The Preeminent State: National Dominance in the Effort to Try Saddam Hussein

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“[T]here is nothing more difficult to take in hand, more perilous to conduct, or more
uncertain in its success, than to take the lead in the introduction of a new order of things.”

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1. NICCOLO MACHIAVELLI, THE PRINCE 17 (Robert M. Adams ed. & trans., Norton

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Introduction

When the interests of powerful states coincide, the appearance of a supranational global order takes hold. But this appearance is illusory. The case of Iraq demonstrates that a powerful state acting without authorization from the United Nations Security Council can drastically alter conditions on a global scale. The trial of Saddam Hussein further reveals that a weak state, backed by a strong state, may take the lead in transitional justice. This reality has forced the United Nations Security Council—charged with maintaining and restoring global peace and security—to react to the actions of states through post hoc declarations of support for the parties it views as most able to secure peace in the aftermath of upheaval.

This Note contends that the Iraqi High Tribunal (IHT) shows the pre-eminence of states in matters of war and peace and, consequently, in transitional criminal justice. Although internationalized efforts are possible if states achieve broad consensus, the United States' effort in Iraq demonstrates that international consensus is not a precondition to action. Further, the Security Council's designation of the United States and the United Kingdom as "occupying powers" in Iraq indicates that consensus may not be a precondition for legitimacy either. Part I of this Note explores several important precedents: the post-World War II Nuremberg and Tokyo trials, the United Nations Security Council's ad hoc tribunals for the former Yugoslavia and Rwanda, and the multilateral treaty-based International Criminal Court. Part II examines the Iraqi High Tribunal's governing statute, analyzes its application at the Saddam Hussein trial in light of historical precedents, and argues that the Tribunal convicted Saddam Hussein on legally defensible grounds. Part III evaluates the institutional legitimacy of the IHT in light of the circumstances under which it was formed, and proposes a three-pronged test for assessing the legitimacy of criminal tribunals, such as the IHT, that apply international criminal law. Finally, this Note concludes with an observation about the respective roles of states and the Security Council in transitional justice and world politics based on the developments in post-invasion Iraq. This Note contends that unilateral actions by individual states force the Security Council to react and realign itself in light of its responsibility to maintain and restore global peace and security.

I. The Development of International Criminal Law

A. The Nuremberg Trials

1. The War Unfolds

When thinking about the Nuremberg Trials, a good place to start is the Allied military victory. On May 7, 1945, after Hitler committed suicide...
and the Nazi regime collapsed. Germany surrendered unconditionally, giving the United States, the United Kingdom, the Soviet Union, and France “the undoubted right . . . to legislate for the occupied territories.” The right to legislate encompassed the power to create courts to prosecute Nazi criminals. Before these prosecutions could occur, however, the Allies needed to reach an agreement on how to proceed.

A full-fledged International Military Tribunal (IMT) was by no means a foregone conclusion. An IMT was not the sole solution proposed for dealing with Nazi officials after the Allied victory, and it came about only after years of military and political struggle. The State Department and its British counterpart, the Foreign Office, initially resisted the idea of international war crimes prosecutions. Eventually, however, “The German Policy of Extermination of the Jewish Race” and numerous other inhuman policies administered by the Nazis received official condemnation and a promise of justice. In the Moscow Declaration of November 1943, President Franklin D. Roosevelt, Prime Minister Winston Churchill, and Premier


7. See NUREMBERG JUDGMENT, supra note 6, at 48 (“The making of the [Nuremberg] Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered . . . “); see also Yavnai, supra note 4, at 192 (“The U.S. Army, as occupier of Germany, had authority to prosecute war crimes within its zone of occupation . . . “).


9. See, e.g., 1 DREXEL A. SPRECHER, INSIDE THE NUREMBERG TRIAL: A PROSECUTOR’S COMPREHENSIVE ACCOUNT 23-24 (1999) [hereinafter 1 SPRECHER] (describing the State Department resisting President Roosevelt’s appointment of Herbert C. Pell to the United Nations War Crimes Commission as “an open and behind the scenes struggle” by “an old guard group of officials”); Cesaranri, supra note 8, at 32 (“From 1939 to 1942, the Foreign Office [FO] was adamantly opposed to any form of judicial retribution . . . except in the case of war crimes, as conventionally defined, and committed only against British and Allied nationals.”).

10. 1 SPRECHER, supra note 9, at 24.

11. See id. at 25.
Joseph Stalin vowed that German "criminals whose offenses have no particular geographic location . . . will be punished by joint decision of the Governments of the Allies."  

The Allied heads of state, however, disagreed about the substance of the envisaged punishment. Stalin's official position was that Nazi leaders should be put to death only after a trial, while Churchill and Roosevelt initially advocated summary execution of Nazi "outlaws." The influential U.S. Secretary of the Treasury, Henry Morgenthau, also favored summary executions. The advocates for death by firing squad argued that the culpability of Nazi leaders and the scale of their crimes were so obvious as to be undeserving of judicial proceedings. American public opinion seemed to reject Morgenthau's draconian plan, however, and helped convince Roosevelt to accept Secretary of War Henry Stimson's competing argument that the United States' fundamental respect for due process compelled war crimes trials. On May 8, 1945, President Truman appointed Supreme Court Justice Robert H. Jackson as the U.S. Chief of Counsel and directed him to work with the Allies on creating an international tribunal with which to prosecute Axis war criminals.  

Representatives of the four Allied powers met in London during the summer of 1945 to negotiate plans for a war crimes trial. One source of disagreement involved competing procedural approaches to criminal law: the Americans and the British had adversarial systems, while the Soviets and the French used an inquisitorial approach. A second source of tension was the American insistence on a conspiracy provision in the Nuremberg Charter and a conspiracy charge in the indictment of the Nazi leaders. Article 6 of the Nuremberg Charter largely reflected the U.S.

12. Id. at 27 (quoting the Moscow Declaration (Nov. 1, 1943)).  
13. See Moghalu, supra note 8, at 28; Michael J. Bazyler, The Role of the Soviet Union in the International Military Tribunal at Nuremberg, in THE NUREMBERG TRIALS, supra note 4, at 45, 45 (noting, however, that the Soviet vision of trials likely consisted of "show trials").  
14. Cesarani, supra note 8, at 34.  
15. See Moghalu, supra note 8, at 28-29; Bazyler, supra note 13, at 45.  
16. See Moghalu, supra note 8, at 28.  
17. See id. at 28-29.  
18. See Whitney R. Harris, Tyranny on Trial—Trial of Major German War Criminals at Nuremberg, Germany, 1945-1946, in THE NUREMBERG TRIALS, supra note 4, at 106, 106.  
19. See 1 Sprecher, supra note 9, at 43.  
20. See id. Differences in procedural approaches left the roles of judges, prosecution, and defense counsel at a war crimes trial in doubt. See id. The final draft incorporated aspects of both systems: a lengthy, detailed indictment and final statements by the defendants free from cross-examination, as favored by the Soviets and the French; and the central role of prosecutors in the presentation of evidence, as endorsed by the Americans and the British. See id. at 44.  
21. For more information, see discussion infra Part I.A.2.  
22. See Edward M. Wise, The Significance of Nuremberg, in WAR CRIMES, supra note 6, at 55, 60. Justice Jackson pursued a theory that "[e]verything the Nazi regime did was alleged to have been done, from the beginning, with the intent of carrying out a conspiracy or common plan to subjugate the European continent." Id. at 61.
2. The Nuremberg Charter

The Nuremberg Charter established "an International Military Tribunal . . . for the just and prompt trial and punishment of the major war criminals of the European Axis." The Charter provided the Tribunal with jurisdiction to try and punish "persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations," committed "Crimes Against Peace, War Crimes, and Crimes Against Humanity." Article 6 of the Charter defines these three offenses:

(a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connexion [sic] with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Article 6 placed additional liability on "[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes . . . for all acts performed by any persons in execution of such plan."

