper interrogators were communicating threats to subjects, hooding subjects, employing kneeling, squatting for three or four hours, striking sources with rifle butts, slaps, punches and forcing subjects to prolonged exposure to the sun and isolation in dark cells.⁷⁷ The use of “isolation” in the High Value Detainee facility was allegedly severe, with detainees kept in cells devoid of sunlight for nearly 23 hours a day.⁷⁸ However, the concerned officers were not found guilty by the inquiry commission established in this regard.

On October 22, 2010, Wiki-Leaks released the largest classified military leak in history, documenting the war and occupation in Iraq, from January 1, 2004 to December 31, 2009 as told by soldiers in the United States Army.⁷⁹ On April 28, 2004 in Fallujah, around 6,000 civilians were killed by coalition forces in numerous air strikes, tank shells and Howitzers, but the official record did not confirm even a single killing.⁸⁰ The city of Fallujah was believed, by the coalition forces, to be the den of Sunni insurgents.⁸¹ Over 60 of the city’s 200 mosques (allegedly used to store weapons) were destroyed.⁸² After the attack, Sunnis were incensed and increased their hostility to the occupation.⁸³

In *Haditha*, a city in the western Iraqi province of Al Anbar, two dozen unarmed civilians—including women, elderly, and children were killed

⁷⁴ 10th Military Police Detachment (CID), “CID Report of Investigation,” The Centre for Public Integrity: The Abu Ghraib Supplementary Documents, June 8, 2003.

⁷⁵ Mike Rosen-Molina, *U.S. Navy Guards Charged with Abusing Detainees at Camp Bucca*, JURIST (Aug. 15, 2008 1:18 PM), <https://www.jurist.org/news/2008/08/us-navy-guards-charged-with-abusing/> [https://perma.cc/F9FY-TNWY].

⁷⁶ INT’L COMM. OF THE RED CROSS, REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC) ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF WAR AND OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT AND INTERROGATION 18 (2004).

⁷⁷ *Id.* at 12.

⁷⁸ *Id.* at 18.

⁷⁹ *Baghdad War Diary*, WIKILEAKS, <https://www.wikileaks.org/irq/> [https://perma.cc/CJ7S-SYVD].

⁸⁰ See generally ALI ALLAWI, THE OCCUPATION OF IRAQ: WINNING THE WAR, LOSING THE PEACE 333–38 (2007), for further examination of battles in Fallujah; Mike Marqusee, *A Name That Lives in Infamy*, GUARDIAN (Nov. 10, 2005), <https://www.theguardian.com/world/2005/nov/10/usa.iraq> [https://perma.cc/R4JZ-2BBS].

⁸¹ ALLAWI, *supra* note 80, at 338.

⁸² *Fallujah: Embattled City of Mosques*, BBC (May 30, 2016), <https://www.bbc.com/news/world-middle-east-25658586> [https://perma.cc/NN3G-V848].

⁸³ *See id.*

indiscriminately by a group of U.S. Marines within close range. One of the counsels of a Sargent, Frank Wuterich, accused of the killings stated:

A unit under the command of his client was on patrol on November 19, 2005 in Haditha, then overrun by insurgents. Lance Corporal Miguel Terrazas, 20, was killed when a roadside bomb exploded underneath the Humvee in which he was riding. In the chaos that followed and the hunt for insurgents, five Iraqi men were killed after they got out of their car and ran. The Marines were taking gunfire from some houses in the area, and the other Iraqis were killed after the squad began a house-to-house search. The Marines used fragmentation grenades and sprayed the room with gunfire.⁸⁴

Those Marines faced virtually no legal consequences in their homeland, and only one of them, Wuterich, was convicted of a minor offense for which he served a flee-bite jail sentence, and the rest were either acquitted or all charges dropped.⁸⁵

“Operation Iron Triangle” was executed in the Tikrit region, a Sunni dominated area coming within the infamous ‘Sunni Triangle’ of insurgents, where orders were given to kill every military age Iraqi on sight by Colonel Michael D. Steele of the U.S. Army.⁸⁶ In the operation that followed on May 9, 2006, four Iraqi males were killed, including an old man, the soldiers were given the orders under the Rules of Engagement (ROE) by the Colonel to kill every military aged male on sight.⁸⁷ While testifying during the Court Martial proceedings, Colonel Johnson recalled that Colonel Steele had created a “toxic command climate” by constantly threatening to remove any of his subordinates who disagreed or questioned his orders from battalion commanders to first sergeants.⁸⁸ This incident has been extensively examined by Professor Stjepan Mestrovic, who argues that the creation and actual wording of U.S. ROE are shrouded in secrecy.⁸⁹ One of the commanders, Colonel Steele, raised the defense during the court proceedings that he did not use the “specific language” to order his soldiers to kill all military age males.⁹⁰ Military courts in the U.S. did not convict the other three commanders, William B. Hunsaker, Corey R. Clagett, Raymond Girouard. Just a soft reprimand was issued against them. This is not surprising as there is simply no precedent in the history of the U.S., except once during the Civil War, that high ranking colonels, generals or civilian

⁸⁴ Edward T. Pound, *Digging Hard for Facts by Edward T. Pound*, LEATHERNECK (June 19, 2006, 3:31 PM), <http://www.leatherneck.com/forums/showthread.php?31155-Digging-Hard-for-Facts> [https://perma.cc/Y3QK-33SG].

⁸⁵ Mary Slosson, *Marine Pleads Guilty, Ending Final Haditha Trial*, REUTERS (Jan. 23, 2012, 12:45 PM), <https://www.reuters.com/article/us-marine-haditha/marine-pleads-guilty-ending-final-haditha-trial-idUSTRE80M1U620120123> [https://perma.cc/DU4V-M5AU].

⁸⁶ STJEPAN GABRIEL MESTROVIC, RULES OF ENGAGEMENT?: A SOCIAL ANATOMY OF AN AMERICAN WAR CRIME- OPERATION IRON TRIANGLE, IRAQ 141 (2007).

⁸⁷ *Id.* at 136.

⁸⁸ *Id.* at 143.

⁸⁹ *See id.* at 142.

