Emasculating the Philosophy of International Criminal Justice in the Iraqi Special Tribunal

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Emasculating the Philosophy of International Criminal Justice in the Iraqi Special Tribunal

Farhad Malekian†

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Introduction

The jurisdictional reality of the system of international criminal law is rapidly developing within the international legal and political community. The states of the world have recently shown a willingness for the pragmatic implementation and attribution of the provisions of international criminal law to those who commit international crimes. This development can be seen in United Nations General Assembly and Security Council Resolutions, behind which the voice of the most militarily and politically strong states is conveying the whole machinery of the implementation of the system of international criminal law. This can particularly be examined in the development of the law of international criminal tribunals, such as the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Statute of the International Criminal Tribunal for Rwanda (ICTR). Neither of the Tribunals could have been established without the direct military participation of the United States. More recently, the Iraqi Special Tribunal (IST) for the prosecution and punishment of Saddam Hussein was established. The Tribunal has a temporary function and has jurisdiction over the former president of Iraq. The judicial legal validity of the Tribunal is, however, one of the most serious questions facing the interna-
tional legal community. These concerns are particularly more serious when one considers the judicial proceedings of other international criminal tribunals or courts including the Charter of the Nuremberg Tribunal, the Special Court for Sierra Leone, the ICTY, and the ICTR. In this article, I examine whether from a historical, contemporary, and prospective approach to the system of international criminal law concerning the prosecution and punishment of individuals, the proceedings of the IST over Saddam Hussein are consistent with the basic philosophy of the prosecution of heads of state in international criminal law. The purpose of this academic article is not to protect the criminals or the former dictator of Iraq from prosecution and punishment under a national criminal jurisdiction, but to see whether the laws of the tribunal reflect the basic foundations of international criminal justice, as stated repeatedly in the Charter of the United Nations and international human rights instruments, as well as the Statute of the International Criminal Court (ICC).

The main goal within the international criminal justice system is not the implementation of the rules, norms, and provisions of the system, but to achieve the essence of these rules in a scale of justice that can be balanced against each substance with the same standard of weight and measure. This means equality before the law for all without any discrimination, which not only includes the ordinary individuals of all states but also the heads of state of the world. In other words, if the system of international criminal law applies in accordance with one of the principles of jurisdiction such as the principle of universality, the principle of territoriality, the principle of passive personality, the principle of flag, the principle of internationality, the principle of international tribunality of jurisdiction, or any other principle, this application must, in all parts of the world, be employed in all appropriate cases without regard to the juridical or political strength of the heads of the relevant states. When the system of international criminal law is applied to individuals who have committed illegal acts, all relevant provisions concerning those crimes including the proceedings, prosecution, and punishment should be applied. This is what I call the complete application of the principle of international tribunality of jurisdiction over persons accused of committing international crimes.

I have organized my arguments under


9. This principle is a comprehensive aspect of the principle of complementary to national criminal jurisdiction.
the above principle.\textsuperscript{10} I introduced the principle for the first time at the Cornell International Law Journal Symposium in spring 2005. I hope that the principle will be developed by all means in international legal systems for the purpose of implementation of a true international criminal justice system in the world.

I. The Principles of the Criminal Justice System

Justice is the matter of understanding and the very question of give and take on an equal basis. It is the philosophy of reciprocity, mutual respect, and proportionality.\textsuperscript{11} It is on the whole meant to regulate the relationship of states with one another.\textsuperscript{12} In the system of international criminal law, justice is the contour between the actual acts of a person on one side and the understanding of the act by the international legal community on the other side. This side may include the ICC or a tribunal that will enforce certain provisions of international criminal law. The function of the court or the tribunal is to examine the conditions and the circumstances of a given case, to judge the acts of the accused person in accordance with the existing law, and to find out whether or not the acts violate the governing international criminal regulations. The final duty of the tribunal is thus to arrive at a reasonable understanding of the rules of international criminal law, apply them to a given case, and if the person is found guilty of committing an international crime, impose an appropriate punishment. The principles of international criminal justice are thus those principles of the system of criminal law that must be respected in the examination of a given case and should not be selected or ignored by the tribunal.

Two of the most important principles of justice are the principle of \textit{de lege lata} and the principle of \textit{nullum crimen sine lege}. Respect for these principles is vital for the basic structure of international criminal law. A brief analysis of these principles, as well as the effect of a selective international criminal justice system is necessary when considering the way in which the IST will administer international criminal law.

A. The Problem of Selective Criminal Justice

The theory of justice, as the drafters of international rules, obligations, and norms have supposed, does not normally function appropriately. The

\begin{itemize}
  \item \textsuperscript{10} For an analysis of the principle of international tribunality of jurisdiction see infra Part VI.D.
\end{itemize}
reason for this is that the international criminal system lacks a central international organization aimed at solving its theoretical issues and conflicts, in contrast to the national criminal system.\footnote{13. See M. Cherif Bassiouuni, Introduction to International Criminal Law 680-82 (2003); Farhad Malekian, International Criminal Law: The Legal and Critical Analysis of International Crimes 23 (1991).} The international conflicts are, therefore, sometimes very intensive and dangerous. The most common forms of these conflicts appear as war crimes, crimes against humanity, genocide, apartheid, torture, terrorism, aggression, and in most cases crimes against the humanitarian law of armed conflict.\footnote{14. See Bassiouuni, supra note 13, at 121-24.} Due to this primary concept of international justice that can appear in international relations of states, justice is considered by some to be weak, inconvenient, and selective.\footnote{15. See Jean Allain, International Law in the Middle East: Closer to Power than Justice 1 (2004); see also Jean Allain, Orientalism and International Law: The Middle East as the Underclass of the International Legal Order, 17 Leiden J. Int’l L. 391, 392 (2004); Robert Cryer, The Boundaries of Liability in International Criminal Law, or ‘Selectivity by Stealth’, 6 J. Conflict & Security L. 3, 3-6 (2001).} It is this selection of justice or the violation of equality within the terms of international conventional norms or the international criminal social contract that creates conflict.\footnote{16. Allain, supra note 13, at 1, 12.} Examples of the selection of justice can be seen in the structure of the United Nations, which presents in its Security Council a clear example of monopolization of international justice.\footnote{17. Farhad Malekian, The Monopolization of International Criminal Law in the United Nations: A Jurisprudential Approach 95-97 (1995).} Another clear instance is the IST and the selection of appropriate international criminal norms under the authority and supervision of the United States government.\footnote{18. See Saby Ghoshray, Enforcing International Criminal Law in the Iraqi Special Tribunal: An Analysis of the Scope, Jurisdiction and Legitimacy of the Proposed Legal Framework (2004), http://www.isrcl.org/Papers/2004/Ghoshray.pdf.} In the case of the IST, the principles of justice, which should have rested upon a theoretical foundation and legality, are based instead on the burdens of military strength.\footnote{19. Id. at 9.} Thus, it will be difficult in practice to convince an outsider who expects justice to be fair and equal. Consequently, the role of justice is not effective. This is because we have a picture of a minimum standard of justice in our theoretical perspective that must be respected at all times. In other words, there is an international society within which every state accepts that the same basic principles of international norms are applicable to every other state and that they are all equal before the law and the international legal system. They can neither modify the rules by their own will nor ignore them. This is a rule that we generally believe in. The concept of international justice denotes the existence of a common point of view between states for the maintenance of international peace and solving of international conflicts from different aspects of the law. But when the concept of justice as fairness is selected and monopolized by some states, views of many states and individuals may be
modified.  

One can find different conceptions of the term "justice" with different degrees and values in international criminal law. All these concepts have been developed through many centuries and resulted in different interpretations. They have, in fact, left different concepts of justice in the jurisprudence of international criminal law. Obviously, various concepts of justice do not solve the problems of international criminal law. While in some cases, they may temporarily solve international conflicts arising between states, in most instances, when justice is not done, armed conflicts are indeed unavoidable. One of the reasons for the conflicts is that a characteristic set of elements for assigning the fundamental rights, duties, and obligations arising from the institute of international criminal justice or international social cooperation which is acceptable to all states without any due regard to their size and strength is lacking. For example, the framework of the ICC, although promising, rests obviously on the military strength of the United States. In other words, it is up to the United States to accept or reject the implementation of certain rules concerning the application of criminality to the acts of certain individuals under the machinery of the ICC.

We should remember that international criminal justice must always have something in common so that the fundamental principle of international social relations can be accepted by all nations. In other words, it is the proper distribution of the principles of justice which brings us closer to peace. One should remember, however, that even the proper distribution of justice might not bring peace. The concept of fair and proper justice does not occur by the formulation and selection of norms, provisions, and rules of international conventions alone. Obviously, the term "peace" means nothing more than to leave aside arbitrary decisions and distinctions that are made between states and their citizens. It is usually our distrust of the principles of international criminal justice that leads to hostility and suspicion. A proper justice system surely introduces a proper international balance between all states and creates international legal trust and stability for the appropriate application of the norms of international criminal law in an international criminal court.

20. Id. at 14.
21. See BASSIOUNI, supra note 13, at 673.
22. Id. at 684–85.
23. Id. at 685.
24. Different schools of thought, namely the naturalists and the positivists, have suggested various conceptions of justice and its implementation. While both schools have struggled to enforce the system of international criminal law in accordance with their own theories, neither has been able to curtail the commission of international crimes. Id. at 686–88.
25. This can be examined within the provisions of Article 5 in conjunction with Part VII of the Statute of the United Nations. Article 5 concerns crimes within the jurisdiction of the Court. While that Article states that the jurisdiction of the Court is limited to the most serious international crimes, this power is restricted to the provisions of Chapter VII of the United Nations. See Rome Statute, supra note 8, art 5.
B. The Principle of De Lege Lata

The international struggle for the principle of legality of the system of international criminal law can be examined in the adoption process of many international criminal conventions.\textsuperscript{26} The formulation of many international conventions for the recognition of certain international crimes has demonstrated that no prosecution or punishment should be implemented without due regard to the basic element of criminal law—the principle of de lege lata.\textsuperscript{27}

One of the important points of the principle of legality is that it prevents the use of ex post facto laws for certain international crimes that are not consolidated within the conventional or customary norms of international criminal law.\textsuperscript{28} Further, de lege lata reflects justice as the most dominate concept of international criminal jurisdiction for the presentation of fairness. It would otherwise be against the social relations of states and individuals to speak of justice but in its retroactive form. It would also be difficult for an accepted international criminal court to satisfy itself by taking measures against the accused by referring to certain regulations and rules that are not an integral part of the system of international criminal law or are not satisfactory.\textsuperscript{29}

On the contrary, it is much easier for the international legal community when an international criminal court takes certain steps on its own in accordance with the particular, general, and jus cogens principles of international criminal law. Due to these important criteria, the Rome Statute relies in most part on the principle of de lege lata.\textsuperscript{30} In certain situations, however, it bases the principle of de lege lata on the politico-legal interpretations of the permanent members of the Security Council of the United Nations.\textsuperscript{31} This shortcoming is indeed against the principle of de lege lata and is one of the serious weaknesses of the Court. This is also true in the case of the IST. We will see that in order to avoid any juridical contradictions, we have to take into serious consideration the principle of international tribunality of jurisdiction, which is without doubt the most useful approach for the application of the system of international criminal law to

\textsuperscript{26} For example, Article 23 of the Rome Statute implies the importance of the principle of legality. It concerns the matter of nulla poena sine lege and reads that "[a] person convicted by the Court may be punished only in accordance with this Statute." Rome Statute, \textit{supra} note 8, art 23.

\textsuperscript{27} \textit{Id.}

\textsuperscript{28} That is why most international criminal conventions oblige the contracting parties to enact, in accordance with their respective constitutions, the necessary legislation in order to give effect to the provisions of the relevant conventions.

\textsuperscript{29} That is why the Rome Statute places emphasis on the applicability of certain laws that have already been accepted within the system of international criminal law. See Rome Statute, \textit{supra} note 8, art. 21.1(b).

\textsuperscript{30} For example Article 24 of the Rome Statute relates to the principle of non-retroactivity ratione personae. See Rome Statute, \textit{supra} note 8, art. 24.

\textsuperscript{31} See Rome Statute, \textit{supra} note 8, art. 5. Article 5 states "[t]he court shall exercise jurisdiction over the crime of aggression once a provision is adopted . . . . Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations."
certain international crimes.\textsuperscript{32}

International criminal justice ought to be fair and just and should, as much as possible, correspond with contemporary international criminal regulations. Further, it should not be the subject of major criticism in the international legal community. Of course, we do not deny that international criminal justice is always under some sort of criticism, but the degree and the level of criticism depends on the basic validity of the norms which are used by the court.\textsuperscript{33} Justice as fairness in international criminal law is to see that if the principle of \textit{de lege lata} is the main cornerstone of its essence, the criminal justice system cannot function without the implementation of this essence. Therefore, with the term \textit{de lege lata}, we do not only mean the law in force but also the practice or procedures and proceedings that must be respected in the terms of the international criminal justice system. Thus, the term \textit{de lege lata} applies to all types of procedures that concern the question of the guilt of the accused before an international criminal court. In other words, when a person accused of committing certain criminal violations is captured, all procedures such as the implication of rules, evidentiary rules, rights of the accused, and pretrial detention, including the implementation of the principles of human rights, must be fair and correspond to the prevailing international rules. Thus, the performance of the rules and norms of international criminal law implies respect for the principle of \textit{de lege lata}.\textsuperscript{34}

\textsuperscript{32} See infra Part VI.