23. See id. (noting that, in Article 6 of the Charter, the definition of Crimes Against Peace includes liability for participation in a "common plan or conspiracy," while the definitions of War Crimes and Crimes Against Humanity do not).
26. Id. art. 1.
27. Id. art. 6.
28. See id. art. 6(a). The term "genocide" is absent from the text of the Charter. See generally id.
29. Id. art. 6(a)–(c).
30. Id. art. 6(c). Colonel Murray Bernays, head of special projects at the Intelligence Division of the U.S. Army General Staff, first proposed the idea of a conspiracy charge. See Wise, supra note 22, at 60. During the London negotiations, the French delegation protested that the common law notion of a conspiracy was a "barbarous legal anachronism." Id. at 61. Throughout the London negotiations, and later during trial, European counsel did not fully embrace the criminal conspiracy idea. See id.
Articles 7 and 8 of the Nuremberg Charter complemented Article 6 by stripping the accused of two potential defenses. Article 7 preempted the official immunity, or state acts, defense: "The official position of defendants, whether as Heads of State or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment." Article 8 addressed the defense of superior orders (the converse of official immunity): "The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires." In his opening statement to the Tribunal, Justice Robert Jackson observed that the twin principles of state acts and superior orders "have heretofore resulted in immunity for practically everyone concerned in the really great crimes against peace and mankind. Those in lower ranks were protected... by the orders of their superiors. The superiors were protected because their orders were called acts of state." The Nuremberg Charter made the extraordinary advance of rejecting these twin immunities.

The structural and procedural framework of the Nuremberg Charter guaranteed the accused minimum rights "to ensure [a] fair trial for the defendants." One of these rights required providing a specific translated indictment to the defendants at a reasonable time before trial. Secondly, throughout preliminary proceedings and trial, a defendant had "the right to give any explanation relevant to the charges made against him." Third, the preliminary examinations and trial were to be conducted in (or translated into) the defendants' native language. Each defendant also had the significant choice to either employ the assistance of counsel or represent himself. With or without the assistance of counsel, defendants had the right to present evidence and cross-examine prosecution witnesses.

3. Application of the Nuremberg Charter to the Nazi Trial

During the 315 days of proceedings, the International Military Tribunal heard testimony against twenty-two high-ranking Nazi officials. After

31. Meltzer, supra note 6, at 21 ("[I]n combination[, the rejected defenses] might have immunized all the defendants.").
32. Nuremberg Charter, supra note 25, art. 7.
33. Id. art. 8.
34. 1 SPRECHER, supra note 9, at 163.
35. See Nuremberg Charter, supra note 25, arts. 7-8.
36. See id. art. 16. Of course a tribunal's own charter cannot simply declare that it will "ensure" a fair trial. The language rings of formal aspiration.
37. See id. art. 16(a).
38. Id. art. 16(b).
39. See id. art. 16(c).
40. See id. art. 16(d). In contrast, the tribunal that would try Saddam Hussein did not allow defendants the right to conduct their own defense. See infra note 185 and accompanying text.
41. Nuremberg Charter, supra note 25, art. 16(e).
42. MOGHALU, supra note 8, at 29. The defendants included Rudolf Hess, Hitler's private secretary; Hermann Goering, commander of the German Air Force; Karl Doenitz, Supreme Commander of the German Navy and leader of the Nazi Government...
an entire first day devoted to reading the indictment, all twenty-two defendants pled "not guilty." President Lawrence then swiftly called upon Chief Prosecutor Robert Jackson to begin his opening statement.

"That four great nations," Jackson intoned, "flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to reason." Jackson's famous remark to open the Nuremberg Trial was more than powerful rhetoric; it was a deliberate response to contemporary critics who challenged the integrity of the Nuremberg effort. In his opening statement, Jackson conceded that the victors' position called for exceptional temperance and fairness. Yet, he defended the role of the Tribunal: "Either the victors must judge the vanquished or we must leave the defeated to judge themselves." Recognizing the tough task at hand, Jackson reminded the Tribunal that "the record on which we judge these defendants today is the record on which history will judge us tomorrow."

The prosecution's case-in-chief set out to prove a four-count indictment, which Jackson believed could be accomplished with books and records. The indictment implicated seven organizations, from the core Nazi leadership to the Gestapo, as well as the individual defendants.

in the days between Hitler's suicide and German surrender; Alfred Jodl, head of the German Armed Forces Operations Staff and signatory to Germany's unconditional surrender; Joachim von Ribbentrop, Nazi foreign minister and negotiator of the Molotov-Ribbentrop Pact that facilitated Germany's conquest of Poland; Julius Streicher, Nazi propagandist; and Ernst Kaltenbrunner, head of the Gestapo and administrator of the extermination program. See id. at 150.

43. See 1 Sprecher, supra note 9, at 150.
44. See id.
47. See 1 Sprecher, supra note 9, at 153.
48. Id. (quoting Justice Robert H. Jackson).
49. Id.
50. See id. at 154. Count One charged "a common plan or conspiracy to commit . . . Crimes against Peace, War Crimes, and Crimes against Humanity, as defined in the Charter." Indictment: International Military Tribunal, in Trial of the Major War Criminals Before the International Military Tribunal 27, 29 (1947) [hereinafter Nuremberg Indictment]. Count Two alleged Crimes against Peace "in the planning, preparation, initiation, and waging of wars of aggression, which were also wars in violation of international treaties, agreements, and assurances." Id. at 42. Count Three charged War Crimes, such as the murder and ill-treatment of civilian populations; the deportation of civilians for slave labor and other purposes; the plunder of public and private property; and the Germanization of occupied territories. See id. at 42-65. Count Four charged Crimes against Humanity, including extermination, enslavement, deportation, and persecution. Id. at 65-67.
51. See 1 Sprecher, supra note 9, at 426. "Collectively they were the ultimate repositories of all power in the Nazi regime; they were not only the most powerful, but the
All four counts alleged "individual, group, and organization responsibility." 53 Relying heavily on contemporaneous documents, 54 the prosecution sought to prove its case by chronicling the Nazi path of aggressive war and horrendous atrocities. 55 Pursuant to their right to present evidence under Article 16(e), the defendants offered documents, called witnesses, and individually testified. 56 The Nuremberg Charter allowed closing arguments by the defense and prosecution, as well as final statements by each individual defendant. 57 The defense gave closing arguments on behalf of each organization and each individual defendant. 58 Likewise, the prosecution dedicated a separate closing argument to each defendant and each organization. 59 The last presentations before the IMT were the final statements of the twenty-one 60 defendants in the dock. 61

4. The Judgment of the International Military Tribunal: An Early Articulation of Modern International Criminal Law

The IMT convicted nineteen of the twenty-two defendants and sentenced twelve of them to death by hanging. 62 The Tribunal acquitted three defendants, perhaps to bolster its own legitimacy, 63 but also to distinguish

most vicious organizations in the regime; and they were organizations in which membership was generally voluntary." Id. at 476 (quoting Justice Robert H. Jackson).

52. See generally id. at 489-546.


54. See Meltzer, supra note 6, at 26 ('Because of Jackson's policy, the case against the defendants was proved by documents of their own making . . . . [T]he German obsession for record keeping made our case.').