⁹⁰ Paul von Zielbauer, *Army Says Improper Orders by Colonel Led to 4 Deaths*, N.Y. TIMES (Jan. 21, 2007), <https://www.nytimes.com/2007/01/21/world/middleeast/21abuse.html#:~:text=Michael%20D.,in%20the%20Army's%20continuing%20investigation> [https://perma.cc/H8GX-TVAH].

officials were prosecuted for breaching the policies and rules of engagement that result in such atrocities.⁹¹ The concept of “command responsibility” has become a cardinal component of international criminal law, which should have been applied at a domestic level in the U.S..⁹²

III. CREATION OF IHT AND INDEPENDENCE FROM OTHER ORGANS OF STATE

After major military operations ended in May 1, 2003, the U.S. appointed 25 Iraqis to the Iraq Governing Council (“IGC”) on July 13, 2003.⁹³ Although the IGC was proclaimed as assuming a transitional parliamentary role, the Coalition Provisional Authority (“CPA”) “was in fact the real bearer of authority in the country, having the power to veto all the decisions of the IGC, leaving the latter with practically no law making powers.”⁹⁴ Rarely did the CPA grant legislative authority to the IGC and when in one instance such authority was granted—with the objective to establish a tribunal to prosecute most serious crimes perpetrated by Saddam Hussein’s regime—the CPA preempted the IGC.⁹⁵ The CPA passed Order No. 48 in December 2003 and the Statute of Iraqi Special Tribunal (“IST”) was annexed to it.⁹⁶ This statute was approved by the IGC and thus the IST was formally notified on the Human Rights Day of December 10, 2003 when CPA Administrator Paul Bremer signed it and published in the Official Gazette.⁹⁷

Professor M. Cherif Bassiouni, a leading authority on the subject, observes that “no norm or precedent exists in international law for an occupying power, the legitimacy of which is in doubt, to establish an exceptional national criminal tribunal.”⁹⁸ He adds that “[y]et, there was no doubt a need for a specialized tribunal to prosecute Saddam and the regime’s major offenders.”⁹⁹ With the establishment of the IST, the objective to prosecute the powerful members of Ba’thist regime who were responsible for seriously violating the fundamental human rights of Iraqi citizens and for thwarting the rule of law in Iraq for more than two decades.¹⁰⁰ The Statute of the IST, which was rechristened as “Iraqi

⁹¹ See Jeremy Dunnaback, *Command Responsibility: A Small-Unit Leader’s Perspective*, 108 NW. U. L. REV. 1385 (2014).

⁹² Amy J. Sepinwall, *Failures to Punish: Command Responsibility in Domestic and International Law*, 30 MICH. J. INT’L LAW 251, 274–75 (2009).

⁹³ Coalition Provisional Authority, Regul. No. 6 (July 6, 2003).

⁹⁴ Ilias Bantekas, *The Iraqi Special Tribunal for Crimes Against Humanity*, 54 INT’L & COMPAR. L.Q. 237, 239 (2005); S.C. Res. 1500 ¶ 1 (Aug. 14, 2003); S.C. Res. 1511 ¶ 1 (Oct. 16, 2003) (proclaiming the IGC as being the principal body of Iraqi interim administration, yet making no reference to the fact that it has, in effect, no exclusive law or decision-making capacity).

⁹⁵ Bantekas, *supra* note 94, at 239.

⁹⁶ Coalition Provisional Authority, Ord. No. 48 (Dec. 10, 2003).

⁹⁷ *See id.*

⁹⁸ M. Cherif Bassiouni, *Post Conflict Justice in Iraq: An Appraisal of Iraq Special Tribunal*, 38 CORNELL INT’L L. J. 328, 359 (2005).

⁹⁹ *Id.*

¹⁰⁰ Michael A. Newton, *The Iraqi Special Tribunal: A Human Rights Perspective*, 38 CORNELL INT’L LAW J. 863, 866 (2005).

High Tribunal (IHT)” in 2005,¹⁰¹ provided that this “Tribunal had jurisdiction over any Iraqi national or Iraqi residents accused of the crimes listed in Articles 11-14, committed since July 17, 1968 and up and until May 1, 2003, in the territory of Iraq or elsewhere.”¹⁰² Two important limitations on the jurisdiction of the Tribunal were, thus, imposed on its functioning: (a) only the crimes committed during the given period (temporal jurisdiction) were to be under its jurisdiction, and (b) crimes committed by Iraqi national or Iraqi resident would only come under its jurisdiction. The pertinent question that arose in this context was as to why only Iraqi nationals or Iraqi resident were covered under the *ratione persona* jurisdiction and not all?

An important principle recognized under all national criminal legal systems relating to personal jurisdiction is that a national criminal court has personal jurisdiction over all individuals committing a crime within the territory of their nationality or residence status. It was unclear why the IHT’s jurisdiction did not extend to all individuals who may be accused of the crimes set out in Articles 11-14 of the Statute who were not Iraqi nationals or residents of Iraq as referred to in Article 10.¹⁰³ In any State, its population may be divided into different categories. Some are called nationals, some others are called residents, and some are non-residents. In the Iraqi context, the non-residents can be the coalition forces present there since the year 2003. However, the Statute of the IHT did not apply to those non-residents even when they committed the crimes punishable under it.¹⁰⁴ This jurisdictional restriction on the applicability of the Statute shows the hegemony of the coalition forces in charting the course of the tribunal in its later functioning. It is not argued here that because the coalition forces were not covered by the Statute that the Iraqi national or resident should also not be prosecuted. Instead, the argument is that one “perpetrator of crime” should not punish the other “perpetrator”.

Another limitation on the jurisdiction was temporal jurisdiction. The Statute limited the temporal jurisdiction of the IHT to crimes committed between July 17, 1968 and May 1, 2003. Did this mean that there was no commission of war crime, genocide and crimes against humanity before July 17, 1968 and there shall be no similar recognition after May 1, 2003? If an obligation upon the coalition forces to prosecute the commission of serious violations of laws and customs of war would have been incorporated in the Statute of IHT, it would have shown objectivity. Professor Bassiouni concludes that it is probable, therefore, that the IHT’s “jurisdictional exclusion of coalition forces during the same range of the I[H]T’s temporal jurisdiction without a concomitant obligation for the coalition forces to prosecute, adds to the perception of

¹⁰¹ Statute of the Iraqi Special Tribunal (Dec. 10, 2003). An unofficial English translation of the Statute as amended on October 18, 2005 is available at https://ihl-databases.icrc.org/applic/ihl-nat.nsf/0/62dfa419b75d039cc12576a1005fd6c1/%24FILE/IST_statute_official_english.pdf [<https://perma.cc/7PSY-9HMF>].

¹⁰² Statute of the Iraqi Special Tribunal art. 1(b), 10.

¹⁰³ Bassiouni, *supra* note 98, at 372.

¹⁰⁴ See ROBERT CRYER, HÅKAN FRIMAN, DARRYL ROBINSON & ELIZABETH WILMSHURST, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 194 (2d ed. 2010).

politicized justice.”¹⁰⁵ Interestingly however, there was no limitation as to places where the crimes were committed.