\textsuperscript{33} It is rightly asserted "each war crimes trial is an exercise in selective justice to the extent that it reminds us that the majority of war crimes go unpunished." Gerry J. Simpson, \textit{War Crimes: A Critical Introduction}, in \textit{The Law of War Crimes: National and International Approaches} \textcopyright{} (T.L.H. McCormack & G.J. Simpson, eds., 1997). However, we cannot deny that the international criminal tribunal created by the United Nations for the prosecution and punishment of Yugoslavian war criminals is one of the most recognized international criminal courts, since it, like the ICTR, was created by international legal community as a whole. Both the ICTY and ICTR have created an important procedure within the legal structure of international criminal law, which cannot be ignored by any radical international criminal lawyer. This discussion does not, however, address the principles of justice and proportionality in the context of the ICTY and ICTY. For some arguments concerning the legal character of the ICTY see George H. Aldrich, \textit{Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia}, 90 Am. J. Int'l L. 64 (1996). For the consideration of the ICTR see William Schabas, \textit{Justice, Democracy and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems}, 7 Crim. L.F. 523 (1996).


\begin{quote}
The U.S. government's use of torture at Abu Ghraib prison in Iraq poses a different kind of challenge: not because the scale of the abuse is as large as Darfur, but because the abuser is so powerful. When most governments breach international human rights and humanitarian law, they commit a violation. The breach is condemned or prosecuted, but the rule remains firm. Yet when a government...\end{quote}
C. The Principle of Nullum Crimen Sine Lege

An appropriate application of the norms of international criminal law at the national or international level relies heavily on the authentic implementation of the principle of *nullum crimen sine lege*. The theory of justice as fairness cannot properly be studied without appropriate consideration of this principle, as it denotes the legal validity of jurisdiction over a person accused of committing an international crime. The importance of this principle cannot only be found within national criminal laws but also in the consideration and examination of international crimes. *Nullum crimen sine lege* has particular relevance for the application of certain criminal provisions within the jurisdiction of international criminal courts. The function and significance of the principle can be studied in conjunction with the prosecution and punishment of Hussein and Milošević. Both cases involve the implementation of international criminal rules, yet the principle of *nullum crimen sine lege* is much more controversial in the IST, operating under the authority of a national jurisdiction. One of the problems of the IST is that it applies criminal provisions which were not previously contained within the Iraqi Criminal Code.

According to the principle of *nullum crimen sine lege*, no person shall be charged with a crime if his conduct was not illegal within the jurisdiction of the given territory at the time it was committed. The principle of *de lege lata* concerns the question of existence of the law, and the principle of *nullum crimen sine lege* relates to the existence of the norms of criminal law that are applicable to criminal conduct. *Nullum crimen sine lege* constitutes a significant principle of national and international criminal law and must always be respected in the structure of any criminal justice system. That is why no international criminal tribunal should prosecute and punish any person without sufficient regard for this principle. This principle directly relates to the integrity of a national or international criminal justice system and its effect on the level and the degree of prosecution of the accused person before a criminal court.

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as dominant and influential as the United States openly defies that law and seeks to justify its defiance, it also undermines the law itself and invites others to do the same. The U.S. government’s deliberate and continuing use of “coercive interrogation”—its acceptance and deployment of torture and other cruel, inhuman, or degrading treatment—has had this insidious effect, well beyond the consequences of an ordinary abuser. That unlawful conduct has also undermined Washington’s much-needed credibility as a proponent of human rights and a leader of the campaign against terrorism. In the midst of a seeming epidemic of suicide bombings, beheadings, and other attacks on civilians and non-combatants—all affronts to the most basic human rights values—Washington’s weakened moral authority is felt acutely.


35. Article 22 of the Statute of the Permanent International Criminal Court, relating to general principles of criminal law, concerns the matter of *nullum crimen sine lege*. Rome Statute, supra note 8, art. 22.

36. See infra Part V.C.

37. The retroactive nature of IST has led to its condemnation.
It is a violation of international criminal law to impute rules and provisions that are not wholly an integral part of the principle of de lege lata or nullum crimen sine lege. Such rules are consistent only with the principle of de lege ferenda, or "the law of the future." Most international conventions that are drafted under the general principles of international criminal law represent de lege ferenda. The position of an international criminal convention that is drafted in the international legal community by the representatives of many states will not change as long as the required number of ratifications are not made.\textsuperscript{38} Even the 1998 Rome Statute was until recently considered only under the principle of de lege ferenda, and not de lege lata.\textsuperscript{39} Thus, the ICC could not come into existence without a certain number of ratifications.\textsuperscript{40} Throughout this article, I will insist that in order for the principle of nullum crimen sine lege to be wholly respected in the IST, we ought to implement the principle of international tribunality of jurisdiction.\textsuperscript{41} Doing so will avoid any violation of the principles of international criminal justice and will uphold the principles of de lege lata and nullum crimen sine lege in the proceeding of the IST. With this in mind, this article examines the growing conditions of the jurisprudence of international criminal law for the application of a proper criminal justice system when national or international criminal courts or tribunals exercise certain provisions of international criminal law.

II. Dimensions of the Earlier Tribunals

An investigation into the historical background of the system of international criminal law demonstrates that the most practical contribution of the states of the world to the prosecution and punishment of heads of state was introduced after the end of the First World War within the provisions of the Treaty of Versailles.\textsuperscript{42} The Treaty included the establishment of an international criminal tribunal for the prosecution of war criminals, especially the punishment of the German head of state, Kaiser William.\textsuperscript{43} For this purpose, the Peace Conference in 1919 appointed a Commission on the "Responsibility of Authors of the War and Enforcement of Penalties." This commission created three sub-committees which were given differ-


\textsuperscript{39}. This was on the ground that a sufficient number of ratifying signatures (60) had to be submitted to the Secretary-General of the United Nations. Rome Statute, supra note 8, art 126.

\textsuperscript{40}. See Rome Statute, supra note 8, art. 126 (concerning entry into force).

\textsuperscript{41}. See infra Part VI.

\textsuperscript{42}. See Vespasian V. Pella, Towards an International Criminal Court, 44 AM. J. INT’L L. 37, 40 (1950).

ent tasks on the following subjects: criminal acts, responsibility for the war, and responsibility for the violation of the laws and customs of war.\textsuperscript{44} In short, the Commission stated that those who were responsible for the outbreak of war should be prosecuted "for supreme offences against international morality and the sanctity of treaties." The 1919 peace treaty concluded in Versailles had a number of significant provisions for the prosecution and punishment of those accused of violating the laws and customs of war formulated in the contexts of Articles 227, 228, 231, and 232.\textsuperscript{45} Among many other suggestions, the Treaty of Versailles emphasized the creation of a "special tribunal" for the trial of those who committed criminal acts during the war.\textsuperscript{46} However, the relevant provisions of the Treaty concerning the establishment of a tribunal for the prosecution of accused war criminals were never implemented and therefore was of no practical help to war victims.\textsuperscript{47}

There were many reasons for the nonattributability and non-implementation of the provisions of the Treaty in international criminal law. One reason was the refuge of Kaiser William in the Netherlands. A further reason was the political character of the crime, which reduced the juridical prosecution of the German head of the state.\textsuperscript{48} However, to be concise, the non-enforcement of the relevant provisions of the Treaty was mostly determined by problematically inequitable provisions of the Treaty and upon the non-existence of a prior impartial international criminal tribunal, which could bring the perpetrators of international crimes before the appropriate international criminal jurisdiction.\textsuperscript{49} For example, it was not clear what type of proceedings would be most useful in the prosecution of the accused. This question was much more sensible in a case dealing with the prosecution of a head of state, given that heads of state have special immunities under civil and criminal jurisdiction, which excuse them from any type of interrogation. Additionally, the militarily strong states had no interest in the establishment of an international criminal tribunal having international juridical authority over heads of state or government. In particular, a forum, its judges and its prosecutors could not be authorized to recognize a head of state as a violator of international criminal pro-

\textsuperscript{44} Id. at 55.
\textsuperscript{45} Id. at 56-57.
\textsuperscript{46} Treaty of Peace Between the Allied and Associated Powers and Germany art. 227, June 28, 1919, 225 Consol. T.S. 188, 285 [hereinafter Treaty of Versailles].
\textsuperscript{47} According to Kelsen, Article 227 of the Versailles Treaty established collective responsibility rather than individual responsibility for violations of the norms of international law. HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 132-33 (2d prtg. 2003).
\textsuperscript{48} MALEKIAN, supra note 43, at 57-58.
\textsuperscript{49} After World War I, approximately 900 individuals were recognized as alleged war criminals. The Supreme Court at Leipzig, Germany became responsible for the exercise of jurisdiction. Of these accused persons, it was decided that twelve would face criminal trial. Three of these did not come before the Supreme Court. The Court also dropped all charges against three others, and the remaining six received the most minimal punishment available. AM. HIST. ASS'N, WHAT SHALL BE DONE ABOUT GERMANY AFTER THE WAR?, G.I. ROUNDTABLE SERIES No. 11, at 13 (1944), available at http://eli.sls.lib.il.us/cgi-bin/ida/fullidarecord.pl?record=157 ("What Happened After the Last War?").
visions. Finally, the treaty rules governing the prosecution and punishment of accused persons, including heads of state, were largely retroactive and arbitrary. The relevant rules of the treaty therefore violated the principle of *de lege lata*.

This inability to use international justice to bring the perpetrators of the First World War under international criminal jurisdiction for prosecution and punishment caused much difficulty for the next generation of the international legal community, faced with World War II. The questions that could not be answered and dealt with in an international criminal tribunal in the beginning of the last century were now passed into the basic foundation of the Charter of the Nuremberg and Tokyo tribunals. The politicians as well as the tribunal judges were forced to deal with questions relating to the tribunal’s proceedings, especially the very significant and sensitive question of the law, namely whether the laws, rules, provisions, norms, and all the proceedings, including implementation, evidentiary rules, and the interrogation of the accused constituted a manifestation of the principles of *de lege lata, de lege ferenda*, or whether they constituted a retroactive or *ex post facto* law. Unfortunately, these questions reduced


51. While there is no special condition for the interpretation of the principle of justice in international law and international criminal law, it indicates the way in which the terminology of justice is discussed and explained by different nations in the international community. If the outcome of justice is known and properly acknowledged by most national societies having given rights and duties to participate in the conclusion of international agreements and the distribution of justice at the same level and degree with other nations, the principles of *de lege lata* are, most probably, correctly delivered to the subjects of their attributability. A simple explanation for the principle of *de lege lata* is that it should present the total sum of norms and rules that have been determined by all those who are a part of our international legal and political community. They should reflect those norms of international behavior that nations have acknowledged within their values. In this instance, one searches for the recognition of an appropriate initial status quo in order to insure that the principles of justice that may be recognized in the process of formulating an international convention are based on fundamental elements of criminal justice as recognized by all nations. In order for the role of international criminal justice to be correct, it should be connected to the mental, moral, and economic requirements of nations that are weak and strong. Justice can scarcely function properly if its fundamental norms dismiss the will of all nations. Where the principle of international criminal justice is not respected by the weak, it may be a protest to an unjustifiable situation.

52. See generally Brownlie, supra note 12 (analyzing the extent of the legal prohibition on the use of force by states, and the quality of this prohibition).

53. According to the victors of the Second World War, the idea of the establishment of an international criminal tribunal was principally based on frequent violations of the principles of the law of armed conflict by the German armed forces. Consequently, the constitution of an international criminal tribunal was drafted in the London Agreement in 1944 and thereafter accepted by many states including the United States, Britain, the Soviet Union, and France. The Constitution of the International Military Tribunal apparently created the legal grounds for the victors to establish an international criminal tribunal in Nuremberg. Many individuals were accused of war crimes and were brought before the Tribunal. Truman Presidential Museum & Library, The War Crimes Trials at Nuremberg, http://www.trumanlibrary.org/whistlestop/study_collections/nuremberg (last visited Apr. 25, 2005).

the legal value of international criminal jurisdiction or international criminal justice for the future. In other words, the Holocaust became a true question of international moral justice without any realistic and sophisticated answer while real justice, as would have been appreciated and consolidated in the legal literature of international criminal law, missed its juridical goals.

The shortcoming of the international legal and political community of that time can also be examined in the United Nations Charter. The Charter did not establish an international criminal court and did not redraft, modify, or translate the Charter of the Tribunals into the law of the United Nations. The only contribution of the world superpowers of the time was to support the World War II tribunals. The refusal to create an international criminal court in the United Nations Charter was due to monopolization of the vocabulary of true international justice by those who were and are responsible for the maintenance of international peace, security, and equality of states. Due to this situation, the legal questions of international criminal justice were left unsolved. More importantly, the issue of bringing world leaders to justice through the use of an international criminal court was left for future generations.