55. See generally 1 Sprecher, supra note 9, at 151-420.

56. See generally 2 Drexel A. Sprecher, Inside the Nuremberg Trial: A Prosecutor's Comprehensive Account 713-1230 (1999) (detailing the defense's case-in-chief) [hereinafter 2 Sprecher].

57. See Nuremberg Charter, supra note 25, art. 24(h)-(j).

58. See, e.g., 2 Sprecher, supra note 56, at 1232-52, 1266-90 (detailing the closing arguments for the individual defendants and the accused organizations respectively).

59. See id. at 1253-65, 1291-1308.

60. "On the 17th November 1945 the Tribunal decided to try the defendant Bormann in his absence . . . ." Nuremberg Judgment, supra note 6, at 2.

61. See 2 Sprecher, supra note 56, at 1309-27. The final statements ranged from sober and regretful to defiant and stubborn. Defendant Wilhelm Keitel expressed remorse: "I would rather choose death than to let myself be drawn into the net of such pernicious methods." Id. at 1315 (quoting Wilhelm Keitel). In sharp contrast, Rudolf Hess declared astoundingly: "If I were to begin all over again, I would act just as I have acted, even if I knew that in the end I should meet a fiery death at the stake." Id. at 1313 (quoting Rudolf Hess).

62. Nuremberg Judgment, supra note 6, at 189-90. Sentenced to death by hanging: Goering, Ribbentrop, Keitel, Kaltenbrunner, Rosenberg, Frank, Frick, Streicher, Sauckel, Jodl, Seyss-Inquart, and Bormann. See id. Sentenced to prison terms ranging from ten years to life: Doenitz (ten years), von Neurath (fifteen years), von Schirach (twenty years), Speer (twenty years), Hess (life), Funk (life), and Raeder (life). See id. Acquitted: Fritzche, Schacht, and von Papen. See id. at 166 (Nikitchenko, J., dissenting).

63. Before the Nuremberg Trials began, Justice Robert H. Jackson warned:

The ultimate principle is that you must put no man on trial under the forms of judicial proceedings if you are not willing to see him freed if not proven guilty. If you are determined to execute a man in any case, there is no occasion for a trial; the world yields no respect to courts that are merely organized to convict.
between merely reprehensible conduct and punishable criminal acts.\textsuperscript{64}

The Nuremberg Judgment firmly established the concept of individual responsibility for war crimes and crimes against humanity.\textsuperscript{65} Prior to this judgment, war crimes did not include atrocities against a government's own citizens, and international prohibitions on crimes against humanity did not yet exist.\textsuperscript{66} The Tribunal tried to avert criticism for \textit{ex post facto} application of Article 6 by citing existing international law in support of its decision, but struggled to find precedent.\textsuperscript{67} The judgment cited Article 46 of the Hague Convention of 1899, which stated: "Family honor and rights, the lives of persons and private property, as well as religious convictions and practice must be respected."\textsuperscript{68} The shift from Article 46 of the Hague Convention to Article 6 of the Nuremberg Charter broadened existing law\textsuperscript{69} by empowering the Tribunal to punish individuals for committing "inhumane acts . . . against any civilian population, before or during the war."\textsuperscript{70} Notwithstanding criticism based on the principle of \textit{nullum crimen sine lege},\textsuperscript{71} "Nuremberg's single most important contribution . . . was to give legitimacy to the concept that the world had something to say about how governments treat their own citizens."\textsuperscript{72}

In one sense, the judgment at Nuremberg earned instant positive recognition among the post-war international community. Immediately following the Nuremberg Judgment, the United Nations General Assembly, in its First Session, adopted Resolution 95(I), which "[a]ffirm[ed] the princi-

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\textsuperscript{64} See \textit{Nuremberg Judgment, supra} note 6, at 153 ("To carry through this plan [to strengthen the Austrian Nazis] he engaged in both intrigue and bullying. But the Charter does not make criminal such offenses against political morality, however bad these may be. Under the Charter von Papen can be held guilty only if he was a party to the planning of progressive war.").

\textsuperscript{65} See \textit{Nuremberg Judgment, supra} note 6, at 3-4.

\textsuperscript{66} See Tina Rosenberg, \textit{Tipping the Scales of Justice, in War Crimes, supra} note 6, at 276, 280 (noting that, before Nuremberg, war crimes law did not cover atrocities against a government's own citizens and "[i]nternational prohibitions on crimes against humanity had not yet been written").

\textsuperscript{67} See Hervé Ascensio, \textit{The French Perspective, in The Nuremberg Trials, supra} note 4, at 39, 42 (explaining that the Tribunal's French member, Donnedieu de Vabres, believed that the definition of crimes against humanity was "posterior to the facts" and "contrary to the principle on non-retroactivity").

\textsuperscript{68} \textit{Nuremberg Judgment, supra} note 6, at 62 (quoting Laws of War: Laws and Customs of War on Land ( Hague II), art. 46 (July 29, 1899)).

\textsuperscript{69} See Rosenberg, \textit{supra} note 66, at 280 (noting that existing legal structures did not exist to cope with bureaucratic mass murder).

\textsuperscript{70} Nuremberg Charter, \textit{supra} note 25, art. 6(c).

\textsuperscript{71} Justice Jackson argued that the character of international law at the time of the Nuremberg trial precluded strict application of the principle of retroactivity. See Meltzer, \textit{supra} note 6, at 23. International law was a primitive system, argued Jackson, dependent on case-by-case development. See \textit{id}. Jackson drew analogy to the earliest common law, which simultaneously declared the criminality of certain shocking offenses and punished the offender. See \textit{id}.

\textsuperscript{72} Rosenberg, \textit{supra} note 66, at 281.
ples of international law recognized by . . . the [Nuremberg] Tribunal.”\textsuperscript{73} This Resolution was one of many post-war manifestations of an international consensus in support of the principles that came out of Nuremberg.\textsuperscript{74}

In fact, the very formation of the United Nations during the summer of 1945—under a Charter that set parameters for the use of force by Member States—confirms that Nuremberg articulated novel but valid principles of international law.\textsuperscript{75} Article 2(3) of the United Nations Charter declares, “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”\textsuperscript{76} Article 2(4) further obligates Members to “refrain . . . from the threat or use of force against the territorial integrity or political independence of any state.”\textsuperscript{77}

The United Nations took several additional steps that validated the Nuremberg proceedings. The next resolution that the General Assembly passed, Resolution 96(I), “affirm[ed] that genocide is a crime under international law.”\textsuperscript{78} General Assembly Resolution 260(III), adopted in December 1948, further declared that “genocide, whether committed in time of peace or in time of war, is a crime under international law [that Member States must] . . . prevent and . . . punish.”\textsuperscript{79} That same month, the General Assembly adopted the Universal Declaration of Human Rights, Article 3 of which affirmed: “Everyone has the right to life, liberty and security of person.”\textsuperscript{80} Moreover, in 1947, the General Assembly directed the United Nations International Law Commission to formulate and compile the principles that emerged from the Nuremberg Charter and the Tribunal’s judg-


\textsuperscript{74} See Benjamin Ferencz, \textit{Nuremberg: A Prosecutor’s Perspective}, in \textit{WAR CRIMES}, supra note 6, at 32, 35 (describing how “the outrage . . . evoked by these trials immediately brought forth” several responses from the United Nations).

\textsuperscript{75} See Rosenberg, \textit{supra} note 66, at 276 (stating that Nuremberg’s punishment of government officials for crimes against peace coincided with the formation of a new international institution that proscribed such crimes).

\textsuperscript{76} U.N. Charter art. 2, para. 3.