An important area of concern regarding domestic internationalized tribunal is independence of its different branches from the executive branch, legislative branch, and foreign control. Earlier experience of such tribunals may be noteworthy in this context. The judges of the IHT comprised of investigative judges, trial chamber or felony court judges and appeal chamber judges. The IGC had appointed all the initial permanent investigative judges. The Chief Investigative Judge Raid Ruhi was chosen by the investigative judges themselves according to the provisions of the Statute.¹⁰⁶ However, his appointment was mired in controversy as the then deputy Prime Minister Ahmed Chalabi expressed doubts over his earlier linkage with the Ba'athist Party. He, however, was allowed to continue for another two years due to pressure from coalition forces until he was offered admission to fellowship program of Cornell Law School in the U.S..¹⁰⁷

Similarly, the Chief Judge of Trial Chamber Rizgar Mohammed Amin during the *Dujail* trial was replaced by a Kurdish Judge, Rauf Rahman, because the new Shia Iraqi government headed by Nuri al-Maliki in 2006 did not like his tolerant attitude towards Saddam's outbursts in the courtroom.¹⁰⁸ Another Trial Chamber Judge Saeed Al-Hammashi was also accused of being a Ba'athist, which led to his immediate transfer from the Dujail trial to another case.¹⁰⁹ It was thus a tragedy for the Tribunal as any judge who showed the slightest respect for the legal procedure or which favored the defendant, was removed from his post.¹¹⁰ During *Al Dujail* appeal proceedings, the President of Appeal Chamber, which was renamed as Cassation Panel in 2005, Aref Shahen so quickly delivered his judgment that it appeared as if the highest panel was not prepared to hear the other side of the story. When Saddam Hussein's lawyers filed the appeal, Judge Aref confirmed the death sentence within three days.¹¹¹ Such haste in conducting judicial proceedings shows prejudice in the Tribunal's working. Another example of political pressure was observed during the *Al Anfal* trial, when Abdallah al-Amiri, the presiding judge, remarked that Saddam Hussein

¹⁰⁵ Bassiouni, *supra* note 98, at 359.

¹⁰⁶ Statute of the Iraqi Special Tribunal art. 7(e).

¹⁰⁷ Raid Juhi al-Saedi wrote an article while availing Fellowship at Cornell Law School. See Raid Juhi al-Saedi, *Regime Change and the Restoration of the Rule of Law in Iraq*, in *THE WAR IN IRAQ: A LEGAL ANALYSIS* 3 (Raul A. 'Pete' Pedrozo ed. 2010).

¹⁰⁸ Peggy McGuinness, *Kurdish Judge Appointed New Chief Judge of Iraqi Special Tribunal*, OPINIOJURIS (Jan. 23, 2006), <http://opiniojuris.org/2006/01/23/kurdish-judge-appointed-new-chief-of-iraqi-special-tribunal/> [https://perma.cc/7WDX-9F5S]. See Jon Brain, *Saddam's Masterful Courtroom Act*, BBC NEWS (Feb. 14, 2006, 9:37 PM), http://news.bbc.co.uk/2/hi/middle_east/4714394.stm [https://perma.cc/NHY3-UASF], on Saddam's outbursts.

¹⁰⁹ *Iraq: Saddam Hussein Trial at Risk*, HUM. RTS. WATCH (Jan. 26, 2007, 7:00 PM), www.hrw.org/news/2006/01/26/iraq-saddam-hussein-trial-risk [https://perma.cc/48QM-5Q89].

¹¹⁰ Aijaz Ahmad, *Empire Marches On*, GLOB. POL'Y F. (Jan. 18, 2007), <https://archive.globalpolicy.org/empire/challenges/overstretch/2007/0118marcheson.htm> [https://perma.cc/S4DY-BX8U].

¹¹¹ *Id.*

was “not a dictator,” he came under immense political pressure.¹¹² He was replaced by Judge Muhammad Uraybi al-Khalifa by the Government.¹¹³ Judge Uraybi did not patiently hear defense counsel and jeered at his “foolish questions.”¹¹⁴ His conduct was questioned during the *Halabja* trial as he was suspected of having links with the Ba’ath party and so he was also replaced by another judge, Aboud Al Hamami.¹¹⁵

The office of public prosecutor in Iraq was meant to be independent of any intervention from judicial members and from the governmental organs.¹¹⁶ However, he was not required to be impartial. The prosecutors were not required by either the Statute or the Rules of Procedure to remain impartial.¹¹⁷ There was also no provision expressly prohibiting prosecutors from taking part in a case, in which their impartiality was or could be seen in doubt, including cases in which they were previously involved or similar other matters.¹¹⁸ One of the cases in point is that of Chief Prosecutor Jaafar-al-Moussawi, who did not conduct the proceedings in *Al Dujail* trial impartially. The defense had leveled an allegation that the Chief Prosecutor had met the prosecution witness in a funeral in *Al Dujail* during July 2004.¹¹⁹ The public prosecutor was seen in the CD of the mentioned funeral.¹²⁰ The defense also alleged that the public prosecutor had offered them huge amounts of money to testify against Saddam Hussein.¹²¹

Independence of the tribunal was also at stake due to the provisions in the Statute regarding foreign judicial advisors, experts and observers. Pursuant to the provisions of the Statute of the Tribunal, the Council of Ministers could, upon a proposal made by the President, appoint non-Iraqis to work as a judge.¹²² In turn, the President of the Court was given the right to appoint non-Iraqi experts to act in an advisory capacity for the Criminal Court and the Cassation Panel.¹²³ The role of the non-Iraqi nationals was “to provide assistance with respect to international law and the experience of similar courts (whether

¹¹² Bill van Esveld, *The Complainant Phase of the Anfal Trial*, INT’L CTR. FOR TRANSITIONAL JUST. 1, 13 <http://ictj.org/sites/default/files/ICTJ-Iraq-Tribunal-Anfal-2009-English.pdf> [https://perma.cc/MLW6-8X96].

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Iraqi High Tribunal Issues Verdict in Halabja Chemical Attack Case*, WIKILEAKS (Jan. 19, 2010), <http://wikileaks.org/cable/2010/01/10BAGHDAD122.html> [https://perma.cc/6QDH-QB3K].

¹¹⁶ Statute of the Iraqi Special Tribunal art. 8(b).

¹¹⁷ AMNESTY INT’L, IRAQI SPECIAL TRIBUNAL—FAIR TRIALS NOT GUARANTEED 17 (2005), <https://www.amnesty.org/download/Documents/88000/mde140072005en.pdf> [https://perma.cc/5B6U-C2G4]; see generally Statute of Iraqi Special Tribunal art. 8.

¹¹⁸ Statute of Iraqi Special Tribunal art. 8.

¹¹⁹ Iraqi High Court, Case No. 1/9 First/2005, at 10 English Translation of Dujail Trial Chamber Opinion, 2005.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Law of The Iraqi Higher Criminal Court, al-Waqā’i’ al-’Irāqīyah [Iraqi Official Gazette], 4006 No. 10 of Oct. 18, 2005 art. 3(5) [hereinafter Statute of IHC].

¹²³ *Id.* art 7(2).

international or otherwise).”¹²⁴ Similarly, the Chief Investigative Judge and Chief Public Prosecutor were given the right, after consultation with the President of the Tribunal, to appoint non-Iraqi nationals to act as experts to help the Investigative judges and Public Prosecutors respectively in investigation and prosecution.¹²⁵

Such provisions in the Statute have no parallel precedent in the history of international criminal law except with prior colonial regimes.¹²⁶ Those provisions were criticized by the members of Iraqi legal profession and were probably the “most offensive provisions in the Statute.”¹²⁷ There was also no clarity in the Statute or the appended Rules of Procedure about the effect of any advice or observation tendered by those experts to the Tribunal. The U.S. provided millions of dollars to support a team of about 50 American and British lawyers, investigators and forensic experts.¹²⁸ They worked in an agency known as the Regime Crimes Liaison Office, which was financed by the U.S. Department of Justice and was housed within the American embassy in an international fortified area, called the Green Zone.¹²⁹ Many experts of law, for instance, Professor Michael Scharf, Professor M. Cherif Bassiouni, Professor David Crane, Eric Blinderman, Greg Nivala, William Wiley, and Sandy Hodgkinson were hired by the Regime Office for short duration to assist the various wings of the Tribunal and in doing so, it incurred significant amounts of expenditure.¹³⁰ Such a significant expenditure by the United States was not purposeless. The conclusion that the IHT was guided mainly by the U.S. was reinforced by these facts.