The provisions of the Charter of the International Military Tribunal have not only been violated by many non-member states but even by the permanent members of the United Nations in their international relations with other states. After the creation of the International Military Tribunal, no other permanent international tribunal was established, until the formation of the ICC. Consequently, crimes against peace, war crimes,

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crimes against humanity, as well as other international crimes such as genocide\(^5\) and apartheid\(^5\) have been committed by a considerable number of states. The international crimes of genocide and apartheid were not recognized and constituted as international crimes at the end of the work of the International Military Tribunal in Nuremberg, even though such crimes had already been committed during World War II.

The misinterpretation of the international criminal system and the controlling of the concept of crime, criminality, and the notion of justice in the central international organizations, such as the United Nations, have obviously been some of the strongest reasons for the grave violations of the system of international criminal law after the establishment of the United Nations. A clear example of the commission of genocide occurred under the authority of one of the most militarily strong permanent members of the United Nations, namely, the United States. The genocide during the Vietnam War is only one of the many illustrative examples of the non-existence of a true international criminal justice system in the 1970s. During the Vietnam War, a considerable number of international crimes were committed but none of the perpetrators of these crimes were brought before any type of international criminal tribunal for prosecution and punishment.\(^5\) They were not therefore recognized as major war criminals or as ordinary criminals under Vietnamese territorial criminal jurisdiction. No government even claimed the application of the principle of universal jurisdiction. The only non-governmental approach to the serious breaches of the humanitarian law of armed conflict was the Russell War Crimes Tribunal.\(^6\) Similarly, to note but a few are the notorious mass murders in Algeria, Biafra, and Indonesia in the 1960s; in Cambodia, East Timor, and Uganda in the 1970s; in Afghanistan, Iraq, and Iran in the 1980s; in Bosnia-Herzegovina, Rwanda,\(^6\) Kosovo, and Zaire in the 1990s; in Sierra Leone at the start of the twenty-first century; and the prolonged Israeli governmental crimes since 1980.\(^6\) Presently, the serious fundamental

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58. Leslie Rubin, United Nations, Apartheid in Practice (1971); Bernhard Graefrath, Convention Against the Crime of Apartheid, 11 German Foreign Pol'y 395 (1972).
62. See Malekian, supra note 13, at 281, 285, 392; see also Amnesty Int'l, Annual Report 1974–75 (1975); Amnesty Int'l, Report on Torture (1975); Amnesty Int'l,
violations of international criminal law in Afghanistan by the United States remain an unsolved question of international criminal justice. Many of the violations outlined above were recognized as genocide, crimes against humanity, war crimes, or crimes against the humanitarian law of armed conflicts. The commission of those crimes was so serious that the United Nations has established several criminal courts for the prosecution and punishment of the accused. Examples of these include the ICTR and the ad hoc court for East Timor. The important feature of these criminal courts is that they are drafted, guided, and implemented under the supervision of the United Nations and particularly by international judges. This means that these tribunals are, in one way or another, implementing the provisions of international criminal law over accused persons with due regard to international justice. By this, I mean that their systems are less criticized by the international legal community. In other words, certain political parties do not monopolize their operation, unlike in the IST. This is particularly important when questions of international criminal responsibility of heads of state are the most important part of conventional and customary international criminal law. Of particular importance is the Rome Statute. It clarifies that:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Both subsections in the Rome statute state that an individual’s official capacity for the purpose of attribution of international criminal responsibility is irrelevant. This is a clear statement of the application and implementation of the system of international criminal law which needs no modification by any special tribunal.


64. The question of individual international criminal responsibility has long been considered in the system of international criminal law. This can particularly be seen within the provisions of international criminal conventions. For example, Article 25 of the Rome Statute relates to individual criminal responsibility. Rome Statute, supra note 8, art. 25.

65. Id. art. 27.
III. The Tragedy of Criminal Justice and Milošević

Although the system of international criminal law extends from various points of view, international criminal violations are the most serious problems faced by the international legal and political community. One of the most well known and serious violations of international criminal law occurred at the end of the last century in the former Yugoslavia. These violations led to the creation of the most well known international criminal tribunal to have been established in the decades following the Nuremberg and Tokyo War Crimes Tribunals. The ICTY was established under the legal and political authority of the United Nations. The Statute of the Tribunal concentrates on the creation of jurisdiction over the violators of the system of international criminal law in order to prosecute and punish them on an international level for the crimes that have been committed between 1991 and 1995.

The ICTY started its task in early 1995. Since that time, the Tribunal has been engaged in the prosecution of a number of individuals for violations of the humanitarian law of armed conflict and the norms of international criminal law. One of the most serious cases that has been brought before the Tribunal’s jurisdiction is that of Slobodan Milošević. Milošević, the President of the former Yugoslavia, has been accused of committing grave violations of international criminal law. The Milošević case may be considered one of the first cases in the history of international criminal law that has involved an international criminal tribunal for the prosecu-

66. According to the ICTY Statute, grave breaches of the Geneva Conventions were committed. These were:
   (a) willful killing;
   (b) torture or inhuman treatment, including biological experiments;
   (c) willfully causing great suffering or serious injury to body or health;
   (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
   (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
   (f) willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
   (g) unlawful deportation or transfer or unlawful confinement of a civilian;
   (h) taking civilians as hostages.

ICTY Statute, supra note 4, art 2.


69. The Tribunal has been dealing with the case for a long period of time, without result. See Marlise Simons, A Warmer Tone in Court as Milošević Pursues his Defense, N.Y. Times, Dec. 7, 2004, at A10.

70. No tribunal has ever been created for the prosecution of heads of state on an international level. For example, consider the case of Napoleon Bonaparte. After conquering most of Europe during the early nineteenth century, he was eventually defeated by British and Prussian forces. While there was an attempt to prosecute and punish him as a war criminal, this idea never came to fruition, and the British government ultimately chose a political rather than a juridical solution. See Remigiusz Bierzanek, War Crimes History and Definition, in 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 562 (M. Cherif Bassiouoni, ed., 1973). The United States Supreme Court dealt with the question of the criminal responsibility of heads of state in 1812, concluding that heads of state are
tion and punishment of a head of state.\textsuperscript{71} One of the most important tasks of the ICTY is to deal with the gravity of the concept of international criminal responsibility and to attribute certain penalties for atrocities and grave violations of international criminal law that occurred under Milošević's political and legal authority.\textsuperscript{72}

As we will examine in the Hussein case, Milošević is accused of committing a number of international crimes during the war. Specifically, the charges against Milošević include (i) violations of the law of armed conflict during the atrocities carried out in Kosovo in 1995, (ii) violations of the provisions of international criminal law concerning crimes against humanity committed in Croatia in 1991 and 1992, and (iii) violations of the provisions of the International Convention on Genocide, namely the alleged genocide in Bosnia-Herzegovina between 1992 and 1995.\textsuperscript{73} Thus, Milošević has allegedly committed at least three categories of international crimes—war crimes,\textsuperscript{74} crimes against humanity,\textsuperscript{75} and genocide. All three are an integral part of one another and in many situations, from a juridical point of view, they overlap. Acts that constitute crimes against humanity or war crimes cannot necessarily be categorized as genocide. However, because of genocide's wide scope, when it is committed during a war, it can also be specified as both a war crime and a crime against humanity. The Nuremberg tribunal had a similar rule but not concerning the crime of genocide which was criminalized after the Second World War. It must be emphasized that war crimes or crimes against humanity do not necessarily need to be specified as "systematic", which is one of the basic elements for the recognition of genocide.\textsuperscript{76}

The ICTY is one of the illustrative examples of an international criminal tribunal that has been internationally created and possesses a broad range of authority to prosecute and punish former heads of state.\textsuperscript{77} Although certain criticisms have been levied against the ICTY, it must be acknowledged that the Tribunal's charter is based on the great willingness of the majority of states to prosecute and punish war criminals. Accordingly, the legislation of the Tribunal does not contain any distinctions between those who were involved in the commission of an international

\textsuperscript{71} See Schooner Exchange v. McFaddon and Others, 11 U.S. (7 Cranch) 116 (1812).

\textsuperscript{72} For example, in the case of Japanese Emperor Hirohito, the allied forces ultimately decided not to try him in front of an international tribunal. See M. Cherif Bassiouni, \textit{From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court}, 10 HARV. HUM. RTS. J. 11, 35 (1997).

\textsuperscript{73} For an analysis of the concept of individual criminal responsibility in the ICTY see James C. O'Brien, \textit{The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia}, 87 AM. J. INT'L L. 639, 651 (1993).

\textsuperscript{74} See ICTY Statute, supra note 4.

\textsuperscript{75} Id. arts. 2, 3.

\textsuperscript{76} Another essential condition for the recognition of the crime of genocide is the element of intent. See Rome Statute, supra note 8, art. 4.2.

\textsuperscript{77} ICTY Statute, supra note 4, art. 9; see also JONES & POWLES, supra note 1, at 348-53.
crime.\textsuperscript{78} This is reflected in the Milošević trial itself.\textsuperscript{79}

IV. The Tragedy of Criminal Justice and Hussein

The non-existence of a centralized international organization having the power to enforce international criminal law has made the maintenance of security, peace, and justice in the international legal realm much more difficult. Consequently, violations of international criminal law have not only become more frequent, but also have affected the way in which states, governments, and heads of states try to settle their military, political, and economic conflicts. One of the clear examples of the tragedy of international criminal justice is the case of Saddam Hussein and the violations of national and international criminal law under his political authority as head of state of Iraq.\textsuperscript{80} Therefore, the international crimes that have been committed under Hussein's presidency are, in one sense, similar to the international crimes that have been committed under Milošević's authority.\textsuperscript{81} The Statute of the IST reflects this important fact.

The Statute was drafted exclusively for the crimes committed under the authority of those who were working for the Iraqi regime and had participated, in one way or another, in the commission of those national and international crimes.\textsuperscript{82} In fact, the United States military forces captured Saddam Hussein in December 2003, and in the beginning of the next year declared that Hussein was a prisoner of war according to the provisions of the Geneva Conventions of 1949. According to the Statute of the IST, Hussein and many other individuals are accused of having committed several categories of international crimes.\textsuperscript{83} These include serious violations of the provisions of the International Convention on Genocide,\textsuperscript{84} violations

\begin{itemize}
\item \textsuperscript{78} ICTY Statute, supra note 4, art. 7.
\item \textsuperscript{79} However, the ICTY has not been able to prosecute Milošević properly because of his ability to control the Tribunal psychologically.
\item \textsuperscript{81} See generally Khadduri & Ghiareed, supra note 80; I.F. Dekker and H.H.G. Post, The Gulf War from the Point of View of International Law, 17 NETHERLANDS Y.B. INT'L L. 75 (1986) (analyzing the history and development of the Iran-Iraq conflict).
\item \textsuperscript{84} See IST Statute, supra note 82, art. 11.
\end{itemize}
of the provisions of international criminal law applicable to crimes against humanity,\textsuperscript{85} and grave breaches of the provisions of the Geneva Conventions applicable in time of war constituting war crimes.\textsuperscript{86} Moreover, the Iraqi Statute also refers to other acts in violation of the fundamental structure of national legislation. This category is dealt with under a separate article concerning violations of stipulated Iraqi laws.\textsuperscript{87}

The philosophy of justice in international criminal law that was not appropriately dealt with in connection with other international violations in international relations has now generated a very serious question regarding the maintenance of authentic international criminal justice in the case of Saddam Hussein. In other words, the inability of the international political and juridical community to deal with questions regarding the application of international criminal justice to international criminals before and after the Second World War created juridical and political conditions under which the former heads of state of Iraq and the former Yugoslavia could notoriously develop their criminal actions during their presidencies. For example, during his presidency, Hussein committed many unlawful acts against his own and other nations, including acts against the Kurdish population and during the Iran-Iraq War.\textsuperscript{88} The use of chemical weapons against the Iraqi Kurdish population and those committed during the war against the Iran\textsuperscript{89} can never be vacuumed from the history of mutilation of human beings, given that the United Nations had already been established for at least forty years, and was supposed to create justice, security, equality, and peace.\textsuperscript{90}

The serious violations of human rights laws during Hussein's presidency were not only a national tragedy for the Iraqi people but also a very serious tragedy for international criminal justice generally, which has scarcely been able to maintain justice and peace in accordance with international rules that have been formulated within the United Nations Charter and numerous international criminal conventions. Thus, international justice, which had been promised under the United Nations Charter has been, in most serious situations, symbolic and not practical for the imple-

\textsuperscript{85} See id. art. 12.
\textsuperscript{86} See id. art. 13.
\textsuperscript{87} See id. art. 14.

\textsuperscript{88} The United States government supported criminal acts of Hussein. See ALEX ATROUSHI, BLOODY FRIDAY, CHEMICAL MASSACRE OF THE KURDS BY THE IRAQI REGIME, \texttt{http://www.kdp.pp.se/chemical.html} (last visited Apr 23, 2005).


\textsuperscript{90} Id.

\textsuperscript{91} The purposes and principles of the Charter are partly formulated within Article 1. It reads:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

U.N. Charter art. 1, ¶ 1.
mentation of the international legal order and the prevention of international crimes. In short, the United Nations has failed to perform its duties.