\textsuperscript{77} Id. art. 2, para. 4. The Charter provides for only two exceptions to the “comprehensive prohibition of the use or threat of force.” \textit{Sharon Korman}, \textit{The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice} 200 (1996). The first exception is the collective use of force sanctioned by the Security Council pursuant to Articles 39 and 42 of the Charter. See U.N. Charter arts. 39, 42. The second exception is the right of individual and collective self-defense in the event of “an armed attack . . . against a Member,” but only on an interim basis, until the Security Council takes measures “necessary to maintain international peace and security.” Id. art. 51.


The UN resolutions and instruments of international law adopted in the wake of the Nuremberg Trials set the course for modern international law regarding aggressive war and state crimes against civilians. The United Nations adopted the principles and other declarations of the Nuremberg Trials and gave the trials a lasting legitimacy. Yet, neither the United Nations Charter nor the organization's early resolutions created an international criminal court for purposes of enforcement. As Eleanor Roosevelt ominously asserted, it remained to be seen "whether a mere statement of rights, without legal obligations, would inspire governments to see that these rights are enforced."

B. The Tokyo Trials: Parallel Proceedings in the "Far East"

The International Military Tribunal for the Far East (IMTFE) derived its authority from the terms of Japan's surrender. According to the Instrument of Surrender, "the Supreme Commander for the Allied Powers . . . will take such steps as he deems proper to effectuate these terms of surrender." One of the terms of surrender, as articulated in the Potsdam Declaration, was the Allies' authority to bring the Japanese war criminals to justice. Accordingly, General Douglas MacArthur unilaterally established the IMTFE by special proclamation in January 1946 and indepen-

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84. See generally G.A. Res. 95 (I), *supra* note 73.
85. See 2 *Sprecher*, *supra* note 56, at 1445 (noting that the UN "resolutions did not address the crucial matter of creating a permanent structure for the enforcement of" the principles of the Nuremberg Tribunals); cf. Farhad Malekian, *Emasculating the Philosophy of International Criminal Justice in the Iraqi Special Tribunal*, 38 *Cornell Int'l L.J.* 673, 685 (2005) ("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.").
86. 2 *Sprecher*, *supra* note 56, at 1448 (quoting Eleanor Roosevelt).
dently approved its Charter. In this way, the formation of the IMTFE stands in contrast to that of the Nuremberg Tribunal, which was established by an agreement among four allied nations. In both cases, however, the state was the preeminent political unit: the Nuremberg Charter required one state's surrender and negotiations among victorious states, while the IMTFE Charter required one state's surrender and another state's unilateral actions. Article 5 of the IMTFE Charter is the equivalent to Nuremberg Charter Article 6; it defines the IMTFE's jurisdiction over persons and offenses. The IMTFE Charter gave the IMTFE jurisdiction over "Far Eastern war criminals who as individuals or as members of organizations are charged with" Crimes against Peace, Conventional War Crimes, and Crimes against Humanity. Like the Nuremberg Charter, the IMTFE Charter incorporated a theory of criminal conspiracy. One noteworthy distinction between the two charters' offense definitions is their respective definitions of war crimes. The Nuremberg Charter sought to expand the notion of war crimes to include crimes against a government's own civilian population. Conversely, the IMTFE Charter limited the Tribunal's jurisdiction to "conventional" war crimes. The United States' particular contempt for Japan's mistreatment of American prisoners of war offers a partial explanation for this difference.

The Tokyo Trial concerned the fates of eighty defendants charged as "Class A war criminals" with "Crimes against Peace." After two years of

91. See discussion of the London Agreement, supra note 24 and accompanying text.
92. Compare IMTFE Charter, supra note 90, art. 5, with Nuremberg Charter, supra note 25, art. 6.
93. Compare IMTFE Charter, supra note 90, art. 5, with Nuremberg Charter, supra note 25, art. 6.
94. IMTFE Charter, supra note 90, art. 5. The IMTFE Charter defines the crimes as follows:
   a. Crimes against Peace: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
   b. Conventional War Crimes: Namely, violations of the laws or customs of war;
   c. Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.
95. See id.
96. Nuremberg Charter, supra note 25, art. 6.
97. See IMTFE Charter, supra note 90, art. 5(b).
98. See Potsdam Declaration, supra note 88, ¶ 10 ("Stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners.").
99. See TIM MAGA, JUDGMENT AT TOKYO: THE JAPANESE WAR CRIMES TRIALS 2–3 (2001). The suspects included premiers (Hiranuma, Tojo, Hirota, Koiso); foreign ministers (Mat-suoka, Shigemitsu, Togo); war ministers (Araki, Itagaki, Hata, Minami); navy ministers
trial and several months of deliberation, the IMTFE found that the prosecution had proven that the defendants had participated in a conspiracy to wage aggressive war, and that all defendants—aside from two who died during trial and one who was declared unfit to stand trial—were guilty for their part in the conspiracy.\textsuperscript{100} Seven defendants were put to death, while others faced prison sentences ranging from seven years to life.\textsuperscript{101}

The Tokyo indictment is notorious not for whom it included, but for whom it excluded. Although Hitler escaped judgment at Nuremberg by taking his own life, Emperor Hirohito enjoyed immunity from prosecution.\textsuperscript{102} Regarding Emperor Hirohito's immunity, General MacArthur believed that "if he [were] to be tried . . . his indictment [would have] unquestionably cause[d] a tremendous convulsion among the Japanese people, the repercussions of which cannot be over-estimated."\textsuperscript{103} With these political aims in mind, the United States took extensive measures to protect Hirohito and the Japanese royal family.\textsuperscript{104} The sparing of Hirohito and the Japanese royal family undoubtedly contradicted Nuremberg's rejection of official immunity.\textsuperscript{105} Therefore, immunity for Emperor Hirohito arguably harmed the legacy of the Tokyo Tribunal.\textsuperscript{106}

Nonetheless, a key concept in international criminal law—"command responsibility"—originated at the Tokyo Tribunal.\textsuperscript{107} Japanese General Yamashita's death sentence rested on an omission offense; he allowed his

\textsuperscript{101} See \textit{id.} at 1675.
\textsuperscript{102} See \textit{id.}
\textsuperscript{104} See \textit{id.} at 301-02. The pervasive racism of the time period may also have contributed to MacArthur's decision not to prosecute Hirohito. See \textit{id.} at 303-05. MacArthur's belief that Hirohito's immunity was necessary to the stability of post-war Japan might have been motivated by a prevailing stereotype of Japanese as childlike followers in need of a father-figure. See \textit{id.} See \textit{generally} John Dower, \textit{War Without Mercy: Race and Power in the Pacific War} (1986).
\textsuperscript{105} See Nuremberg Charter, supra note 25, art. 7.
\textsuperscript{106} See, e.g., M. Cherif Bassiouni, \textit{The Perennial Conflict Between International Criminal Justice and Realpolitik}, 22 \textit{Ga. St. U. L. Rev.} 541, 554 (2006) ("MacArthur had more concern about governing Japan than prosecuting Japanese Emperor Hirohito. Japan's head of state thus escaped responsibility . . . ."); Wanhong, supra note 100, at 1675 ("Japan fought World War II in the name of the Emperor, and there is abundant evidence pointing to the fact that the Emperor himself was aware of the Imperial Army's atrocities in the war.").
\textsuperscript{107} See Moghalu, supra note 8, at 65.
The prosecution could not prove that the General had actual knowledge of the crimes that his subordinates committed. Instead, the Tribunal reasoned that the crimes were so widespread and conspicuous that General Yamashita must have either secretly ordered them or must have been aware of their commission. The doctrine of command responsibility would later prove important in the trials of Slobodan Milosevic and Saddam Hussein.