IV. COMPROMISING FAIR PROCEDURE

Numerous provisions of the Statute of the Tribunal and the Rules of Procedures and Evidence were not fully consistent with international law and standards regarding fair procedure, nor did they reflect recent developments in international law.¹³¹ For example, the accused was only entitled to a public hearing and not a fair hearing under the Statute of IHT.¹³² Right of fair hearing is an important right of the accused under international law.¹³³ Compared to the

¹²⁴ *Id.*

¹²⁵ *Id.* arts. 8(9), 9(7).

¹²⁶ Bassiouni, *supra* note 98, at 369.

¹²⁷ *Id.*

¹²⁸ *Trying Saddam*, CBC NEWS (Dec. 29, 2006), https://www.cbc.ca/news2/background/iraq/trying_saddam.html [<https://perma.cc/TW4E-49JY>].

¹²⁹ Miranda Sissons, *And Now From Green Zone . . . Reflections on the Iraq Tribunal's Dujail Trial*, 20 ETHICS & INT'L AFF. 505, 505–15 (2006).

¹³⁰ See generally Michael A. Newton, *The Iraqi High Criminal Court: Controversy and Contributions*, 88 INT'L REV. RED CROSS 399, 424 (2006).

¹³¹ Anna Triponel, *Can the Iraqi Special Tribunal Further Reconciliation in Iraq?*, 15 CARDOZO J. INT'L & COMPAR. L. 277, 302 (2007).

¹³² Statute of IHC art. 19(3).

¹³³ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) art. 10 (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 14, Dec. 16, 99 U.N.T.S. 171 [hereinafter ICCPR]; Statute of the International Criminal Tribunal for the Former

international standards, the Statute and Rules of Procedure of IHT revealed an “inappropriate standard of proof, inadequate protections against self-incrimination, and inadequate procedural and substantive steps to ensure adequate defense.”¹³⁴ The requirement of proof beyond reasonable doubt reflects the defendant’s “interest of transcending value” in his liberty.¹³⁵ This principle has been enshrined in the Rules of Procedure and Evidence of ICTY, ICTR as well as in the Rome Statute of International Criminal Court.¹³⁶ Similar standards are also laid down regarding protection against self-incrimination,¹³⁷ and adequate measures of defending the accused.¹³⁸

The above well-established principles were not given due importance during the trials of many defendants at the Iraq High Tribunal. In the *Al Dujail* case, the eight accused, while defending themselves with a team of lawyers, had a tough time in the Trial Chamber. Defending lawyers of Saddam Hussein were browbeaten, maligned and some of them killed.¹³⁹ Among the lawyers who sought to defend Saddam Hussein at the cost of these adverse conditions was the former U.S. Attorney General, Ramsey Clarke.¹⁴⁰ Saddam’s defense team consisted also of volunteer lawyers without adequate resources or the ability to find experts or adequate witnesses.¹⁴¹ His defense team could not visit the sites of the alleged crimes because of the state of insecurity in Iraq.¹⁴² Non-Iraqi lawyers willing to join his defense team could not even enter Iraq to visit their clients regularly. Saddam’s attorneys were held under virtual house arrest without access to telephones, faxes, computers or books. Even the legal notes prepared by Saddam’s attorneys were read by American officials and only

Yugoslavia art. 21, 1993 [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda art. 20, 1994 [hereinafter ICTR Statute]; European Convention on Human Rights art. 6, 1950 [hereinafter ECHR].

¹³⁴ Triponel, *supra* note 131, at 277.

¹³⁵ *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958).

¹³⁶ A comparison of Statute of IHT and the Rules of Procedure and Evidence of ICTY may help in evaluating the relative importance of two instruments. Similarly a comparison of Statute of IHT and the Rules of Procedure and Evidence of ICTR may be helpful. Rules for Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia Rule 87(A), U.N. Doc. IT/32/Rev.50 (July 8, 2015) [hereinafter ICTY R. P.]; Rules for Procedure and Evidence of the International Criminal Tribunal for Rwanda Rule 87(A), U.N. Doc. ITR/3/Rev.1 (June 29, 1955) [hereinafter ICTR R. P.]; Rome Statute of ICC art. 66(30).

¹³⁷ ICTY R. P. 63, 67(1)(g); ICTR R. P. 63, 67(1)(g); Rome Statute of ICC art. 65 (1)(b).

¹³⁸ ICTY R. P. 42; ICTR R. P. 42; Rome Statute of ICC arts. 67(1)(d) & (e).

¹³⁹ Ahmad, *supra* note 110.

¹⁴⁰ Ramsey Clarke had formerly worked valiantly in documenting hundreds of thousands of Iraqi dead during the period of the United Nations condoned Anglo-U.S. economic sanctions prior to the full scale invasion of Iraq; Laurence Arnold, *Ramsey Clark, Lawyer for Those ‘Demonized’ by U.S., Dies at 93*, BLOOMBERG (Apr. 12, 2021 5:05 AM), <https://www.bloomberqint.com/politics/ramsey-clark-lawyer-for-those-demonized-by-u-s-dies-at-93> [https://perma.cc/DD32-8GB6].

¹⁴¹ *Press Statement: The Iraqi Court Prevents the Defense from Making its Defenses*, BASRA NETWORK (Apr. 6, 2006), http://articles.abolkhaseb.net/ar_articles_2006/0406/isnad_080406.htm [https://perma.cc/DR6U-4U3B].

¹⁴² P.A. Sebastian, *Death Sentence to Saddam Hussein*, 41 ECON. & POL. WKLY. 5311, 5312 (2006–07).

thereafter those notes were approved or rejected.¹⁴³ Other shortcomings of the *Dujail* trial included “continuous non-disclosure of incriminating evidence, a repeated failure to disclose potentially exculpatory evidence in a timely way, non-responsiveness to procedural motions by the defense, widespread use of anonymous (or effectively anonymous) witnesses and the reading of 29 witness statements into the record without examination.”¹⁴⁴ In the *Al Anfal* trial too, one of the defendant’s private counsel alleged that the “documents relating to the case had either been stolen or were not provided by the prosecutor.”¹⁴⁵ Another grievance leveled by the defense team during the *Anfal* trial was the availability of less time to prepare for the trial as it was held on day-to-day basis, not giving the names of prosecution witnesses.¹⁴⁶ In such conditions, the right of the accused to a fair trial and similar other due process rights could not be protected and the outcome of the trial was not trusted as authentic and up to the required standards.