V. International Criminal Responsibility

A. Generally

Nothing in the law is as important as the question of liability or responsibility. This is certainly true in the case of international criminal law. In fact, the whole body of international criminal law is based on the notion of attributing responsibility to persons who commit international crimes. My aim here is to examine whether the concept of international criminal responsibility that has been included in the ICTY and the Statute of the IST presents justice, as it is understood by the majority of nations. The term “international criminal responsibility” has no appropriate meaning without a proper understanding of the concept of true international criminal justice that is expressed by an impartial international criminal tribunal. It is however very difficult to give a constructive definition to the question of international criminal jurisdiction as presenting the fair and right concept of justice in international criminal law. We have to properly consider what principles of justice are acceptable to the international legal community and, at the same time, ensure that those principles are acknowledged by the majority of the nations of the world.

The complicity in the definition of the term “justice”, especially in international criminal law, creates difficulties in the application of the concept of international criminal responsibility to individuals who have committed international crimes. That is why we have to give a chain of definitions to the term “international criminal justice” as presenting equality between different subjects of the law. It is therefore on this proposition that the system of justice and criminal responsibility should be based. In other words, justice represents equality, and equality gives rise to the concept of criminal responsibility in international criminal law. Thus, international criminal law should apply equally to all those responsible for illegal conduct. Under this principle, international criminal law should not only apply to Hussein, but also, historically, to those who have violated and are violating the system.

Given the basic position and the reasons for delivering international criminal justice, we may automatically divide the concept of international criminal responsibility into three classes. One class is the international criminal responsibility that is directly or indirectly recognized by the pow-

92. See Malekian, supra note 2, at 153.
93. See supra Part I.
94. See supra Part I.
95. See Rome Statute, supra note 8, arts. 25–33.
96. For example, international criminal law should apply to those governments, such as the United States, which participated in Hussein's international criminal actions.
erful states in the United Nations Security Council. The second class relates to the concept of international criminal responsibility that is attributed in accordance with the jurisdiction of a national or international criminal court. Finally, the third class relates to the concept of international criminal responsibility that is not necessarily stated by an international criminal court or the Security Council members but rather through the strong tendency and the will of most nations of the world to bring the perpetrators of certain acts to justice. Between these three classes of justice, the first relies on the resolutions and military powers of the Security Council. The second is based on the principle of *de lege lata* that is the result of the provisions of international criminal conventions. The third class is different, however, as it is based on the cultural, moral, religious, theoretical, and economic understanding of different nations of what should constitute a violation of international criminal law and what should not. For example, the Holocaust of the Second World War was surely unjust and immoral and constituted without doubt a crime against mankind. This conclusion can always be achieved regardless of whether or not the Nuremberg Tribunal was established by the victorious states, as our judgments are based on actions that are against the standard of human society and human protection, especially the protection of civilians.

In this way, we may indicate a wider understanding of the concept of justice in international criminal law and we may at the same time find a larger conception of international criminal responsibility based on the principles of international criminal law. International criminal justice is thus not just the expression of the circumstances of the time by the strong military powers but also the conditions under which our understanding of the matters alternates with due regard to the progressive development and evolution of international civilization as in the case of slavery and war crimes. Furthermore, it would be very strange if we would speak about

97. We must not forget, however, that when we face an international case which is brought under the consideration of the Security Council for the application of international criminal responsibility, we face international tensions and reactions regarding the subject matter of interest. Therefore, a criminal case that is brought before the Council concerns an important matter of international justice. It indicates also the existence of a conflict in the international legal system. Here, the permanent members of the Security Council cannot officially modify the principle of *de lege lata* and the concept of responsibility, but surely can modify it by new interpretations characterizing its own political interests. A clear example was the Gulf crisis and the propaganda relating to Hussein's prohibited chemical weapons. It has, however, become clear today that the case was brought before the Security Council because of America's political interests. Here again we have a clear example of international criminal monopolization of international criminal justice. This creates conflicts between what the principle of *de lege lata* is and what its practical interpretation appears to be. The Gulf Crisis in 2003 has surely modified the system of international criminal law and the way in which we interpret international criminal justice. See generally Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 Am. J. Int'l L. 124 (1999).

98. Apart from the concept of justice which has prevailed due to the support of strong states but lacks legitimacy in the international relations of states, many states have struggled to cooperate with one another to create certain circumstances which can prevent acts they deem immoral. For example, the slavery conventions and the four
the concept of criminal responsibility only in relation to international courts and tribunals. The concept of international criminal responsibility in the Nuremberg tribunal developed due to the world's opinion about criminals with the reservation that the concept was, for many, retroactive and did not fulfil the conditions for the principle of *de lege lata* and attribution of the concept of juridical responsibility. Thus, in the course of an international criminal tribunal, such as the ICTY, we would expect that the judges of the Tribunal are delivering the highest standard of international justice regarding the investigations, proceedings, and conclusions of the case. That is why we insist on the implementation of jurisdiction on an international level for the most serious international crimes committed by individuals or states. With this we wish to hinder any type of justice which is prejudiced by strong or weak political parties in the United Nations. The purpose is to create an impartial and neutral jurisdiction, as well as to ensure that the conclusions of the court or the tribunal are accepted by the international legal and political community. I am focusing here on the IST, created under the political order of the United States as well as the ICTY. In focusing on these two tribunals, I wish to apply an equal concept of international criminal responsibility to those who are accused of committing war crimes, crimes against humanity, and genocide.

B. Criminal Responsibility of Milošević

Considering the concept of international criminal justice, one can see that the ICTY has been able to prosecute many individuals who have allegedly committed war crimes, crimes against humanity, and genocide. The tribunal has not considered the juridical or political position or authority of the accused person in his home state in its operation. Thus, neither ordinary individuals nor superiors are permitted to escape prosecution and punishment. In the Milošević case, then, his international criminal responsibility is considered a fact in the ICTY procedures and the judges must deal with all of his criminal actions.

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100. These include aggression, war crimes, crimes against humanity, genocide, torture, and unlawful use of weapons.

101. For various discussions relating to the Security Council rules in the matter of international crimes, see generally *THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION* (Mauro Politi & Giuseppe Nesi eds., 2004).

102. See *Ghoshray*, supra note 18.

103. See *INTERNATIONAL CRIMINAL LAW DEVELOPMENTS IN THE CASE LAW OF THE ICTY*, supra note 99 (presenting discussions on the development and application of international criminal law in the ICTY).

104. *Id.*

Article 7 of the ICTY Statute concerns international criminal responsibility of the individuals who have participated in the commission of international crimes during the war in the former Yugoslavia. The words of the Article are clear—it calls for international criminal responsibility for those who have committed international crimes. The terms of the article apply to heads of state as well as ordinary citizens. The conception of justice as fairness and rightness not only results in direct satisfaction for the victims of the crimes, but also the recognition of those important norms of international criminal law that are applicable in certain situations. Thus, we must have a direct definition of the concept of international criminal responsibility in conjunction with the concept of international criminal justice, which is delivered by impartial judges that are selected by and under the authority of the United Nations, with due regard to the majority views of the members of the General Assembly.

The provisions of the ICTY Statute must therefore be examined in conjunction with the provisions of international criminal law concerning the attribution of responsibility to the accused. Article 7 of the Statute rejects the concept of immunity for former heads of state. Further, no mitigation of punishment is permitted under the terms of the article. Although the Statute may be criticized from various points of view, it is nevertheless obvious that it creates a certain discipline of justice that cannot be rejected in the international criminal system because of its united policy of implementation under United Nations authority. But this is not the whole picture of international criminal justice, and justice cannot only be measured in the Milošević trial. The explanation for the Hussein trail makes this argument illustrative.

106. Id. art. 7. Article 7 specifies that:

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

Id.

107. Id. art. 13 (governing the qualifications and elections of judges); see also Rome Statute, supra note 8, arts. 35, 36.
C. Criminal Responsibility of Hussein

Article 15 of the Statute of the IST governs the concept of international criminal responsibility. The provisions of this article are significantly different from those of Article 7 of the ICTY. This is primarily because the basic conditions of the Iraqi Tribunal have been based on the juridical and political power of the victorious states within the occupied territory. Further, Iraqi national criminal provisions have been utilized when the rules of international criminal law could not be properly applied.

Article 15 of the IST Statute puts special emphasis on the concept of individual criminal responsibility. It states that an official position may not be used to escape liability. No immunity is given for the crimes listed in the Statute, including genocide, war crimes, and crimes against humanity.108 The logical consequences of the provisions of the article conflict

108. Article 15 reads:

a) A person who commits a crime within the jurisdiction of this Tribunal shall be individually responsible and liable for punishment in accordance with this Statute.

b) In accordance with this Statute, and the provisions of Iraqi criminal law, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Tribunal if that person:

1. Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

2. Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

3. For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

4. In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

   i. Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Tribunal; or

   ii. Be made in the knowledge of the intention of the group to commit the crime;

5. In respect of the crime of genocide, directly and publicly incites others to commit genocide;

6. Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

c) The official position of any accused person, whether as president, prime minister, member of the cabinet, chairman or a member of the Revolutionary Command Council, a member of the Arab Socialist Ba'ath Party Regional Command or Government (or an instrumentality of either) or as a responsible Iraqi Government official or member of the Ba'ath Party or in any other capacity, shall
with the way in which national and international criminal courts behave.\textsuperscript{109}

Looking at the IST and the concept of criminal responsibility of a persons accused of committing certain international or national crimes, a simple question is whether the Tribunal can properly and impartially attribute the concept of international criminal responsibility to those who have been brought before it.\textsuperscript{110} On the one hand, in certain situations, such as those former Iraqi government officials who systematically committed a range of international crimes, the application of justice by the judges and prosecutors who were victims of their criminal acts is very problematic.\textsuperscript{111} How can the judges be impartial in the application of international criminal justice or national criminal justice in certain serious cases? On the other hand, justice is not just the implementation of some type of jurisdiction but the very balanced and unbiased presentation of the notion of rightness and fairness with due regard to the principles of proportionality, reciprocity, impartiality, and the global accountability of the judges in the field of international human rights. Moreover, within the sphere of international criminal law, there are acts or omissions for which international criminal responsibility can only properly be imposed either by accurately empowering an international criminal court or tribunal or by an ad hoc court empowered under the authority of the United Nations. Thus, the condi-

\begin{itemize}
  \item not relieve such person of criminal responsibility nor mitigate punishment. No person is entitled to any immunity with respect to any of the crimes stipulated in Articles 11 to 14.
  \item d) The fact that any of the acts referred to in Articles 11 to 14 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to submit the matter to the competent authorities for investigation and prosecution.
  \item e) The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.
\end{itemize}

IST Statute, \textit{supra} note 83, art. 15.

109. This is because the legal personality of the Tribunal is domestic; it lacks an international legal capacity. For instance, according to Article 4 of the Rome Statute, which governs the \textit{legal statute and powers of the court}, "\textit{t}he Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes." Rome Statute, \textit{supra} note 8, art. 4. This means that the impartiality of the court must be the first step when applying the provisions of international criminal law. Moreover, the concepts of crimes against humanity, war crimes, and genocide did not exist in Iraq's former national criminal code, yet they will be employed by the IST. Thus, they may be criticised as ex post facto laws, and, therefore, may be considered a serious violation of the principles of international human rights.

110. This is clearly stated in Article 36(3)(a) on qualifications, nominations, and elections of ICC judges. See Rome Statute, \textit{supra} note 8, art. 36(3)(a).

111. Furthermore, the judges of the IST have no knowledge of criminal law and international criminal law. The occupying power has taught them in London. One must not forget that competence in criminal law and procedure is a primary condition for election to an international tribunal, such as the ICC. See id. art. 36(3)(b)(i).
tions and circumstances of the attribution of certain international crimes such as genocide requires the principle of international tribunality of jurisdiction. Tribunals or courts of an entirely international or semi-international character exercise partial international jurisdiction through their application of international criminal law and, more significantly, by their constitution. Even in the case of a national criminal court, the court may exercise jurisdiction through the legislation applied and the appropriate provisions of international criminal law justified by international criminal jurisdictions.

VI. Application of the Principle of Internationality of the Courts

A. Hostis Human Generis

The principle of universality in the system of international criminal law is the oldest and most consolidated principle in the international legal system. The whole theory of the principle of universality rests on the very concept of prosecution and punishment of certain criminals whose activities constitute crimes against a generation of mankind and cannot be accepted in any civilized society. This is what is known as hostis humani generis. The principle of universality is based on the concept of delicta juris gentium. The principle thus represents an exceptional situation in which a state has a right to bring a foreigner, who has committed a crime neither necessarily under the state’s territorial jurisdiction nor against the nationals of that state, under its criminal jurisdiction for prosecution and punishment. This jurisdictional right of a state to try an offender is based on the principle of protection of societal values for the interest of the international community as a whole.