The multilateralism and compromise among the Allies at Nuremberg was conspicuously absent in Tokyo. The United States single-handedly applied the military force necessary to secure Japan's surrender. The United States' military commander in the Pacific unilaterally approved the Tribunal's governing instruments and appointed the Tribunal's judges. The overarching U.S. goal in Japan was to mold the former enemy into a Cold War ally, and immunity for Hirohito went hand-in-hand with that agenda. The Tokyo Trial, therefore, has been interpreted largely as realpolitik in disguise as justice. Although the United Nations embraced the principles that emerged from Nuremberg, the IMTFE is still searching for its "proper legacy." This situation reflects the respective roles of states and international bodies. The role of the United Nations was to either legitimze or distance itself from state action. In the case of the Tokyo Trials, the United Nations chose to keep its distance.

109. See id.
110. See id.
111. See MOGHALU, supra note 8, at 65; Michael Louis Minns, A Brief History of Willfulness as It Applies to the Body of American Criminal Tax Law, 49 S. TEX. L. REV. 395, 396 n.9 (2007).
112. See M. Cherif Bassiouni, Justice and Peace: The Importance of Choosing Accountability Over Realpolitik, 35 CASE W. RES. J. INT'L L. 191, 196 (2003) ("The original Nuremberg tribunal was a product of the London Treaty of August 8, 1945, which was signed by four countries and acceded to by nineteen others. In the Far East, on the other hand, the tribunal's foundation rested on General MacArthur's proclamation ... ").
113. See WILLIAM H. CHAFE, THE UNFINISHED JOURNEY: AMERICA SINCE WORLD WAR II 56 (5th ed. 2003) (quoting Japanese military expert who said that if bomb had not been dropped, "we would have fought until all 80 million Japanese were dead"); MOGHALU, supra note 8, at 47.
114. See Bassiouni, supra note 112, at 196.
115. See id. at 196-97 ("[T]he United States had based its future Southeast Asia policy on Japan's stability and strength, and it was important that the Japanese not feel humiliated by the consequences of World War II.").
116. Id. at 191 ("Realpolitik involves the pursuit of political settlements unencumbered by moral and ethical limitations.").
117. See id. at 196 ("While the Nuremberg tribunal is widely viewed as a major historical step in the evolution of international norms of accountability, the Tokyo tribunal reveals how adjudicative bodies can be used to support realpolitik.").
118. See MAGA, supra note 99, at 140 (noting that "[a] minimum of ... world political attention had been paid to the Tokyo effort as compared to that in Nuremberg").
120. See MAGA, supra note 99, at xiii.
C. The United Nations Takes a More Prominent Role in Post-Conflict Justice: Ad Hoc Tribunals and the International Criminal Court

Between 1950 and 1990, the international community effectively shelved the Nuremberg Charter and did not convene a single international tribunal despite the commission of many chargeable crimes. The Cold War power politics between the United States and the Soviet Union did not leave much room for legal accountability for acts and policies defined as crimes. The fall of the Soviet Union and removal of communist influence throughout Europe in the 1990s seemed to promise renewed international cooperation fueled by Western democracy and capitalism.

In the midst of what appeared to be a moment of progress, however, gross and systematic human rights violations were taking place in the former Yugoslavia. Unlike the leaders of Nazi Germany and Imperial Japan, however, Serbian leader Slobodan Milosevic seemed focused only on regional domination; Serbia did not pose a military threat to the United States or its peers on the Security Council. Thus, rather than mobilize a military intervention, the Security Council began a barrage of resolutions and fact-findings—eventually developing an international tribunal.


122. See Jeremy Rabkin, Global Criminal Justice: An Idea Whose Time Has Passed, 38 CORNELL INT'L L.J. 753, 758 (2005) (noting the "general atmosphere of suspicion and distrust between the superpowers (and their respective allies) during the Cold War"); Geoffrey Robertson, Ending Impunity: How International Criminal Law Can Put Tyrants on Trial, 38 CORNELL INT'L L.J. 649, 656 (2005) ("It was doubtless due to Cold War realpolitik that no head of state was held responsible in international law" after Nuremberg.).

123. See Rabkin, supra note 122, at 758 & n.16 (describing the 1990s as a time when "[e]verything seemed possible," the World Bank announced a "Washington Consensus," and Fukuyama predicted the end of history).

124. See 1 Morris & Scharf, supra note 121, at 21. Serbian forces used methods evoking Nazi Europe: forced population transfers in cattle trucks, organized massacres, and over 400 detention centers where Bosnian Muslims were tortured and killed. See id. at 22. By 1993, forces led by Radovan Karadzic and Slobodan Milosevic had killed or displaced 2.1 million Bosnians. See id.

125. See Rabkin, supra note 122, at 761 (noting that the Clinton administration was adverse to sending troops to the Balkans after American troops had been lost during a humanitarian mission in Somalia).

126. See Moghalu, supra note 8, at 63 ("[T]he great powers were clearly unwilling to go to such lengths to support international justice.").

127. For an account of the various Security Council resolutions in response to the Yugoslav conflict, see 1 Morris & Scharf, supra note 121, at 22-35. Resolution 764 declared that parties to the conflict must follow international law. See id. at 22. Resolution 771 demanded cessation of violations of international law. See id. Resolution 780 expressed alarm and called for a Commission of Experts to assess the situation. See id. at 24-25. Four months later, the Commission confirmed that serious breaches had occurred and suggested that the Security Council or another competent UN organ form
On May 23, 1993, the Security Council adopted the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY)\textsuperscript{128} pursuant to its authority under Chapter VII of the United Nations Charter.\textsuperscript{129}

The jurisdiction of the ICTY extends over all "persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."\textsuperscript{130} The ICTY has jurisdiction concurrent with that of national courts, but "shall have primacy over national courts," meaning that the ICTY can request that national courts defer to its competence.\textsuperscript{131} The ICTY Statute covers "grave breaches of the Geneva Conventions" of 1949,\textsuperscript{132} violations of the laws or customs of war,\textsuperscript{133} genocide,\textsuperscript{134} and crimes against humanity.\textsuperscript{135}

The crimes defined in the ICTY Statute were conceived of, in similar language, as early as the Nuremberg Charter\textsuperscript{136} and were "beyond doubt customary international law" by 1993.\textsuperscript{137} Thus, according to its proponents, the ICTY Statute does not violate the fundamental principle of \textit{nullum crimen sine lege}.\textsuperscript{138} The ICTY Statute's provisions regarding individual criminal responsibility were also in line with precedent. Like the Nuremberg Charter, the ICTY Statute declares that the official position of any accused person "shall not relieve such person of criminal responsibility nor mitigate punishment"\textsuperscript{139} and that "[t]he 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."\textsuperscript{140} Unlike the Nuremberg Charter, however, the ICTY Statute does