Right to appeal is also an important constituent of fair trial in international law. It is provided for in different instruments of human rights, humanitarian law, and international criminal law treaties.¹⁴⁷ However, the Statute of Iraqi High Tribunal did not grant the right to appeal beyond a certain limit. It provided for only three grounds for an appeal by defense or prosecution. Those were: (a) procedural error, (b) error of fact, and (c) error of law.¹⁴⁸ Thus, no appeal was possible on the ground that there was no fair trial in the lower Chamber. Even without any express provision in the Statute regarding appeal on the ground of lack of fairness at the trial level, the defense team of Saddam Hussein filed an appeal in the *Al Dujail* case, raising expectation of fair hearing. However, that expectation was belied when the Appeal Court confirmed the death sentence of Saddam Hussein in a record time of three days.¹⁴⁹ Saddam’s lawyers “were given less than two weeks to appeal against a judgment of 300 pages.”¹⁵⁰ In such circumstances, his appeal crumbled under the burden of an imposed one-sided Statute, Rules of Procedure and Evidence and the U.S. controlled Tribunal. The *Al Anfal* trial too carries over much of the dynamic of the *Dujail* trial with chaotic court antics and a tribunal openly hostile to the defendants and the defense counsel.¹⁵¹ When the trial chamber decision was challenged in the Cassation Panel, it was decided within two and half months in September 2007 and the

¹⁴³ Press Statement, *supra* note 141.

¹⁴⁴ Nehal Bhuta, *Fatal Errors: The Trial and Appeal Judgments in the Dujail Case*, 6 J. INT’L CRIM. JUST. 39, 56 (2008).

¹⁴⁵ Van Esveld, *supra* note 112, at 11.

¹⁴⁶ *Id.* at 12.

¹⁴⁷ ICCPR art. 14(5); ECHR, *supra* note 133, Protocol No. 7, art. 2; Geneva Convention Relative to the Treatment of Prisoners of War art. 106, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 73, Oct. 21, 1950, 75 UNTS 287; ICTY R. P. art. 25; ICTR R. P. art. 24(a); Rome Statute of ICC art. 81.

¹⁴⁸ Statute of IHC art. 25.

¹⁴⁹ Ahmad, *supra* note 110.

¹⁵⁰ *Id.*

¹⁵¹ Michael J. Kelly, *The Anfal Trial Against Saddam Hussein*, 9 J. GENOCIDE RSCH. 235, 241 (2007).

appeal was rejected.

Disclosure of all exculpatory as well as inculpatory evidence by the prosecution is also an important norm in the proceedings of a criminal trial to ensure equality of arms to both the parties. Indeed, the Rules of Procedure and Evidence relating to Iraqi High Tribunal required that the Prosecutor would, at least forty-five days prior to the commencement of proceedings, disclose to the defense copies of all the witnesses and other evidence.¹⁵² However, several restrictions were imposed on such disclosure. Even when such evidence was disclosed, the defense found it very difficult to analyze and rebut the evidence as the time given for such rebuttal was very short, usually a day.¹⁵³ Consequently, the principle of providing equality of arms was also violated in the trials of IHT which was not in the interests of justice. The requirement of “proof beyond reasonable doubt” is an important principle in many legal systems.¹⁵⁴ In such systems, the prosecution must produce evidence so as to prove the guilt of the accused beyond reasonable doubt. However, this principle was also diluted and the Statute of IHT allowed the judge to adjudicate the defendant as guilty if he is satisfied with the evidence as to the guilt.¹⁵⁵

V. NORMS FOR INTERNATIONAL CRIMINAL COURT AND IHT: DIFFERENT TUNES?

The quest of the international community to prosecute individuals alleged to have committed internationally proscribed crimes led to the creation of a permanent international judicial structure. That structure has been created under the aegis of the Rome Statute, a multilateral treaty of 1998.¹⁵⁶ This new international judicial structure is given the name of International Criminal Court (“ICC”). It is different from the *ad hoc* tribunals established by the Security Council of the United Nations in Former Yugoslavia and Rwanda in 1993 and 1994 respectively because, *inter alia*, it is established on a permanent basis and it is primarily based on the consent of States Parties.¹⁵⁷ Its statute has incorporated some fundamental norms of international criminal justice, such as the principles of consent and complementarity, individual criminal and command responsibility, *nulla poena sine lege* and *nullum crimen sine lege*, and satisfactory interpretation of serious crimes punishable under it.¹⁵⁸ These principles should be observed across the globe to make it more predictable and

¹⁵² Rules of Procedure and Evidence of the Iraqi High Tribunal, al-Waqā’i’ al-’Irāqīyah [Iraqi Official Gazette] No. 4006 of Oct. 18, 2005 Rule 42(2) [hereinafter Tribunal Rules of Procedure]; AMNESTY INT’L, *supra* note 117, at 39.

¹⁵³ AMNESTY INT’L, *supra* note 117, at 39.

¹⁵⁴ Chiara Secli, Reaching the ‘Beyond Reasonable Doubt’ Standard in International Criminal Law Cases: A Comparison with Italian Doctrine and Jurisprudence (Stockholm University Research, Paper No. 67, 2019), <https://ssrn.com/abstract=3335515> [<https://perma.cc/NB8B-GJAX>].

¹⁵⁵ See Kelly, *supra* note 151, at 237.

¹⁵⁶ Text of Rome Statute, Jul. 17, 1998, 37 I.L.M. 1002.

¹⁵⁷ Stuart Ford, *The Impact of the Ad Hoc Tribunals on the International Criminal Court*, in THE LEGACY OF AD HOC TRIBUNALS IN INTERNATIONAL CRIMINAL LAW 318 (Milena Sterio & Michael Schard eds., 2019).

¹⁵⁸ *Id.* at 316.

acceptable.

Of late, the basis of creating obligations on States regarding prevention and prosecution of persons responsible for the commission of very serious international crimes is their consent. Although a new hegemonic concept called “responsibility to protect” is being promoted by the powerful capitalist countries, consent-based development of international law is the best one. The ICC is positioned delicately on a shaky but solid mixture of consent of the nations as well as hegemonic exercise of power by the Security Council. At the Rome Conference,¹⁵⁹ it was easy to convince the States by putting the principle of complementarity on their platter and obtain their consent for adoption and ratification of the Statute of ICC. This principle of “complementarity” ordains the ICC not to take up a case when the concerned nation is itself willing to prosecute the offender. The Iraqi tribunal was not based on the principle of complementarity, but on its “primacy” over all other Iraqi courts.¹⁶⁰ It had borrowed this concept from the Statutes of ICTY and ICTR.¹⁶¹ When the primary jurisdiction of a court created not by the national parliament is asserted in the same State, it becomes an anachronism. Iraqi tribunal was created in Iraq itself not by its own Parliament, but by the multinational forces in collusion with the puppet government.