The concept of universal jurisdiction was traditionally applicable only to those activities whose offensive nature was already accepted in the national legislatures of the majority of states of the world. This included murder, under national criminal law, and the crime of piracy, under international law. Consequently, the universality principle allowed extraterritorial jurisdiction over offenders of other nations. No state in certain situations, such as the crime of piracy, could legally protest to the proсе-
Universal jurisdiction may, therefore, traditionally apply to certain crimes, the legal characterizations of which are consolidated under conventional or customary international law. These include piracy and certain crimes committed during war. Accordingly, every state, regardless of its participation in the formulation, adoption, and ratification of multilateral conventions has a right to exercise extraterritorial jurisdiction over those who have committed the above mentioned crimes, without due regard to their nationality, as long as the offender is in the state’s custody when he is brought to trial. This is called judex deprehensionis. A state cannot force another state to extradite an alleged offender under its jurisdictional authority in order to prosecute and punish him on the basis of universal jurisdiction. The first right of prosecution is given to the state that has arrested the offender. This right is absolute and cannot be transformed without the free consent of the relevant state.

The issue of universal jurisdiction may be faced in the Hussein trail. For example, since Hussein is in American custody, the United States may have, according to the principle of universality, a traditional legal right to bring the accused under its jurisdiction. Later, however, I will argue that the United States cannot juridically use this principle.

B. The Problem of Universal Jurisdiction

One of the most serious problems associated with universal jurisdiction is that it may interfere with the juridical or political situation of a state. Because of America’s prior support of some of Hussein’s criminal actions, the United States is itself subject to juridical questions regarding its complicity and participation in the development of Hussein’s plans, for example, during the Iran-Iraq War. Moreover, regarding the gravity of the crimes that have been committed by the Hussein regime in violation of international criminal conventions, the international community has juridical priority over the Hussein trial. There are two essential reasons for this—Hussein’s mass murders and the systematic violations of the conventional body of international criminal law. Thus, an argument can be made for both universal jurisdiction and international criminal jurisdiction, which was created to deal precisely with the types of crimes of which Hussein has been accused.

Consequently, one of the problems of the principle of universal jurisdiction in relation to certain grave violations of the system of international law.
criminal law is that, in the application of the principle of universality, the forum state may influence the final decisions of a tribunal and therefore violate the principles of justice regarding the prosecution and punishment of notorious criminals at an international level. Thus, universal jurisdiction may violate the territorial integrity or the juridical and sovereign independence of any state. A state may apply it for the purpose of self-help. Further, the use of universal jurisdiction will not be admissible internationally unless the United States has proven that it did not participate in the commissions of some of those crimes charged. Finally, universal jurisdiction presents two additional problems. First, it may be utilized by several states concurrently, each acting in their own self-interest. Second, it may preclude cooperation and accommodation among states when trying a person before an international criminal court.

The above problems may not be faced if the principle of international tribunality of jurisdiction were implemented. The basic philosophy behind this argument is that in the application of the above principle, the international legal community must respect certain other recognized principles of general international law such as the principle of impartiality of judges and prosecutors. Obviously, the full implementation of the above principles will be very difficult in the case of the application of universal jurisdiction under the sole authority of any state. Furthermore, the rights of the accused may not be respected because of interests of the state, which has power over the accused. This right may even be seriously violated by the custody state. Clear examples include the serious violations of the international humanitarian law of armed conflict which occurred at Abu Ghraib Prison by the U.S. military.

Even if we recognize that the principle of universal jurisdiction in the case of Saddam Hussein would be accepted in the narrow or wider perspective of the definition of the principle, there remains the fulfillment of other

120. The following is a clear example. Karl Adolf Eichmann hid for approximately four years in Germany. He eventually fled to Argentina. In 1960, he was kidnapped from Argentina and brought to Israel where he was charged by a criminal court in Jerusalem, applying universal jurisdiction, as Eichmann was accused of grave violations of the laws of armed conflict during the Second World War. He was found guilty on fifteen counts of a criminal indictment against him. Obviously, the neutrality of the court could not be guaranteed, since the Israeli government did not exist at the time of the commission of the crimes. Eichmann was therefore prosecuted according to conveniens principle. See Nicolaos Strapatsas, Universal Jurisdiction and the International Criminal Court, 29 MANITOBA L.J. 1, 4 (2002); see also Baruch C. Cohen, What to do with Adolf Eichmann's Memoirs?, JEWISH LAW, http://www.jlaw.com/Commentary/eichmanns_memoirs.html (last visited Oct. 23, 2005).


123. For example, contrary to the practice of the United States and Israel, which commit abductions and violate state sovereignty in applying the universality principle, some states, such as South Africa, Costa Rica, and Zimbabwe refuse to exercise jurisdiction over an abducted defendant. South Africa has stated that abduction may endanger international legal norms, considering the violations of sovereignty that abductions entail. Id. at 409-10.
essential conditions for the implementation of the principle. The accused's home state will not utilize universal jurisdiction to prosecute, since it can utilize its own territoriality and nationality principles instead of universal jurisdiction.\textsuperscript{124} Consequently, even if the IST Hussein in accordance with the principle of territoriality and under a temporary governmental authority, it still faces many difficulties in order to fulfill the primary conditions for the application of the principle of territoriality. The problem of the territoriality principle is that its scope of application is traditionally restricted in certain situations concerning the application of the code of crimes to heads of state with constitutional immunities.\textsuperscript{125} This means that Hussein, as the former head of state of Iraq, can neither be tried under the territoriality principle nor under the former Iraqi criminal court.\textsuperscript{126}

C. The Dilemma of Prosecution

The universality principle creates extraterritorial rights for other states to prosecute and punish the offenders who are not their own nationals and when the crime is not, in any sense, committed under their territorial jurisdiction.\textsuperscript{127} In other words, the principle of universality applies mostly in the case of accused persons who are found under the territorial jurisdiction of the arresting state or the high seas.\textsuperscript{128} In the case of Hussein, the United States arrested him in his own home state. Particularly, the United States has accepted the power of the Iraqi Governing Council over Hussein, which means that there is no claim of universal jurisdiction.

Yet, a glance at the categories of crimes committed under the political and juridical authority of Hussein demonstrate that a great many of those crimes were against the State of Iran, during the ten years monopolized war.\textsuperscript{129} These crimes included genocide, war crimes, crimes against humanity, unlawful use of weapons, torture, and crimes against cultural heritage and property.\textsuperscript{130} This means that Iran could have jurisdiction over Hussein. But here again, the political reality of the case demonstrates that justice cannot be done properly, even in Iran, as the Iranians are also suspected of international crimes.\textsuperscript{131} In other words, those political

\textsuperscript{124} For a good discussion of the principle of universality see Benavides, supra note 114.
\textsuperscript{125} See Qanun al-Uqubat [Criminal Code], Law No. 111 of 1969 (Iraq). This is the former Iraqi legislation governing the application of jurisdiction over certain crimes within its territorial jurisdiction.
\textsuperscript{126} Id.
\textsuperscript{127} Benavides, supra note 114, at 28.
\textsuperscript{128} Id. at 28, 42-45.
\textsuperscript{129} Approximately 600,000-900,000 Iranians were killed during the Iraq-Iran war between 1980 and 1988. See Twentieth Century Atlas, Death Tolls for the Major Wars and Atrocities of the Twentieth Century, http://users.erols.com/mwhite28/warstat2.htm (last visited Apr. 23, 2005). Iraq's casuality was approximately 300,000. Id.
\textsuperscript{130} The Iran-Iraq war itself, as well as the various criminal acts committed during the war, violated many international conventions, the purpose of which was to prevent certain acts during war or peacetime. For a discussion of the crimes committed, see Bassiouuni, supra note 13; Malekian, supra note 13.
\textsuperscript{131} Neutrality of the judges and prosecutors is one of the fundamental principles of justice. See Rome Statute, supra note 8, arts. 40, 41.
authorities who are accused of committing international crimes within their own or other nations are not, according to the international criminal justice system, legitimately able to take part in the use of universal jurisdiction, as they are not free from prejudice. The leaders of a state whose actions are notoriously recognized in international relations of states might influence the procedures of the tribunal, especially when dealing directly with Hussein or Milošević.

Another alternative for the application of universal jurisdiction could have been to allow the Iraqi Kurds to prosecute Hussein. The Kurds suffered continuously during the Hussein regime. The use of chemical weapons against the Kurdish population is one of the most serious tragedies facing international criminal justice. The Kuwaiti government also has a legitimate claim against Hussein, given the invasion of their sovereignty during the Gulf War, and thus could exercise jurisdiction over Hussein. Many other states may also claim universal jurisdiction over Hussein, considering that his government has seriously harmed the conscience of humanity. But the fact is that the principle of universality cannot function as the principle of international tribunality of jurisdiction because of its potential for a biased administration of justice.

The fact is that in analyzing universal jurisdiction, we must not forget that in the system of international law, the principle of universality is used in situations where the state possessing territorial jurisdiction or forum delicti commissi is not able to arrest the criminal and bring him under its jurisdiction. This does not mean necessarily that the injured states are not interested in prosecuting the offender. The principle of universal jurisdiction was therefore employed in certain cases as an auxiliary principle or as auxiliary jurisdiction. If we accept this principle, it means that the state which has arrested the criminal and wishes to conduct a trial, must first offer extradition of the offender to the state of the forum delicti commissi. If that state is not willing to prosecute the offender, the state which has the offender in its custody has the right of jurisdiction. This is a possibility in the prosecution of Saddam Hussein. There are several groups, including the Kurds, the Iranians, the Kuwaitis and the Iraqis themselves, that have an interest in prosecuting him. Since Hussein cannot be prosecuted and punished by several criminal tribunals at the same time and since the principle of ne bis in idem must not be ignored, the only solution would be regional or international criminal jurisdiction over his international criminal actions. Several important principles of jurisdiction would be satisfied by the application of the principle of international tribunality of jurisdiction. These are the principle of forum delicti commissi, the principle

132. This should be the sole inspiration of any civil or criminal justice system.
133. This includes the governments of the United States, Iran, Serbia, Israel, China, and Russia.
135. An examination of the historical evolution of the crime of piracy indicates this fact. See Malekian, supra note 13, at 500–06.
136. Article 20 of the Rome Statute concerns the principle of ne bis in idem. The Article provides:
of forum conveniens, the passive personality principle, the territoriality, and the universality principle. It would no longer be important under which principle the accused is brought to justice. However, a problem of cooperative criminal tribunals operated by victimized states is that some of them are themselves accused of committing international crimes and therefore the principle of impartiality may not be appropriately respected in the tribunal's proceedings.

D. The Principle of International Tribunality of Jurisdiction

In the last decade the principle of universality has been altered by another emergent principle. The principle of universality is not justified in certain situations that are of concern to positive international crimes. The punishment of such crimes under international criminal law and the legal and political authority of the United Nations is much more in the interest of the international legal community than the implementation of universal jurisdiction by the state which has arrested the accused person. These crimes require prosecution in an international criminal court. This is what I call the principle of international tribunality of jurisdiction over certain obligations of international criminal law called erga omnes and jus cogens norms. The protection of jus cogens norms is mostly a collective duty of the international legal community. The duty is supported by

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

   (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

   (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Rome Statute, supra note 8, art. 20; see also id. art. 88.

137. Some criticize the principle of universality because it interferes other states' sovereignty. See Benavides, supra note 114, at 41.

138. It is even stated that it is "a danger to international standards for a fair trial." Id.


140. As the often-quoted statement of International Court of Justice clarifies: [A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-a-vis another State . . . . By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.
most states, which have historically voted for the international implementation of certain crimes including crimes against peace, crimes against humanity, war crimes, and genocide.\textsuperscript{141}

The application of the *principle of international tribunality of jurisdiction* can be found within the provisions of the Nuremberg Tribunal and particularly, in the statutes of the ICTY, ICTR, and the ICC.\textsuperscript{142} Concerning the implementation and application of certain multilateral international crimes, the important task of the aforementioned tribunals is slowly abolishing the principle of universality.\textsuperscript{143} The following is one of the most significant statements of the ICTY Trail Chamber governing the implementation of the *principle of international tribunality of jurisdiction*:

[I]t should be noted that the crimes which the International Tribunal has been called upon to try are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognized in international law as serious breaches of international humanitarian law, and transcending the interest of any one State. The Trial Chamber agrees that in such circumstances, the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of

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141. At the end of the Second World War, the victorious states attempted to prosecute and punish those who had violated customary and conventional rules of international criminal law governing regulations applicable to armed conflicts. The central idea was to prosecute the perpetrators of the war in a particular international criminal tribunal that had the power to criminalize those acts that had already been committed by the members of Nazi Party. In order to legitimate such an international criminal tribunal, representatives of the Soviet Union, France, the United States, and Great Britain eventually agreed upon and ratified the 1945 London Agreement. The Agreement consists of seven articles. Article 1 states that the International Military Tribunal was created for the trial of war criminals whose offenses had no particular geographical location. Article 2 indicates that "[t]he constitution, jurisdiction and functions of the International Military Tribunal shall be those set out in the Charter annexed to this Agreement, which Charter shall form an integral part of this Agreement." Accordingly, the Charter of the Tribunal recognized three categories of international crimes; crimes against peace, war crimes, and crimes against humanity. The provisions of the Charter, which are considered today to be *jus cogens* norms and an integral part of contemporary international criminal law, were ratified by the United States, the United Kingdom, France, and Russia. For a documentary collection, see generally Benjamin B. Ferencz, Defining International Aggression: The Search for World Peace (1975).

142. For example, the words of the preamble of the Rome Statute definitely point to the application of the *principle of international tribunality of jurisdiction*. They clarify that the state parties "establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole." The next subsection emphasizes that "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions." Further, the ICC is "to guarantee lasting respect for and the enforcement of international justice." Rome Statute, supra note 8, pmbl. (emphasis added).