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  \item \textsuperscript{128} Statute of the International Criminal Tribunal for the Former Yugoslavia, May 25, 1993, 32 I.L.M. 1192 [hereinafter ICTY Statute].
  \item \textsuperscript{129} U.N. Charter art. 39. The Security Council holds the power to "determine the existence of any threat to the peace, breach of the peace, or act of aggression and... make recommendations, or decide what measures shall be taken... to maintain or restore international peace and security." \textit{Id}.
  \item \textsuperscript{130} ICTY Statute, supra note 128, art. 1.
  \item \textsuperscript{131} \textit{Id.} art. 9(1)-(2).
  \item \textsuperscript{132} \textit{Id.} art. 2.
  \item \textsuperscript{133} \textit{See id.} art. 3.
  \item \textsuperscript{134} \textit{See id.} art. 4.
  \item \textsuperscript{135} \textit{See id.} art. 5.
  \item \textsuperscript{136} \textit{Compare id.} arts. 2-5, with Nuremberg Charter, supra note 25, art. 6.
  \item \textsuperscript{137} 1 \textsc{Morris} & \textsc{Scharf}, \textit{supra} note 121, at 51-52.
  \item \textsuperscript{138} \textit{See id.} at 52 & n.177 (characterizing \textit{nullum crimen sine lege} as the principle that one cannot be guilty for an act or omission that was not criminal at the time it was, or was not, done).
  \item \textsuperscript{139} ICTY Statute, supra note 128, art. 7(2).
  \item \textsuperscript{140} \textit{Id.} art. 7(4).
\end{itemize}
\end{footnotesize}
not permit imposition of the death penalty.\textsuperscript{141}

Slobodan Milosevic's first act as a criminal defendant at The Hague was one of defiance: he refused to appoint defense counsel.\textsuperscript{142} In a trial that began in February 2002, Milosevic faced charges of crimes against humanity and war crimes, grave breaches of the Geneva Conventions, and violations of the laws and customs of war.\textsuperscript{143} Unlike the Nuremberg prosecution, in which the defendants' own documents proved their guilt,\textsuperscript{144} the ICTY prosecution found little or no direct evidence of Milosevic's involvement in the vicious crimes perpetrated during his rule.\textsuperscript{145} Thus, the indictment embraced concepts of conspiracy from the American prosecution at Nuremberg, alleging Milosevic's participation as a "co-perpetrator" in a "joint criminal enterprise."\textsuperscript{146} The prosecution also utilized the concept of command responsibility, which provided a path to Milosevic's guilt if the crimes of his subordinates could be proven.\textsuperscript{147} The charges mounted against Milosevic did not lead to a conviction.\textsuperscript{148} Instead, the proceedings dragged on for four years due to his ill health and filibustering tactics, and the trial abruptly ended when Milosevic died on March 11, 2006.\textsuperscript{149}

Has impunity come to the rescue of other high-level officials tried by ad hoc tribunals of the UN? An examination of the International Criminal Tribunal for Rwanda (ICTR) suggests that this is largely the case. Between April 6 and July 17, 1994, approximately 800,000 Rwandans were massacred\textsuperscript{150} as part of a pre-planned government campaign.\textsuperscript{151} The international community did not intervene militarily to stop the genocide; rather, the Security Council ordered the withdrawal of peacekeeping forces.\textsuperscript{152} The genocide halted only when an invading army took control of the Rwandan militarily on July 17, 1994 and formed a new government.\textsuperscript{153} Once again, institution-building began at the state level as the international community looked on. The international community became involved

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\item[141.] Compare id. art. 24(1), with Nuremberg Charter, supra note 25, art. 27.
\item[142.] See Moghalu, supra note 8, at 67.
\item[143.] See id. at 64.
\item[144.] See supra notes 50-61 and accompanying text for a discussion of Nuremberg prosecution tactics.
\item[145.] See Moghalu, supra note 8, at 64.
\item[147.] See Moghalu, supra note 8, at 65.
\item[148.] See id. at 70-72.
\item[149.] See id. at 67-69. During his self-representation, Milosevic sought to win over public opinion back home in Serbia during the televised proceedings, delivering political speeches that had little to do with the forensic trial. See Michael P. Scharf, \textit{Chaos in the Courtroom: Controlling Disruptive Defendants and Contumacious Counsel in War Crimes Trials}, 39 \textit{CASE W. RES. J. INT'L L.} 155, 161-62 (2007). His tactics were quite effective in turning Serbian public opinion in his favor and in foreclosing a timely conviction. \textit{Id.}
\item[150.] See Kingsley Chiedu Moghalu, \textit{Rwandá's Genocide} 1 (2005) [hereinafter \textit{Rwandá's Genocide}].
\item[151.] See Madeline H. Morris, \textit{Justice in the Wake of Genocide: Rwanda, in War Crimes}, supra note 6, at 211, 211-12.
\item[152.] See Rabkin, supra note 122, at 762.
\item[153.] See Morris, supra note 151, at 212; Rabkin, supra note 122, at 763.
\end{thebibliography}
only after the military conflict had quieted.154 The Security Council began investigations and negotiations with the government of Rwanda with the goal of creating an ad hoc tribunal to handle a portion of the more than 100,000 cases arising from the Rwandan genocide.155 As was the case with the ICTY, the Security Council acted pursuant to its Chapter VII peace enforcement powers.156 The ICTR came into existence pursuant to Security Council Resolution 955,157 passed by the vote of thirteen of fifteen Members.158 China abstained, and Rwanda—coincidentally a Security Council Member at the time—cast the sole dissenting vote.159

Like the ICTY, the ICTR has primacy over national courts, which means its law—not Rwandan law—will apply to the defendants it tries.160 Rwanda wanted its domestic legal culture to feature prominently in the ICTR Statute; however, disagreement arose over the structure of the ICTR.161 The ICTR Statute, for instance, prohibited the death penalty despite its place in Rwanda's domestic criminal code.162 Thus, if the ICTR pursued defendants from the previous regime's top leadership, these leaders would escape the death penalty, face prison conditions superior to those in Rwanda, and enjoy the belabored process of international justice illustrated most prominently by the Milosevic trial.163

In the case of Iraq, the threat of a veto from a Permanent Member of the Security Council probably foreclosed the possibility of an ad hoc tribunal.164 Additionally, the permanent International Criminal Court (ICC) was not a possible forum for trying Saddam Hussein.165 The ICC is the product of a multilateral treaty negotiated in Rome in 1998.166 Less than half of the 189 UN Member States have ratified the treaty.167 The ICC does not have temporal jurisdiction over crimes that occurred before July

155. See id.
156. See RWANDA'S GENOCIDE, supra note 150, at 31.
158. See RWANDA'S GENOCIDE, supra note 150, at 31.
159. See id.
160. See Statute of the International Tribunal for Rwanda, S.C. Res. 955, supra note 157, Annex, art. 8(2) [hereinafter ICTR Statute].
161. See Morris, supra note 151, at 213-15.
162. See id. at 214-15.
163. See id. at 219.
165. See id.
167. See Wedgwood, supra note 166, at 82. India, Japan, China, Egypt, Israel, Russia, and the United States have not ratified the Rome statute. See id. at 82-83. The United States' opposition to the ICC stems largely from its concern that the Court's broadly-defined subject matter jurisdiction could be used as a political tool to challenge U.S. policies. See id. at 82-83.
1, 2002, and therefore could not have tried Saddam Hussein whose crimes were alleged to have been committed before that date.

The ICC, like the ICTY and the ICTR, has subject matter jurisdiction over crimes whose definitions have their origin at Nuremberg: war crimes, crimes against humanity, genocide, and the crime of aggression. Proponents of the ICC have described it as "a permanent court of universal jurisdiction," signaling a paradigm shift in international law towards a "supranational structure." The reach of ICC jurisdiction is controversial; the Court can prosecute any statutory crime committed in the territory of a State Party, even if those crimes were committed by a national of a non-State Party, such as the United States. The ICC may also prosecute a national of any State Party, regardless of where the crime was committed. However, significant opposition by major powers such as the United States, China, and India calls into question the future relevance of the ICC. Additionally, the ICC's early setbacks illustrate the preeminence of states. The ICC's authority to set binding precedent will continue to depend on ratification at the state level.