Another important principle of individual criminal and command responsibility emerged during the Nuremberg and Tokyo trials after the Second World War and which has been firmly entrenched in the jurisprudence of *ad hoc* and other international tribunals, such as ICC.¹⁶² These principles have also been enshrined in the Statute of IHT.¹⁶³ However, it became a matter of concern that the tribunal did not issue indictments against low-ranking officials. The ICTY had issued indictments against these officials also. In the case of Iraq, the predominant tendency was to indict the high-ranking officials. In the *Al Dujail* trial, out of the eight defendants, only one was a low ranking official.¹⁶⁴ In the *Al Anfal* trial also, out of the seven defendants (including Saddam Hussein), none were a low ranking or even middle ranking official.¹⁶⁵

¹⁵⁹ Rome Conference was convened in the second week of June 1998 to adopt Rome Statute for International Criminal Court. *Rome Statute of the International Criminal Court*, INT’L COMM. RED CROSS (July 17, 1998), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/585?OpenDocument> [https://perma.cc/N3P2-MJ8Z]

¹⁶⁰ Statute of IHC art. 29(2).

¹⁶¹ ICTY Statute art. 9; ICTR Statute art. 8.

¹⁶² Rome Statute of ICC, *supra* note 73, at arts. 25, 28; ICTY Statute art. 7; ICTR Statute art. 8; *see also* Prosecutor v. Halilovic, IT-01-48-T, Judgment ¶ 38 (United Nations Nov. 16, 2005); Prosecutor v. Blaskic, IT-95-14-A, Judgment ¶ 61 (United Nations Jul. 29, 2004); Prosecutor v. Delali, IT-96-21-T, Judgment ¶ 319–20 (United Nations Nov. 26, 1998); Prosecutor v. Bemba, ICC-01/05-01/08, Judgment of Judges Ekaterina Trendafilova, Hans-Peter Kaul & Cuno Tarfusser ¶ 404–05 (Jun. 15, 2009); *see also* Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT’L L. 573, 575–76 (1999).

¹⁶³ Statute of IHC art. 15.

¹⁶⁴ Michael Scharf & Salem Chalabi, *The Iraqi Tribunal: The Post Saddam Cases*, CHATHAM HOUSE 3 <https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/il041208.pdf> [https://perma.cc/6ZXM-LCZ6].

¹⁶⁵ *See id.*; *see also* 1 KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW 141–42 (2013).

The principles of *nullum crimen sine lege* (no crime without law) and *nulla poena sine lege* (no punishment without law) have also become an integral part of the Rome Statute based norms of international criminal law. The Rome Statute provides for the *nullum crimen* principle in all its forms (*sine lege scripta, praevia, certa, and stricta*).¹⁶⁶ According to Kai Ambos, a person can only be punished for an act which was codified in the Statute at the time of its commission (*lex scripta*), was committed after its entry into force (*lex praevia*), was defined with sufficient clarity (*lex certa*), and was not extended by analogy (*lex stricta*).¹⁶⁷ In the IHT's case, Iraq followed Criminal Code of 1969, which did not recognize the offenses of genocide, war crimes, crimes against humanity, and acts of aggression. No other law in Iraq criminalized these acts. However, on an international plane, it is a fact that Iraq ratified all the four Geneva Conventions on February 14, 1956 and the Genocide Convention on January 20, 1959. Furthermore, the prohibition of genocide and war crimes is considered as *jus cogens* norm, which enjoys a higher rank in the hierarchy of sources than treaty and even ordinary customary rules. Unlike war crimes and genocide, crime against humanity was not included in any specialized international convention, and thereby any such treaty could not bind Iraq.¹⁶⁸ Nevertheless, the IHT applied the norm on crime against humanity in the *Al Dujail*, *Al Anfal*, *Halabja* cases on the basis of express provisions in the Statute and on the basis of nature of the norm, *jus cogens*.

The ICC has also promised to apply the high threshold of the crimes in a responsible way when it decided the *Lubanga* and *Katanga* cases.¹⁶⁹ Some basic mistakes were committed in the *Al Dujail* judgement.¹⁷⁰ According to some scholars, the decision cannot be regarded as a credible historical record of individual criminal responsibility, particularly on the concept of 'joint criminal enterprise.'¹⁷¹ The Appeals Chamber failed to conduct an adequate review of the Trial Chamber judgement. Not only it failed to correct those mistakes, but it added to it by "misstating several essential legal principles."¹⁷² The Trial Chamber's finding on knowledge and intent on the part of Barzan Al Tikriti and Taha Yassin Ramadan was erroneous as it misapplied the ICTY Appeal Chamber's judgment in the *Krnjelac* case.¹⁷³ Simply holding an office does not amount to knowledge and intent to commit a crime by his subordinates under his command responsibility. The Appeals Chamber of ICTY has held that in

¹⁶⁶ Rome Statute of ICC arts. 22–23; see also AMBOS, *supra* note 165, at 90.

¹⁶⁷ AMBOS, *supra* note 165, at 90.

¹⁶⁸ The legal doctrine and practice in Iraq deem that a treaty, even if ratified, must be subject to the adoption of national implementing legislation before it can be considered applicable domestically. In addition, all laws must be published in the Official Gazette.

¹⁶⁹ See Prosecutor v. Lubanga Dyilo, ICC-01/04-01/07, Majority Opinion of Judges Adrian Fulford, Elizabeth Odio Benito & Rene Blattmann (Mar. 14, 2012); See generally Prosecutor v. Katanga, ICC-01/04-01/07, Majority Opinion of Judges Sang-Hyun Song, Sanji Mmasenono Monageng, Cuno Tarfusser, Erkki Kourula, & Ekaterina Trendafilova (Mar. 27, 2013).

¹⁷⁰ Bhuta, *supra* note 144, at 42.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 44.

order to convict a commander for the crimes of his subordinates, the evidence must prove that the commander had actual knowledge that these crimes were about to be or had been committed, or at least that specific information which would have provided notice of the crimes was made available to the commander.¹⁷⁴ Knowledge on the part of defendant cannot be presumed if he enjoys a position of command. The position of command, however, may be an indicator of defendant's knowledge depending on other circumstances.¹⁷⁵ The Appeals Chamber did not also rectify these errors, because it admitted new evidence and arguments based on it. In other words, the IHT applied the judicial precedents laid down by the other tribunals and courts administering international criminal justice in a selective way.