143. Moreover, the application of the principle of universality is not absolute and has traditionally been limited to the crime of piracy. In the Lotus case, Judge Moore suggested the application of the universality principle is indeed exceptional and limited to piracy. The Case of the S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 3 (Sept. 7).
the world. There can therefore be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community.\textsuperscript{144}

The purpose of the international courts has been to apply the norms of \textit{jus cogens} and the obligations of \textit{erga omnes}—specifically, crimes against peace or aggression, war crimes or grave violations of the customary or conventional law of war, crimes against humanity, genocide, torture, slavery, and various fundamental principles and rules relating to international humanitarian law of armed conflicts and human rights. Other reasons for the use of the \textit{principle of international tribunality of jurisdiction} include the massive and systematic violations of international criminal law,\textsuperscript{145} the gravity of the crime and its effect on the international morality, and the inviolability of international customary and conventional law.\textsuperscript{146}

The \textit{principle of international tribunality of jurisdiction} applies in situations that are too important for universal jurisdiction to be used. Clear examples include the Milošević and Hussein trials. Universal jurisdiction is inappropriate in such situations, since it represents only the limited jurisdiction of one state over a criminal case that has come under its authority. Moreover, only a limited number of offenses are subject to universal jurisdiction.\textsuperscript{147} In contrast, the \textit{principle of international tribunality of jurisdiction} is broader than universal jurisdiction, in that it grants jurisdiction to all states collectively over a person who has committed international crimes that endanger the maintenance of international peace, security, and justice. By implementing the \textit{principle of international tribunality of jurisdiction}, one may take into consideration the opinions of the international legal community as a whole.

While I do not reject the use of universal jurisdiction in international criminal law and its implementation over certain international crimes such as piracy, I strongly believe that the application of the principle of universality in contemporary international criminal law should be limited to certain crimes that involve violations of traditional international crimes, those that are not as harmful as the newly internationally recognized international crimes such as genocide, apartheid, crimes against humanity, and different categories of war crimes. Thus, the philosophy of universality should not override the principle of internationality of an international crime. In other words, the \textit{principle of international tribunality of jurisdiction} means the application and implementation of the system of interna-


\textsuperscript{146} \textit{Id.} at 156–58.

tional criminal law to certain international crimes under an international criminal tribunal, by international judges and prosecutors. These crimes are specifically selected for such jurisdiction due to the gravity of their consequences, both in terms of international morality and the conventional body of international criminal law. The principle requires the establishment of a tribunal which is legislated and guided by multilateral conventions or positive international criminal law and human rights. Such a tribunal is necessary in order to apply the principle of proportionality and to maintain peace and justice.

VII. Infringement of the Rights of the Accused

Since the establishment of the United Nations, the development of the provisions of international human rights has been one of its purposes and aims. For this reason, human rights provisions have not only been involved in the basic structure of the Declaration of Human Rights but have become a part of conventional international criminal law and particularly the international law of armed conflict. For example, the provisions of the four Geneva Conventions of 1949 must be respected by all parties during an armed conflict. Failure to abide by the Geneva Conventions constitutes a violation of the law of armed conflict. Although the provisions of these conventions are considered an integral part of international customary and conventional law, conflicting parties have constantly disregarded or violated them. Examples include the following: the Vietnam War; the Iran-Iraq War in which Iraq used chemical weapons against Iranian troops and Kurdish civilians; the 1991 armed attack by the Coalition powers against Iraq under the protection of the United Nations Security Council resolutions; the 1991-1995 War in the territory of the former Yugoslavia; the massive armed attack against Iraq in accordance with the provisions of the United Nations as it is asserted by the United States starting in 2003; and the occupation of the Palestinian homeland by the Israeli military forces since the establishment of the United Nations.

Below, the article considers some of the violations of the Geneva Conventions committed by the United States in Iraq, as well as the future effects of such violations. The article will also consider the rights of the accused before a criminal tribunal operating under the supervision of the Coalition.

After the United States captured Iraqi President Saddam Hussein on December 13, 2003, it stated that Hussein was a prisoner of war under the provisions of the Geneva Conventions applicable in a time of armed con-

However, shortly after Hussein’s capture, the Coalition power violated one of the principles of the Geneva Conventions concerning the protection of the prisoners of war. Specifically, the violation occurred when American military personnel distributed pictures and videos of Hussein and the dead bodies of his sons, relating to the arrest and medical examination. These activities violated, inter alia, the following:

- the principle of positive international law relating to the treatment of the prisoners;
- the principle of customary international law concerning the protection of the dignity of prisoners at the time of arrest;\(^{152}\)
- the principle of international criminal law concerning the humanitarian law of armed conflict;\(^{153}\)
- the basic principles of the Geneva Conventions;\(^{154}\)
- the principles of the Red Cross Organization governing the protection of prisoners of war, even after war has ended;\(^{155}\)
- the most basic principles of international human rights concerning the rights of accused persons to be protected against any kind of abuse by military personnel;\(^{156}\)
- the fundamental values of medical ethics including the Helsinki Declarations of 1964;\(^{157}\)
- the most often respected principles of any domestic civilization.

Respect for the rights of those captured by the conflicting parties is one of the basic principles of the Geneva Conventions. Such principles are stated explicitly in Articles 13 and 14 of the Third Geneva Convention Relating to the Treatment of Prisoners of War.\(^ {158}\) Accordingly, the state that has accused persons in its custody must at all times respect their

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\(^ {152}\) Geneva III, supra note 149.


\(^ {155}\) Id.


\(^ {158}\) Geneva IV supra note 154 13–14.
rights as contained in certain provisions applicable in time of war or peace. Respect for such principles is considered essential to upholding the dignity and integrity of human beings. Violation of these principles may be recognized as grave breaches of the Geneva Conventions. The example above, as well as the instances of prisoner abuse at Abu Ghraib, demonstrates that the occupying powers seriously violated fundamental rights of prisoners or accused persons. In Abu Ghraib prison, the United States Armed Forces not only violated the international humanitarian law of armed conflict but also many other international criminal conventions including the principles of Islamic international criminal law concerning the protections of prisoners of war. Thus, the Coalition Power seriously violated the rights of many accused persons who may be brought before the Special Tribunal for prosecution and punishment. Furthermore, it is axiomatic that the physical and psychological effects produced by such violations may prevent those accused from being able to freely defend themselves in court. The following are some of the violations committed by American and British military in Abu Ghraib prison:

- grave violations of the regulations and theories of religions.

159. According to Islamic international criminal law, the following principles must be respected by the parties to the conflict when dealing with those who are captured:
1. Prisoners should not be held responsible for the cause of hostilities between the conflicting parties.
2. Prisoners who have acted in accordance with the law of war during an armed conflict should not be held responsible for whatsoever damages caused to the conflicting parties.
3. The dignity and integrity of prisoners should not be disregarded.
4. Any cause of human suffering must be avoided. This includes torture and the humiliation of prisoners.
5. The cultural attitudes of prisoners must be fully respected.
6. Females should especially be respected.
7. No person should be raped.

26. The above provisions are a duty of the conflicting parties and therefore parties should not expect prisoners to be grateful for the fulfilment of such a duty.


160. For example, Islamic international criminal law considers the acts committed in Abu Ghraib prison to be grave violations of the law of war and therefore constitute war crimes and crimes against the Islamic humanitarian law of armed conflict. These war crimes, some which were committed in Abu Ghraib prison, are as follows:
1) Killing women.
2) Killing mothers who have dependent infants.
3) Killing those who are incapable of fighting such as those who are handicapped, blind, insane, or elderly.
4) Killing minors who have not taken part in the actual fighting.
- grave violations of the philosophy of criminal laws of different nations;\textsuperscript{161}
- grave violations of all instruments of international human rights in connection with the degrading and humiliating published pictures of the prisoners;\textsuperscript{162}
- the use of force by American and British military personnel against the dignity and integrity of the Iraqi people;\textsuperscript{163}
- grave violations of the customary international law of armed conflicts;\textsuperscript{164}
- grave violations of the purposes and functions of the United Nations for the promulgation and protection of international peace, security, and justice;\textsuperscript{165}
- grave violations of Chapter VII of the Charter;\textsuperscript{166}
- grave violations of the soft law embodied in the General Assembly resolutions;

5) \textit{Rape}.

6) Adultery and fornication with families.

7) \textit{All types of sexual abuse}.

8) Killing parents for a purpose other than self-defence.

9) Killing monks, priests, and hermits.

10) Killing a national of the enemy state who is already a resident under the jurisdiction of another state.

11) Killing neutrals, including physicians and journalist who do not take part in the actual fighting.

12) Mistreatment of prisoners of war.

13) \textit{Torture}.

14) Excess and wickedness.

15) \textit{Degradating treatment of sick and wounded and prisoners of war}.

16) \textit{Humiliation of men}.

17) Treachery and perfidy.

\textit{Id. at 73}.

161. For example see Sweden's Brottsbalken [BrB] [Criminal Code] 1:1, 1:2, 1:5-9, 6:1-3; Lag om kriminalvård i anstalt (Svensk författningssamling [SFS] 1974:203); see also 3:1 \textsc{Brottsbalken: En Kommentar, del (1-12 Kap.): Brotten Mot Person och Förmögenhetsbrotten mot Person och Föormögenhetsbrotten M.M.} [Crimes against Person and Crimes of Wealth] (Lenna Holmqvist. ed.).

162. \textit{See generally Ian Brownlie, Basic Documents on Human Rights} (1971) (presenting the basic treaties and constitutional provisions relating to international human rights).

163. The actions of the United States and British military personnel at Abu Ghraib prison were, in effect, actions against the social, cultural, and religious inspiration of Islam. In most Islamic nations, the religion of Islam not only functions as a religion, but also represents the citizen's cultural attitudes towards certain behaviors. In fact, Islamic law is a combination of many rules including, for example, social law, tax law, family law, criminal law, and the law of behavior or moral law. These rules should be respected by Moslem nations as well as by aliens who are visiting the theological community of Islam. \textit{See Malekian, supra note 159, at 157}.

164. \textit{See Henchaerts & Doswald-Beck, supra note 153}.

165. \textit{See U.N. Charter pmbl., art. 1}.

166. \textit{See U.N. Charter pmbl., arts. 39-51}.
the use of torture and the violation of conventional international criminal law governing protection of individuals from torture and other cruel, inhuman, or degrading treatment and punishment;\textsuperscript{167}

- crimes against humanity;\textsuperscript{168}

- grave violations of the consolidated rules and norms of the law of war;\textsuperscript{169}

- grave violations of the conventions applicable to international humanitarian law of armed conflicts.\textsuperscript{170}

A. The International Rights of Accused Persons

Bearing in mind the systematic infringements of the system of international criminal law committed under American authority, discussed above, I am forced to list some of the most important international rights of accused persons.\textsuperscript{171} There are some basic fundamental norms of procedure governing the protection of accused persons that must, at all times, be respected in the proceedings of an international criminal court. In fact, it is the right of any accused person to protect himself during the proceedings of a criminal court regarding the application of the basic principles of human rights.\textsuperscript{172} These rights must be respected in any criminal court which deals with statutes of international crimes such as crimes against


\textsuperscript{168} See, e.g., Rome Statute, \textit{supra} note 8, art. 7.

\textsuperscript{169} Geneva III \textit{supra} note 149, arts. 3, 129, 130.

\textsuperscript{170} Provisions of Articles 1 and 2 of the Torture Convention definitely constitute an integral part of international humanitarian law of armed conflict. CAT, \textit{supra} note 167, arts. 1, 2; see also M. Cherif Bassetouni, \textit{Crimes Against Humanity in International Criminal Law} 321-27 (1999).

\textsuperscript{171} One of the most important rights of the accused relating to a criminal case is the right to defend himself in person or through judicial assistance that can be obtained by choosing a lawyer. This right has been reconfirmed in the ICTR and ICTY statutes. See ICTY, \textit{supra} note 4, art. 21; ICTR, \textit{supra} note 4, art. 20. More importantly, the right of the accused to judicial assistance starts from the time that he is interrogated, arrested, and detained by the detainee power. However, this principle of criminal justice as well as the system of international criminal law was seriously violated during Saddam Hussein's interrogation, as well as the interrogations of other accused persons, as they did not have access to a defense lawyer during questioning, nor when they were brought to court on July 1, 2004. See \textit{Transcript of Saddam Proceeding}, CNN.COM, July 1, 2004, http://www.cnn.com/2004/WORLD/meast/07/01/saddam.transcript/index.html; Pentagon: \textit{Saddam Not Abused}, CNN.COM, June 23, 2004, http://www.cnn.com/2004/WORLD/meast/06/23/saddam.lawyer/.