II. Application of International and Iraqi Criminal Law at the Trial of Saddam Hussein

The Statute of the IHT largely comports with international precedent, but includes features that reflect the national character of the Tribunal. Professor Michael Scharf has commented that "the IHT is not fully international or even international enough to be dubbed a hybrid court, since its seat is Baghdad, its Prosecutor is Iraqi, it uses the Iraqi Criminal Code to supplement the provisions of its statute and rules, and its bench is com-

168. See Rome Statute, supra note 166, art. 11(l) ("The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.").
169. See Interview with Michael Scharf, supra note 164.
170. See Rome Statute, supra note 166, art. 8.
171. See id. art. 7.
172. See id. art. 6. Though the crime of genocide was not articulated as a separate crime in the Nuremberg Charter, it was mentioned by Nuremberg prosecutors under the auspice of crimes against humanity. See William Driscoll, Introduction, in The International Criminal Court: Global Politics and the Quest for Justice, supra note 166, at 11, 14.
173. See Rome Statute, supra note 166, art. 5. The Rome Statute does not define the crime of aggression, instead it stipulates that a definition will be worked out and incorporated at a later date. See id. This strange provision reflects the inability of delegates to agree on a definition for the crime of aggression. See Driscoll, supra note 172, at 15.
175. Id. at 185.
176. See Driscoll, supra note 172, at 15-16.
177. See id.
178. See id. at 14-22. The United States has used "Article 98 Agreements" to prevent the ICC from reaching its nationals. See id. at 21. Article 98 of the Rome Statute stipulates that the ICC cannot force a state to surrender an accused person if the surrender conflicts with the state's other obligations under international law. See id. The United States has reached treaties with over seventy countries whereby these countries promise not to surrender U.S. nationals to the ICC. See id.
posed exclusively of Iraqi judges.\textsuperscript{179} Article 1 of the Tribunal's organic statute explains the IHT's jurisdictional reach:

The Tribunal shall have jurisdiction over every natural person, whether Iraqi or non-Iraqi resident of Iraq, accused of committing any of the crimes listed in Articles 11, 12, 13, and 14 of this law, committed during the period from 17 July 1968 to 1 May 2003, in the Republic of Iraq or elsewhere, including the following crimes:

A. Genocide;
B. Crimes against humanity;
C. War crimes; and
D. Violations of Iraqi laws listed in Article 14 of this law.\textsuperscript{180}

The IHT Statute defines genocide, crimes against humanity, and war crimes using language derived from the Nuremberg Charter and found in the statutes of Security Council ad hoc tribunals.\textsuperscript{181} In the opinion convicting Saddam Hussein, the IHT Trial Chamber further provided that,

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\item \textsuperscript{179} Michael P. Scharf, Comment, \textit{The Iraqi High Tribunal: A Viable Experiment in International Justice?}, 5 J. INT'L CRIM. JUST. 258, 259 (2007).
\item \textsuperscript{181} For example, the IHT statute defines "crimes against humanity" as any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
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\item A. Willful killing;
\item B. Extermination;
\item C. Enslavement;
\item D. Deportation or forcible transfer of population;
\item E. Imprisonment or other severe deprivation of physical liberty in violation of fundamental norms of international law;
\item F. Torture;
\item G. Rape, sexual slavery, enforced prostitution, forced pregnancy, or any other form of sexual violence of comparable gravity;
\item H. Persecution against any specific party or population on political, racial, national, ethnic, cultural, religious, gender or other grounds that are impermissible under international law, in connection with any act referred to as a form of sexual violence of comparable gravity;
\item I. Enforced disappearance of persons; and
\item J. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to the body or to the mental or physical health.
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\textit{Id.} at 9 (art. 12). Similarly, the Nuremberg Charter defines "crimes against humanity" as murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Nuremberg Charter, \textit{supra} note 25, art. 6(c); see also ICTY Statute, \textit{supra} note 128, art. 5 (defining "crimes against humanity" as crimes "committed in armed conflict" that were "directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts").
"[t]he evolution of international criminal law bestows legality on the law of the Iraqi High Tribunal . . . ."182 The unique aspect of the IHT's subject matter jurisdiction is that it encompasses the violation of Iraqi laws as well.183 Scharf sees this development as a strength of the IHT, commenting that "the IHT Statute . . . represent[s] a novel attempt to blend international standards of due process with Middle Eastern legal traditions."184

The amended IHT Statute includes provisions on rights of the accused, but rescinds the right to conduct one's own defense, which was featured in the original 2003 Statute.185 To what extent does this limitation on the procedural rights of the accused depart from precedent? In 2006, the ICTY revoked Serbian leader Vojislav Seselj's right to self-representation in light of his disruptive behavior and because of the lessons learned from the hijacked Milosevic proceedings.186 If the goal is to ensure a fair trial, rules ensuring the defendant's right to be informed of the charges against him, present evidence, and cross-examine witnesses are far more important than the right to represent oneself.187 The IHT Statute, like its predecessors, provides for these safeguards.188 With provisions on

183. For example, article 14 of the IHT Statute asserts:
   The Tribunal shall have the power to prosecute persons who have committed the following crimes under Iraqi law:
   First: Interference in the affairs of the judiciary or attempting to influence its functioning.
   Second: The wastage and squandering of national resources pursuant, to Article 2(g) of the Punishment of Conspirators against Public Safety and Corrupters of the System of Governance Law Number 7 of 1958.
   Third: The abuse of position and the pursuit of policies that [may lead to] the threat of war or the use of the Iraqi armed forces against an Arab country, in accordance with Article 1 of Law 7 of 1958.

184. See Scharf, supra note 179, at 259.
185. See Scharf, supra note 149, at 163 ("On August 11, 2005 the . . . Assembly replaced the clause providing for a right of self-representation with a clause that said that all defendants before the Tribunal had to be represented by Iraqi Counsel, who could be assisted by foreign lawyers."); Michael P. Scharf, Self-Representation Versus Assignment of Defence Counsel Before International Criminal Tribunals, 4 J. INT'L CRIM. JUST. 31, 46 n.89 (2006).
187. See Ellis, supra note 186, at 172-75 (discussing the qualified nature of the right to counsel).
188. For example, article 19 of the IHT Statute provides that,
   First: All persons shall be equal before the Tribunal.
   Second: The accused shall be presumed innocent until proven guilty before the Tribunal in accordance with this law.
   Third: Every accused shall be entitled to a public hearing, in accordance with the provisions of this law and the rules of procedure made hereunder.
   Fourth: When bringing charges against the accused pursuant to this Law, the accused shall be entitled to a fair impartial trial in accordance with the following minimum guarantees:
jurisdiction, substantive crimes, and procedural rights, the IHT stood ready to try Saddam Hussein.

Scharf, who was involved in the training of judges and prosecutors for the Iraqi High Tribunal, has called the trial of Saddam Hussein "more or less an open and shut case."189 Likening the trial to the proceedings at Nuremberg, Scharf points to "a public record of . . . atrocities"190 and extensive "knowledge of . . . involvement"191 to suggest that a guilty verdict under prevailing international criminal law was never really in doubt.192 Likewise, Professor Jonathan Drimmer has argued that, notwithstanding the debate over procedural defects at the IHT, "the ultimate verdict . . . certainly is consistent with the evidence presented."193

The trial of Saddam Hussein and his co-defendants covered measures taken by Hussein's government between 1982 and 1985 against the people of the Iraqi town of Dujail, which is located sixty kilometers north of Baghdad.194 On July 8, 1982, gunshots rang out during a presidential procession in Dujail.195 Soon after the gunshots fired, military forces surrounded the town and Saddam Hussein charged his brother with the mission of responding to the perceived threat.196 Within minutes, shelling from warplanes and helicopters had killed nine Dujail residents.197 Saddam Hussein "insisted on the revenge and harm [sic] as many people of

A. To be informed promptly and in detail of the content, nature and cause of the charge against him;
B. To have adequate time and facilities for the preparation of his defense and to communicate freely with counsel of his own choosing and to meet with him in private. The accused is entitled to have non-Iraqi legal representation so long as the principal lawyer of such accused is Iraqi;
C. To be tried without undue delay;
D. To be tried in his presence, and to be assisted by counsel of his own choosing, or to be informed of his right to request legal assistance if he cannot afford it; and to have the right to seek such assistance that will allow him to appoint a lawyer without paying the fees;
E. To have the right to call and examine defence [sic] and prosecution witnesses, and to present any evidence in his defense in accordance with the law[; and]
F. Not to be compelled to confess guilt, and to have the right to remain silent and not to testify without such silence being interpreted as evidence of guilt or innocence[.]