VI. ISSUES OF ACCOUNTABILITY IN IRAQ FOR THE NEW U.S. ADMINISTRATION

An important historic year for Iraq is 2006 when the country had its own democratically elected, constitutional government broadly representing the diverse population consisting of majority Shia, Kurds and minority Sunnis, Assyrians, Yazidis and Turkmen. At one point, Joe Biden spoke in 2006 on the need to divide Iraq along ethnic and religious lines—a Kurdish area to the north, and the rest divided between Shia and Sunni Muslims.¹⁷⁶ Biden's term as the Vice President during Barack Obama's time saw him handling relations with Iraq almost exclusively. In an almost karmic way, he was charged with the disengagement of the U.S. troops with Iraq under the Obama administration. The Prime Minister after CPA rule has been the Shias and Kurds, such as Ahmad Chalabi, Ayad Allawi, Jalal Talabani, Haider al-Abadi, Adil Abdul Mahdi, and the present one Mustafa al-Kadhimi. The Kurds are given the ceremonial headship of the State in the form of the President, and the Sunnis are placated by offering the post of Vice President.¹⁷⁷ Shias are politically united under a coalition called "United Iraqi Alliance" comprising two main political parties, Islamic Supreme Council of Iraq (ISCI) and *Al-Dawa*.¹⁷⁸ The Kurds have also formed their own coalition called Democratic Patriotic Alliance of Kurdistan, comprising two main political parties, namely, Kurdish Democratic Party (KDP) and Patriotic Union of Kurdistan (PUK).¹⁷⁹ However, Sunni Arabs have not been very active in the new democratic government, yet they have also formed a political alliance, called Sunni Arab Iraqi Front, comprising the Iraqi Islamic

¹⁷⁴ Prosecutor v. Blaskic, IT-95-14-A, Judgment ¶ 62 (United Nations July 29, 2004).

¹⁷⁵ Bhuta, *supra* note 144, at 49.

¹⁷⁶ Joseph R. Biden & Leslie H. Gelb, *Unity Through Autonomy in Iraq*, N.Y. TIMES (May 1, 2006), <https://www.nytimes.com/2006/05/01/opinion/01biden.html> [<https://perma.cc/VE34-UZGG>].

¹⁷⁷ Samir Sumaida'ie, *The Hijacking of Democracy: The Role of Political Parties in Iraq*, WILSON CTR. (Apr. 8, 2021), <https://www.wilsoncenter.org/article/hijacking-democracy-role-political-parties-iraq> [<https://perma.cc/WK89-HZ4B>].

¹⁷⁸ Rend Al-Rahim Francke, *Political Progress in Iraq During the Surge*, U.S. INST. PEACE 7 (2007), <https://permanent.fdlp.gov/lps89335/sr196.pdf> [<https://perma.cc/LBJ2-V82C>].

¹⁷⁹ GARETH R. V. STANSFIELD, *IRAQI KURDISTAN: POLITICAL DEVELOPMENT AND EMERGENT DEMOCRACY* 83–85 (2003).

Party (IIP), Muslim Scholars Association and Iraqi National Front (INF).¹⁸⁰

Running almost parallel to the State apparatus and its offices are the powerful militia, private army and insurgent groups—Islamic resistance fighters which have put the country into trouble after the withdrawal of the coalition forces in late 2011. Many militias are affiliated to specific political organizations—*Badr* Brigade of Shia are in the service of ISCI, some other veterans of resistance are attached to *al-Dawa* (Shia), Peshmerga to KDP and PUK, and Asa'ib and Kita'ib Hizbollah to the security forces of the Government.¹⁸¹ Others which have delinked themselves from politics are the Mahdi Army (Shias). Sunni Arabs have grouped together into different insurgent groups, such as Islamic State of Iraq and Levant (“ISIL”), Islamic Resistance Movement, Islamic Front for the Iraqi Resistance, Islamic Army in Iraq, Islamic State of Iraq and Syria (“ISIS”), and Al-Qaida of Iraq.¹⁸² According to ‘Iraqi Study Group Report,’ sectarian violence causes the largest number of Iraqi civilian casualties. Sunni insurgent attacks spark large-scale Shia reprisals, and *vice versa*. Iraqis leave their ordinary place of residence to those places where their group is in majority.¹⁸³ As a result, the people’s confidence in the government is shaken and the armed militias are emboldened.¹⁸⁴ At one point of time in 2014, the ISIL militia drove the government of Iraq out of key cities and captured Mosul. During that campaign against the government, the ISIL committed large scale massacre of Yazidis. Civil war in Iraq continued until 2017.

If the grave breaches of international humanitarian law committed by the armed forces of Saddam Hussein and of U.S.-led multinational occupation are considered in this study, it would not be complete and comprehensive as these militia, private armies and insurgent groups have also been engaged in the commission of these breaches. They wear military uniforms at the time of supporting the government efforts, but the responsibility of killing innocent civilians is not borne by them or the government. The following table may serve as an example of the indiscriminate violence committed by these groups:

Name of the organization	Place of conflict	Civilians killed/kidnapped/wounded	Year
Mahdi Army	Karbala	50 killed, 300 wounded	2007

¹⁸⁰ For more on the Iraqi Islamist Party see Muhanad Seloom, *An Unhappy Return: What the Iraqi Islamic Party Gave Up to Gain Power*, CARNEGIE MIDDLE E. CTR. (Nov. 19, 2018), <https://ssrn.com/abstract=3287332> [<https://perma.cc/8LM7-2CQ6>]. See Daniel Fink & Steven Leibowitz, *The Muslim Scholars Association: A Key Actor in Iraq*, WASHINGTON INST. FOR NEAR E. POL’Y (Dec. 2006), <https://www.washingtoninstitute.org/media/3496?disposition=inline> [<https://perma.cc/HJ7X-GYBP>].

¹⁸¹ Dai Yamao, *Sectarianism Twisted: Changing Cleavages in the Elections of Post-War Iraq*, 34 ARAB STUD. Q. 27, 29, 40 (2012).

¹⁸² See HASHIM, *supra* note 12, at 16.

¹⁸³ JAMES A. BAKER III & LEE H. HAMILTON, THE IRAQ STUDY GROUP REPORT 4 (2006).

¹⁸⁴ *Id.*

Mahdi Army	Baghdad	51 killed	2008
Islamic State of Iraq and Levant	Tal Afar	500 women kidnapped	2014
Islamic State of Iraq and Levant	Baghdad	Car bomb killed 50 people	2013
	Mosul	3 Women and 40 men tortured to death by Sunni court, 2 shot at	2014
	Mosul	Civilians made human shield in Battle of Mosul	2016
	Kocho, Hardan	400 villagers	
	Sinjar	Genocide of Yazidis men, women & children	2013
	Baghdad	3 suicide bombing killed 70 civilians	2014
	Daquq	2 suicide bombing killed 38 civilians and wounded 105 people	2017 2018
		5 young men killed, 10 wounded in mortar attack	2019
Asa'ib/Khazali Network (League of the Righteous)	Baghdad Belt	109 Sunni	2014
Kurdish Workers' Party	Hakkari (Turkey)	40 Turks	2011

(Source: Amnesty International, Human Rights Watch, The New York Times, The Iraq Study Group Report)

Discriminatory attacks against other religious sects are committed, apparently in a planned manner. In one of the recent studies undertaken by Human Rights Watch, this trend is reaffirmed.¹⁸⁵ One doctor in the Health Ministry is quoted as “Sunnis are a minority in Baghdad, but they are the majority in our morgue.”¹⁸⁶ Another incident quoted is that of a man kidnapped by the fighters who identified themselves as members of Asa'ib militia. who was later released because he convinced them that he was a Shi'ite and not a Sunni.¹⁸⁷ Not only Shi'ite militia, but the Sunni also have regrouped them dreadfully in

¹⁸⁵ See Belkis Wille, *Mass Grave Discovery Highlights Iraq's Impunity Gap for Grave Crimes*, HUM. RTS. WATCH (Feb. 8, 2021), <https://www.hrw.org/news/2021/02/08/mass-grave-discovery-highlights-iraqs-impunity-gap-grave-crimes> [https://perma.cc/7QKE-3PJK].