\textsuperscript{172} For the proper application of criminal procedures concerning juvenile under Swedish national criminal law see Kerstin Nordlöf, \textit{Unga Lagöverträdare I Social, Straff och Processrätt} (2005).
peace, crimes against humanity, war crimes, genocide, torture, and so forth. At a minimum, some of the most important rights of accused persons for international crimes arising from customary and conventional international criminal law instruments include the following:

   i) The right of the accused to be informed of the charges against him.

   ii) The right of the accused to remain silent.

   iii) Respect for the rights of the accused at pre-indictment stages.

   iv) Accused persons shall not be kept with convicted persons and shall be subjected to separate treatment as appropriate to their status according to international criminal rules.

   v) Accused persons should not be discriminated against on account of sex.

   vi) The treatment of accused persons should not depend on their former positions.

   vii) Accused persons should not be deprived of sleep or rest.

   viii) Primary living conditions must be available to accused persons.

   ix) Under necessary supervision, accused persons shall be allowed to have contact with their family and friends at regular intervals, both by correspondence and in person. Further, accused persons have the right to read books and newspapers.

x) Accused persons should not be kept in a place that is harmful to their health.

xi) The health conditions of accused persons should be respected at all times.

xii) Based on an official certificate from a legitimate doctor, an accused person has a legal right to medical treatment.

xiii) The right to food should not be ignored.

xiv) All those who are dealing with the accused persons during a criminal tribunal should be wholly impartial toward the accused person's political, juridical, economic, social, cultural, religious, and theoretical beliefs.

xv) The rights of the accused should not be interrupted or disregarded during the proceedings due to certain judicial expediencies.

xvi) An accused person has a legal right to be informed immediately of the charges against him, and the grounds for such charges, in a language that he understands.

xvii) The accused person has a legal right to adequate facilities and time for the preparation of his defense.

xviii) The accused person has a legal right to the assistance of legal counsel.

xix) The accused person has a legal right not to testify during the proceedings.

xx) The accused person has a legal right to a fair proceeding and a public hearing within a reasonable period of time.

xxi) The accused person has a right to public hearings when brought before a criminal court. This right is granted by international norms governing the protection of human rights. The right is based on the theory that if a tribunal wants to ensure fairness, it has to hold primarily open and public hearings, including publicly pronounced judgments.

xxii) An accused person is presumed innocent until proven otherwise.

xxiii) The accused person has the right to be present when the trial begins.

xxiv) No political officials should overlook the rights of the accused during the proceedings of the tribunal.

xxv) The accused person has a legal right to defend himself in person or through any other judicial assistance in accordance with his own choice.

xxvi) Since the understanding of certain international criminal law terms may be difficult, the accused person should have access to a free interpreter.

xxvii) The accused person has the right to examine witnesses. In certain extraordinary circumstances, the witness may be examined under oath prior to the tribunal hearings, upon authorization by the tribunal or judges of the tribunal.

xxviii) The accused should not be convicted for an act or omission that was not a crime at the time it was committed or omitted according to the provisions of national law or international criminal law.

xxix) Confessions obtained through coercion do not have legal or juridical validity in the proceeding of a criminal tribunal. This principle has an important place within conventional international criminal law.
xxx) The threat or use of degrading and humiliating treatment against accused persons or their families for the purpose of extracting evidence should not be admissible in a fair and just proceeding of a national or international criminal court.

xxxi) The accused person has a right to appeal. It is very doubtful in the case of the IST that this principle can be workable from a procedural point of view. In the international criminal tribunals, an appeal is heard by the Appeals Chamber of the tribunal.

xxxii) Capital punishment is prohibited. This principle has been established in customary international criminal law and has been utilized by the international criminal tribunals.

1. The International Right to Reject the Tribunal

Although the system of international criminal law has developed into a practical system and has become one of the most important subjects of international and national legislations, its scope of applicability remains very weak. This can be examined in the contemporary situation of the international standard of politico-juridical anatomy. The problem is very important when one considers that many provisions of the system of international conventional law have not been adopted into the national legislation of United Nations members. For example, the United States government was for a long time reluctant to ratify the Genocide Convention. The whole policy of the Convention was considered as an instrument against the foreign policy of the United States government. The United States has had the same problem with the provisions of the Rome Statute. It is very doubtful that the Rome Statute will be ratified by the United States government in the near future.

Yet, the United States is not the only example of a state that does not ratify or implement international conventions. There are also other countries in the world which do not respect the provisions of international criminal conventions. Examples include Chile, the Philippines, Argentina, Rwanda, East Timor, the former Yugoslavia, Iraq, Russia, Israel, and Iran. Most of these countries, as well as many others, do not believe


175. Malekian, supra note 17, at 64.


177. Id. The United States has, on many occasions, refused to ratify the Rome Statute.

178. Id.

179. One hundred and twenty states signed the Rome Statute. Seven states voted against the treaty and twenty-one states abstained. The United States, Israel, People's Republic of China, Iraq, Qatar, Libya, and Yemen all refused to sign or ratify the Statute. On July 1, 2002, the Statute entered into force. Rome statute, supra note 8.

that the system of international criminal law is as effective as their own criminal system. Further, they state that they have no legal duty to apply the principles of international criminal law to their own conduct. The legal questions that may arise in this connection are the following: Do international criminal treaties create rights and obligations for all parties? Do the provisions of certain international criminal treaties create obligations for non-parties? Can states avoid fulfilling their international criminal obligations by reasoning that they have not included such obligations into their national legislation?

The customary or conventional law of treaties indicates that treaty law creates rights and obligations only for those states that enter into a treaty and ratify it. Thus, parties to a treaty cannot force other states that are not parties to that treaty to respect and fulfil the obligations of the treaty. Moreover, state parties to a treaty are under conventional obligations to adopt the provisions of the treaties into their relevant legislation and be sure that their internal authorities implement the relevant treaty obligations.

There are of course some exceptions to the above rules. One exception exists for treaty provisions that can be considered a reflection of a *jus cogens* norm, which creates international obligations for all states regardless of whether they have ratified a particular treaty. A second exception exists when the provisions of a multilateral treaty that has been ratified by a state has not been adopted into the internal legislation of the state. This can occur when a treaty provision conflicts with a cultural norm, or when the internal political party has changed and consequently the new political power does not adopt those international criminal provisions into its internal legislation. A clear example is the criminal law of Iraq, which has no explicit provisions concerning the international crime of genocide, war crimes, or crimes against humanity.\(^1\) Rather, the criminal legislation explicitly and implicitly permits the commission of those crimes, although they can be against the international criminal obligations of the relevant state.

The Statute of the IST was passed by the Iraqi Governing Council, which received temporary legislative authority for the establishment of the Tribunal. The Tribunal is a combination of the former criminal policy of Iraq and the present legislation of the Iraqi Governing Council and the Coalition Provisional Authority. Thus, the Iraqi Governing Council has adopted certain international criminal provisions into the Statute of the IST that were never part of the former Iraqi Criminal Code.\(^2\) Given this, Hussein can challenge the IST by claiming that it relies upon ex post facto laws.\(^3\) To avoid this problem, an international tribunal could be established. Using an international tribunal would make the punishment of

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\(^1\) See Qanun al-Uqubat [Criminal Code], Law No. 111 of 1969. This is the former Iraqi legislation governing the application of jurisdiction over certain crimes within its territorial jurisdiction.

\(^2\) *Id.*

\(^3\) *Id.*
Hussein less difficult, when one considers the massive criminality, systematic violations, and gravity of international crimes that were committed during his presidency. But we have to be vigilant not to violate the legal harmony of the system of international criminal law with the daily political considerations of the superpowers' politics. Concerning certain consolidated international crimes such as crimes against humanity, the system of international criminal law should be applied solely on the basis of the principle of international tribunality of jurisdiction. This will avoid any kind of difficulty relating to certain important questions of justice and jurisdiction over the accused.

2. The International Right to Object to Capital Punishment

Capital punishment for international crimes is prohibited under the statutes of the international criminal tribunals. Thus, if a national tribunal, such as the IST, is conducting a trial in which certain international crimes are alleged, the tribunal should not apply capital punishment. This argument is based on the principles of consistency and legality. A tribunal dealing with international crimes, such as crimes against humanity, war crimes, and genocide, is juridically required to follow international procedures and international punishments that are foreseen for the commission of those crimes and in accordance with the contemporary practices of international tribunals. Therefore, a person accused of committing certain international crimes has an international right to receive the prescribed punishment that is normally imposed by international tribunals for similar international crimes.

The ICTY, among other international tribunals, forbids the application of the death penalty. The statute of the Tribunal does not encourage or permit the implementation of capital punishment at the international level. The philosophy behind the abolition of the capital punishment in

184. See supra Part VI.D.
185. See Rome statute, supra note 8, art. 77.
187. Further, when applying international criminal law provisions, one must not only apply the relevant provisions in their entirety, but also follow the development of international proceedings in order to appropriately implement the system.
189. This prohibition is clearly stated in the ICTY Statute, Article 24, concerning penalties. It states: "[t]he penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia." ICTY Statute, supra note 4, art. 24.
international criminal law emanates from the fact that capital punishment in the system of international human rights is considered an act against the integrity of human nature and is therefore strongly condemned, and should not be implemented in a national or international system.190 The Rome Statute also deals with the question of penalties for those who have violated the system of international criminal law and are brought before the jurisdiction of the Court. The Statute clearly states that penalties including imprisonment should not exceed a maximum of thirty years. Thus, the ICC is not permitted to apply capital punishment to convicted persons.191 Consequently, the legislation governing capital punishment under Iraqi national criminal law and entered tacitly into the IST is analogous to life imprisonment in international criminal law, and can be seen as cruel, immoral, and unusual punishment compared with the practice of international criminal courts concerning similar cases. Even though the policy of most international criminal conventions concerning punishment is not clarified in their absolute form of application, it is a fact and a consolidated principle of the system of international criminal law that punishment policies must be implemented with due regard to the evolution and development of international human rights instruments and the practice of international criminal courts. For example, there has not been a single case in the ICTY that has permitted the implementation of capital punishment.

VIII. The Legal and Political Effect of the Hussein Trial

A. Political Arguments

The Hussein trial, conducted under the supervision of the United States government and its military forces in Iraq, is one of the most controversial trials in the history of mankind for the prosecution and punishment of a head of state.192 Consequently, it has created the most serious question of international criminal law concerning the application of international criminal justice that can be accepted in the juridical and political relations of states. Due to this important situation, the whole structure of the IST has been subject to serious international criminal inquiries that cannot be ignored in the system of law in general and in the system of international law in particular. One of the primary reasons for this situation is the double morality of different governments regarding the application and non-application of international criminal law under certain conditions.
conditions. For example, the ICC Statute, the IST, and Security Council Resolutions 1422 and 1487 reflect different interpretations of the system of justice.\textsuperscript{193}

Obviously, with the application of international criminal justice, we do not mean its application by one means or another only, but its appropriate and correct implementation toward persons having been accused of committing international crimes. This is because, as discussed above, justice is not necessarily the implementation of the provisions of international criminal conventions or the provisions of the statute of a tribunal, but the way in which we reach the high level of its acceptance in international relations among states. Concerning the Hussein trial, the problem of defining international criminal justice becomes more sensitive and serious when we look back and see the way in which Hussein received political and juridical authority under the supervision of the United States government. The question becomes even more complicated when one examines the history of the resolutions of the Security Council governing the political situation of the Iraqi government and the willingness of different super-military states to convince others about the development of chemical weapons in Iraq.\textsuperscript{194} Therefore, the statute of the IST makes the true application of international criminal law very difficult and problematic in the scale of international criminal justice.\textsuperscript{195} Thus, the Statute of the IST cannot be

\textsuperscript{193} Both Resolutions 1422 and 1487 provide immunity from ICC investigation or prosecution to citizens of states that have not ratified the Rome Statute, when those individuals are involved in United Nations authorized operations. Amnesty International, the European Commission Legal Service, and many other groups which support the ICC state that the agreements that the United States has concluded with other states are not consistent with the words of Article 98 of the Rome Statute. Accordingly, it was argued that Resolutions 1422 and 1487 violate the Rome Statute. This controversy was resolved by a decision of the European Union ministers in October 2002. The Council of the European Union adopted a common position which permits member states to enter into Article 98 arrangements with the government of the United States. The arrangement applies only to U.S. military personnel, U.S. diplomatic including consular officials, and persons extradited by the U.S. with their permission. Accordingly, the arrangements do not grant the general protection to U.S. nationals that the U.S. government had sought. The European Union further stated in the common position that any person protected from criminal investigation and prosecution under the ICC by such arrangements would have to be tried by the United States. See Labor Law Talk, definition of International Criminal Court in Encyclopedia, http://encyclopedia.laborlawtalk.com/International_Criminal_Court (last visited Nov. 8, 2005); Amnesty International, US Threats to the International Criminal Court, http://web.amnesty.org/pages/icc-US-threats-eng (last visited Nov. 8, 2005).

\textsuperscript{194} However, the waging of an intensive war within Iraq proved that the Coalition power, with its strong military development under the supervision of the United States and Great Britain, has found nothing supporting their propaganda machinery during at least the last fourteen years.

\textsuperscript{195} Of course, it will not be so easy to decide what constitutes the most favorable interpretation and expression of the principle of legality in the system of international law. I believe that the principles of justice should be chosen and decided under certain international conditions that are workable and suitable to the administration of justice. This is much more significant in the case of administration of international criminal justice, which has a very important role to play in the maintenance of international legal order and peace. One of the important aspects of the principle of \textit{de lege lata} is to see whether it incorporates those commonly shared presumptions of justice as presented by
considered similar to other international tribunals that have been established to try individuals or heads of state for their criminal conduct. International criminal justice cannot properly function when those accused of criminal acts cannot express themselves freely, given the monopolization of the national criminal justice system by the occupying power.

But what is meant by "equal justice"? Is "equal justice" the prosecution and punishment of the loser or the weaker parties alone? Or is it the prosecution and punishment of all individuals who have, in one way or another, participated in the commission of international crimes? This includes those who have participated in and worked with Hussein outside the territorial jurisdiction of Iraq. A proper answer to these questions may conflict with the questions of justice presented by the strong political parties in the Hussein trial and might not be welcomed into the structure of the international criminal justice system as represented by the permanent members of the Security Council in the United Nations. It may not even be welcomed into the structure of the international criminal justice system, as represented by the ICC, as the diplomacy of the court depends on the 

the principle of legality. The shared principles of equality may simply be entered into the principle of legality but they may practically be interpreted in a very narrow way. The aim of the commonly shared principles of international criminal law is to establish acceptable principles of justice. This is why states enter into international criminal conventions. The philosophical idea is to create a unique set of criminal principles acceptable to all nations. The conventions of international criminal law are supposed to apply to all injustices and inequalities based on the principle of legality or de lege lata. International criminal justice has to satisfy the row between the mind and reality. Without doubt, the idea of international criminal justice should not be restricted and limited to specific groups, states, or individuals in the international legal community. But, of course, reality is different. A permanent member of the Security Council can give effect to many unsolved questions of international law. The Council can especially take decisions concerning the questions of international criminal law—the character of which denote a breach of peace, threat to peace, or acts of aggression. Thus, a powerful nation under its political independence can interpret the original purpose of the system of international criminal law. This interpretation gives a temporary definition to the principle of de lege lata and justice. The interpretation basically consists of political, economic, and military interests of the state claiming to express the words of justice or the concept of rightness and fairness. The expression scarcely has a negative effect on the interests of the state itself. See U.N. Charter art. 7; see also Jose E. Alvarez, Judging the Security Council, 90 AM. J. INT'L L. 1 (1996); Thomas M. Franc, The "Power of Appreciation": Who Is the Ultimate Guardian of UN Legality?, 86 AM. J. INT'L L. 519 (1992); Keith Harper, Does the United Nations Security Council Have the Competence to Act as Court and Legislature?, 27 N.Y.U. J. INT'L L. & POL. 103 (1994). Schachter correctly states that: 

[It had] become evident to international lawyers as it had to others that States that made and applied law were not governed by morality or 'natural reason'; they acted for reasons of power and interest. It followed that law could only be ascertained and determined through the actual methods used by the States to give effect to their 'political wills'.


197. Id.

198. Id.

199. Charney, supra note 177, at 459 ("A particularly instructive case is that of Iraq, whose citizens remain unaccused despite strong Security Council involvement, the
will of the Security Council, which determines whether it will consider an important question of international criminal justice.\textsuperscript{200}

The question is even more complicated when one or several of the permanent members of the Security Council are involved in the preparation, participation in, or commitment of certain international crimes. Thus, while the concept of international criminal responsibility may exist for the criminal actions of certain highly protected individuals of all states regardless of their political, military, and economic situations, the laws are not enforceable for certain reasons.\textsuperscript{201} For example, in the IST, Hussein has no right to express his history of juridical and political power as in an international criminal tribunal those actions are guided and directed under the supervision of the United Nations by international judges. While it seems clear that the system of international criminal responsibility is an integral part of the international criminal justice system, it may not be incorrect to say that both systems have been divided into separated jurisdictional issues. The consequence of this is that the difficult questions of international criminal law such as the question of appropriate implementation of international criminal law in an appropriate international criminal tribunal is still one of the serious problems of international criminal law. Of course, the significant question is not the constitution of the ICC but the prevention, elimination, abolition, and abandonment of international crimes as well as the implementation of international criminal law to every individual who has committed international crimes, regardless of nationality.

B. Legal Arguments

There are many reasons why the Saddam Hussein Trial might be criticized under the system of international criminal law. While an exhaustive list is impossible, the following is a representative sample of the legal arguments relating to the trial:

\begin{itemize}
\item active use of force against that country and the rather clear violations of international criminal law.
\end{itemize}

\textsuperscript{200} Id. ("Because international crimes almost always occur in a political context, one cannot be certain whether the creation of the ICC was a 'feel good' agreement or a genuine commitment by states to support international prosecutions of such crimes in relative independence from the political context.").

\textsuperscript{201} Take for example, the case of Ariel Sharon. When we talk about Sharon's international criminal responsibility for his criminal actions within the occupied territories, we not only base our judgments on the principles of \textit{de lege lata} and \textit{nullum crimen sine lege}, but also on the principle of application of equal international criminal justice to anyone who violates the constructive elements of international criminal law. Sharon committed genocide against Palestinians and Lebanese at the Sabra and Shatila refugee camps in 1982. The Belgian authorities attempted to indict Sharon for his criminal acts, but U.S. President George W. Bush requested the Belgian government to terminate its prosecution of the case in 2003. \textit{See} Nicholas Blanford, \textit{Sharon May Be Off Hook as Belgium Revisits Law}, \textit{DAILY STAR} (Leb.), July 14, 2003, \textit{available at} http://lebanonwire.com/0307/03071417DS.asp; Francis A. Boyle, Barak Appoints War Criminal Yaron, http://www.derechos.org/human-rights/mena/doc/boyle2.html (last visited Nov. 8, 2005).
1) The Tribunal’s statute was not drafted by a group of international lawyers chosen under the authority and supervisions of the United Nations, but rather exclusively by lawyers chosen by the United States government.

2) Given that the newly formed Iraqi government has no independent political or legal character, especially governing certain serious questions of law, politics, and economics, the juridical effect of the Tribunal diminishes automatically.


4) Unlike international tribunals such as the ICTY, the Tribunal cannot function as an independent national or international criminal court having freedom of action regarding different judicial, historical, and political questions.\(^{202}\)

5) The Tribunal’s ability to employ certain principles of justice is limited by procedure.

6) The proceedings of the Tribunal are at all times subject to the will of the occupying power.

7) Since Saddam Hussein is the most important subject of the tribunal, and since the Tribunal is mostly established to exercise its jurisdiction over him, the function and the significance of the Tribunal reduces its juridical effect.

8) The judges of the Tribunal are not elected in accordance with international norms, as is done in the ICTY, but rather chosen by the occupying power.

9) The judges of the Tribunal have far less experience, as compared to the ICTY or ICTR judges, regarding criminal cases involving serious human rights violations.

10) Since the judges of the Tribunal are chosen by the Iraqi Governing Council, which lacks power to pass legislation, the power of all judges remains a question of politics and policies of the occupying power and authority within the territorial jurisdiction of another state.\(^{203}\)

11) Given that the Tribunal judges have been trained in London by the occupying power,\(^ {204}\) they are likely to have difficulty being impartial.

12) Since the former Iraqi government is known to have seized power with the political assistance of the United States, the Tribunal cannot open any discussions that could divulge secret international political facts that may harm the position of the occupying power.


\(^{203}\) The Coalition Provisional Authority appointed the Iraqi Governing Council. The Council’s power as well as that of the Tribunal comes from United States Ambassador Bremer who gave the Council legislative authority for the purpose of creation of the Tribunal. This authority was given when the Council lacked the power to adopt legislation. See Ryan J. Liebl, Rule of Law in Postwar Iraq: From Saddam Hussein to the American Soldiers Involved in the Abu Ghraiib Prison Scandal, What Law Governs Whose Actions?, 28 Hamline L. Rev. 91, 95–106 (2005); Somini Sengupta & John F. Burns, Much at Stake in an Iraq Trial, N.Y. Times, June 30, 2004, at A1.

13) The cases that will come before the Tribunal are selective and not exhaustive.

14) The limitations on the presentations of different cases because of political concerns will affect the Hussein case and that of others accused of international crimes.

15) Because of bias, the Tribunal will be unable to consider those evidentiary rules that are supposed to control decisions of the court.

16) The judges and the Tribunal as a whole cannot, in any way, guarantee the just outcome of the monopolized court.

17) The principles of international human rights cannot appropriately be respected in a Tribunal that exclusively follows the rules of the victorious state.

18) The rights of the accused recognized by general principles of law are not free from political ties and therefore cannot function under the proceedings of the forum.

19) The Tribunal prosecutors are not free from monopolization by the victorious states, especially the United States.

The list above is not exhaustive and can be extended further. Many of these problems stem from the presence of political and juridical monopolization. By "monopolization," I mean the rule of strong military and political powers. Ultimately, there cannot be a free Tribunal if it is supervised by strong states, as the concept of justice is fairness and rightness and wherever we cannot fulfil this elementary requirement of justice, we have failed to exercise the essence of justice in international criminal law. In presenting here these contrasts between the principles of international criminal law and the way in which international criminal law is implemented under the authority of one of the permanent members of the United Nations, I have had in mind the general idea of justice as is understood by any person. Naturally, none of us wants justice that exists solely for the satisfaction of strong political powers. We are seeking international criminal justice, not for the satisfaction of unequal international treaties, but for the implementation of the first contract of social order—no crime without punishment and no jurisdiction without proper implementation of justice.

Conclusion

In a criminal tribunal, we seek to complete and understand the relationship between the accused person and the crime in order to find out whether the person who has been brought before the tribunal has violated the codes of criminal law. The philosophy of justice in international criminal law is thus to protect the rights of international society, the victim, and the accused. This is done in order to avoid any discrimination among individuals before the law and to secure the principle of impartiality.

The framework of international criminal law does not necessarily present international criminal justice but international criminal jurisdiction must surely, if its foundation is true, present a fair and acceptable criminal justice system. In other words, the term "international criminal justice" is
not synonymous with the term "international criminal law" or the term "international criminal jurisdiction." While each term has its own definition, their main task is to implement the standard of international criminal legislation. Clearly, none of the parts of international criminal law can function without the presence of the others—they are an integral part of each other and aim at the same goal. However, they can be monopolized by different states depending on the cases which have been brought before the criminal justice system. This is why international criminal justice or international criminal tribunals have been called “victorious jurisdiction and justice,” as is repeatedly stated in the case of the IST.

By the same token, we have analyzed the philosophy of justice in general and the philosophy of international criminal justice in particular. We have come to the conclusion that the IST does not create peace, reciprocity, equality, and international criminal justice for which the permanent members of the United Nations, namely the United States, is politically and juridically responsible in its equal implementation under the system of the Security Council of the United Nations. The reasons for this dissatisfaction have been numerous. The discussion not only involves whether the Statute of the Special Tribunal is legitimate under international criminal law, but also its monopolization by the occupying power. The fact is that the United States government has intentionally handed over Saddam to a national criminal tribunal for criminal investigation and punishment. It is, at the very least, curious that he is not being tried in an international criminal tribunal, given that such tribunals have been established in several similar situations already. The problem with the newly invented Tribunal is not just its juridical body, but also its effect and its implicit or explicit ignorance of the Rome Statute, including its prohibition on capital punishment.

Above all, the emerging dynamics of the system of international criminal law, due to the development of international criminal tribunals, is based on the newly exercised principle of international criminal law—namely the principle of international tribunality of jurisdiction, which encourages the prosecution and punishment of Hussein in an international court. The principle is implemented over those who are accused of committing certain international crimes at an international level. The principle is slowly abolishing many aspects of universal jurisdiction, but is simultaneously aiming in a much more sophisticated way at implementing the principle of internationality under absolute jurisdiction of the international criminal tribunals. This is a form of globalization of international criminal justice. The newly customary norm of international criminal law has developed in accordance with the laws of international criminal tribunals, the practice of the United Nations and its resolutions, the international criminal conventions, the resolutions and statements of the international institutions for the protection of human rights, and the opinions of highly recognized international publicists. The purpose of the principle is to prevent and hinder the type of shortcomings and
monopolization of international criminal law on a national level that have been seen in the IST.

The problems associated with the IST are not the first that has been faced concerning the implementation of the system of international criminal law. The IST is not the start or the end of this monopolization of international criminal law under the United Nations Charter. On the one hand, we must remember that the monopolization of those important issues of international law is strongly criticized by most members of the United Nations. On the other hand, we must not forget that the United Nations Charter is itself the chief reason for these unbiased developments of the system of international criminal law. Although the IST will be conducted under the supervision of the Iraqi Governing Council and the authority of the United States, United Nations Security Council Resolutions have also played a role in the development of monopolized rules of international criminal justice. In other words, recognition of the policy of the United States government, right or wrong, does not help the issues of international criminal law and justice, but certainly opens our eyes to what can happen when the international legal order is based on unequal footing. Consequently, the IST will not be the last mistake of international criminal law. This will happen again and again, as long as we are teaching in our own universities the basic function of international criminal law on unequal norms of the Charter of the United Nations. Moreover, the question is how to establish security, equality, peace, and justice when there is a persisting absence of common values, common consent, mutual tolerance, reciprocal understanding of international problems, and, above all, an intentional misunderstanding of the integration of national, regional, and international legal systems by lawyers, entities, and governments into a pure global juridical mechanism.