¹⁸⁶ David D. Kirkpatrick, *Shiite Militias Pose Challenge for U.S. in Iraq*, NEW YORK TIMES (Sep. 16, 2014), <https://www.nytimes.com/2014/09/17/world/middleeast/shiite-militias-pose-challenge-for-us-in-iraq.html> [https://perma.cc/ZM8H-YZYS].

¹⁸⁷ *Id.*

the form of Islamic State. This organization has unleashed a campaign of terror with the ultimate aim to establish barbaric Islamic State with the olden glory of the Caliphate.¹⁸⁸ With this aim, they kill Christians, Kurds, Shias, Yazidis or any non-Sunni.¹⁸⁹ One of the Senators in America said: “If they’re not conducting mass executions, they’re burying people alive.”¹⁹⁰ Serious human rights violations and control of important areas by ISIL forced Obama administration in 2014 to send American troops to Iraq again.

On assuming office of the United Nations High Commissioner for Human Rights in September 2014, Mr. Zeid Ra’ad Al Hussein of Jordan, undertook the task to closely monitor the activities of Islamic State. In a statement issued by him, he was quoted as saying: “The array of violations and abuses perpetrated by ISIL and associated armed groups is staggering, and many of their acts may amount to war crimes or crimes against humanity.”¹⁹¹ He urged the “Iraqi government to accept the jurisdiction of the International Criminal Court to investigate whether such crimes had been committed.”¹⁹² In these circumstances, it is indeed necessary to establish a sense of accountability for the killing of innocent civilians in Iraq. It is expected that Iraq would find its due place in the foreign policies priorities of the new U.S. President, Joe Biden.

VII. CONCLUSION

During the Gulf wars, Saddam Hussein’s regime committed egregious crimes against its own population whom it believed gave support to the enemy forces. The tacit support provided by the U.S. further emboldened him. After the Kuwait war, the sanctions which were imposed on Iraq starved many citizens to death as the sanctions were very severe and Iraqis did not have sufficient food. Those sanctions had also angered Iraqis towards the Anglo-American strategy in the region. Post-conflict strategy of coalition forces was aimed at stabilizing the peace process and cooling down the cauldron of sectarian tension by democratizing the country with adequate guarantees of protection given to Sunnis, Shias, and the Kurdish population. The Iraq High Tribunal was established with this objective, but the political pressure defeated it and it became a mere agent of coalition forces and the Shia-led government. It is estimated that the U.S. contributed \$128 million a year to the Court, which was not without reasons.¹⁹³ The Tribunal was dissolved in July 2011 and there were

¹⁸⁸ Patrick J. Ryan, *Revisionist Islam: The Origins of a Modern Nightmare in Iraq and Syria*, 211 AM. PRESS 16 (Nov. 24, 2014).

¹⁸⁹ COUNTER EXTREMISM PROJECT, *ISIS PERSECUTION OF RELIGIONS* 1, 7 (2017).

¹⁹⁰ Rick Hampson, *Returning Islamic State Fighters Could Threaten U.S.*, U.S.A. TODAY (Aug. 21, 2014), <https://www.usatoday.com/story/news/nation/2014/08/21/islamic-state-jihadis-foley-iraq/14408951/> [https://perma.cc/9K9Z-HFWA].

¹⁹¹ Nick Cumming-Bruce, *5,500 Iraqis Killed Since Islamic State Began Its Military Drive*, U.N. SAYS, N.Y. TIMES (Oct. 2, 2014), <https://www.nytimes.com/2014/10/03/world/middleeast/un-reports-at-least-26000-civilian-casualties-in-iraq-conflict-this-year.html> [https://perma.cc/JL7X-D29C].

¹⁹² *Id.*

¹⁹³ Dave Johns, *Defining Justice*, PBS (Jan. 24, 2006), http://www.pbs.org/frontlineworld/stories/iraq501/defining_victors.html (last visited May 11, 2021).

no pending appeals. The role of the Tribunal in promoting peace in Iraq has been very limited as it has prosecuted and punished a handful of defendants who belonged to Ba'ath Party during Saddam's rule. Defendants believed that they were specially targeted by the tribunal as they are Sunnis.¹⁹⁴ During its existence, the tribunal decided around two dozen cases, including most prominent situations of *Al Anfal*, *Al Dujail*, and *Halabja*.

The Iraqi experiment with democracy began with the formation of the Interim Governing Council in July 2003. Ultimately the elections of 2006 proved to be a milestone, as the first Constitutional government was constituted after the general elections. At the same time, post 2006 elections and democratic Iraq has witnessed a rise in the grave human rights violations committed by private militias, insurgent groups, and fundamentalists. The government of Iraq, at many times, seems to have lost control over the actions of these groups. Consequently, mass killings, sexual slavery, and recruitment of children for insurgency are on rise. Iraq is neither a party to the Statute of International Criminal Court, nor has it the ability to prosecute those persons responsible for the killings of innocent civilians. Leaders of the fundamentalist forces and militia have even captured some territories and have continued barbarity. Unless the government of Iraq does not establish a sense of accountability for the violators of fundamental norms of human rights, the prospects for peace and justice are certainly not imminent. This differential paradigm of international criminal justice followed in Iraq would not make its future healthy and worthy enough to be emulated successfully.

The functioning of IHT was also marred with allegations of sectarianism. IHT has already been criticized by many on counts of its selective jurisdictions as well as its functional biases. Since the commencement of IHT, Iraq has witnessed many more horrific crimes that still remain unpunished. There are still many questions about the abuses committed by foreign forces and the quest for justice to the victims. The purpose of tribunals like IHT is not only to conduct trial but they are instrumental in establishing long lasting peace and harmony. Such tribunals are the tools to maintain international peace and security. But any bias and unequal judicial set ups may further endanger the peace in the region. Since Biden was the one who advocated for invasion as a march towards peace and security, it is also expected from him that he would like to find the still elusive peace and security paradigm for the Iraqi people. Any such attempt by Biden would not be complete without getting actively involved in evolving non-sectarian mechanisms to prosecute many such international crimes committed in Iraq by foreign and local forces including terrorist organizations. It is imperative that the new U.S. administration engage and support the new Iraqi leadership in the most fruitful manner so as the region finds its equilibrium with due respect to human rights and rule of law.

¹⁹⁴ Sinan Salaheddin, *Iraq Decides to Disband Court That Prosecuted Saddam Hussein*, TORONTO STAR (May 4, 2011), http://www.thestar.com/news/world/2011/05/04/iraq_decides_to_disband_court_that_prosecuted_saddam_hussein.html (last visited May 3, 2021).