IHT Statute, supra note 180, at 19.
189. See Interview with Michael Scharf, supra note 164.
190. Id.
191. Id.
192. See id.
195. See Al-Dujail Trial Chamber Opinion, supra note 182, at 7 (referring to "the 10 to 12 gunshots (Kalashnikov gunshots) from behind the fence of one of the gardens on the presidential procession in Al Dujail on 7/8/1982").
196. See id. at 7-8.
197. See id. at 8.
th[e] town as possible." 198 Iraqi forces initially detained 1000 Dujali residents and ultimately killed 143. 199 Following mass detentions in deplorable conditions of torture, 200 Hussein's Revolutionary Court hastily sentenced 148 Dujail residents to death. 201 Saddam Hussein subsequently "knowingly and with design summarily approved the execution of the death sentences." 202

For his vicious, indiscriminate response to the incident in Dujail, the IHT convicted Saddam Hussein of crimes against humanity under Article 12 of the IHT Statute, and of premeditated murder under the Iraqi Penal Code. 203 The IHT followed international precedent by evoking the doctrine of command responsibility. 204 Regarding Hussein's liability, the Tribunal declared: "In your capacity as the Supreme head of the ruling Revolutionary Command Council, President of the Republic, the Commander in Chief of the Armed Forces, and in view of your high responsibility, you are directly responsible for crimes committed against those victims and their families." 205 The IHT placed great emphasis on Hussein's authorization of execution orders that he handed down without a shred of due process by a corrupt Iraqi court. 206 With this action, the IHT set solid precedent for future tribunals looking to concretely link government acts and crimes against humanity. 207 The IHT also rejected the head-of-state immunity defense based on reasoning that followed and lucidly elaborated on international precedent. 208 Although Saddam Hussein argued that his actions were a response to a threat posed by terrorists aligned with Iran in the Iran-Iraq War, 209 the tribunal decided that his response was unnecessary and disproportionate. 210 The conviction was not only supported by

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198. Id. at 9.
199. See id. at 136.
200. See, e.g., id. at 150.
201. See id. at 137-38.
202. Id. at 138.
203. See id. at 139. The IHT found Hussein guilty of the following crimes against humanity: deliberate killing, forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental norms of international law, torture, coercive disappearance, and other inhumane acts. See Press Release, Int'l Ctr. for Transitional Justice, Iraq Tribunal Chooses Speed over Justice in Final Ruling: Lost Opportunity to Solve Flaws of Dujail Case 2 (Dec. 27, 2006), available at http://www.ictj.org/images/content/6/1/618.pdf. All of these crimes were proven to be "part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." See IHT Statute, supra note 180, at 9 (art. 12). The IHT also convicted Hussein of murder under the Iraqi Penal Code for ordering and approving executions. See Al-Dujail Trial Chamber Opinion, supra note 182, at 132; see also Penal Law No. 111 [1969], ¶ 406(1)(a) (Iraq), available at http://law.case.edu/grotian-moment-blog/documents/Iraqi_Penal_Code_1969.pdf.
204. See Al-Dujail Trial Chamber Opinion, supra note 182, at 135, 137.
205. Id. at 135.
206. See, e.g., id. at 110, 138.
207. Id.
208. See, e.g., id. at 30, 112-15 (discussing, for example, the case of Milorad Kornylak in the ICTY).
209. See Scharf, supra note 179, at 261.
210. See id. at 105; see also Michael P. Scharf, Foreword: Lessons From the Saddam Trial, 39 CASE W. RES. J. INT'L L. 1, 3 (2006) ("Saddam's main defense was that as a
sound reasoning, it was also based on strong evidence.211

III. A Coalition-Created Institution: Assessing the Legitimacy of the Iraqi High Tribunal

A. Post-Invasion Governance in Iraq

Following the trial of Saddam Hussein, the United States and the United Kingdom (the Coalition) forcibly removed Hussein from power, providing the necessary precondition for bringing to trial former Ba'athist officials who "were responsible for depriving Iraqis of their human rights, and of virtually extinguishing the real rule of law for over two decades."212 The now-historic image of U.S. Marines tearing down Saddam Hussein's statue in a Baghdad square to the cheers of Iraqi onlookers213 symbolizes the IHT's basic claim to legitimacy: the Coalition deposed a tyrant and delivered him to a victimized nation.214 The official website of the IHT reflects this intuitive idea of legitimacy; it describes the Tribunal's role as "recognizing the wishes of the Iraqi people to establish a legal instrument suitable for proving their rights and uncovering the truth about what happened during the past years in Iraq."215

Yet to say that the IHT fulfills the Iraqis' desire for retributive justice only begins to answer the question of the Tribunal's legitimacy. What does it mean to say that the IHT is or is not legitimate? From what sources does a newly created tribunal derive its legitimacy? To answer these questions, this section examines the political developments surrounding post-invasion Iraq and then evaluates those events in light of pertinent ideas on the legitimacy of new institutions in occupied territories.

In the wake of its victory over Saddam Hussein, the Coalition set out to fill the power vacuum in Iraq by creating a temporary government—the Coalition Provisional Authority (CPA).216 In May 2003, President George

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211. See Interview with Michael Sharf, supra note 164 ("Just like the Nazis were convicted on the strength of their own documents, so too did Saddam Hussein end up being convicted largely on the strength of seven documents that beared [sic] his signature and proved all of the elements of this case.").

212. Michael A. Newton, The Iraqi Special Tribunal: A Human Rights Perspective, 38 CORNELL INT'L L.J. 863, 866 (2005); see Malekian, supra note 85, at 677 (pointing out that post-invasion justice in Iraq is based on "the burdens of military strength").


214. See Newton, supra note 212, at 866 ("The elation that Iraqi citizens expressed as the statues of Saddam Hussein fell in Baghdad testified to their deep desire for the restoration of a society built on the rule of law rather than one dominated by the whims of a dictator . . .").


216. See Coalition Provisional Authority Reg. No. 1, § 1(1)-(2), CPA/REG/16 May 2003/01 (May 16, 2003) ("The CPA shall exercise powers of government temporarily in
W. Bush, through Secretary of Defense Donald Rumsfeld, appointed L. Paul Bremer III Administrator of the CPA.\footnote{217} CPA Regulation No. 1, signed by Bremer on May 16, 2003, spelled out the extensive reach of CPA authority.\footnote{218} Regulation No. 1 not only placed all legislative, executive, and judicial power in Iraq with the CPA, but it also authorized the CPA to issue regulations and orders superseding existing Iraqi law.\footnote{219} The CPA’s unilateral authority, according to Regulation No. 1, was to “be exercised by the CPA Administrator.”\footnote{220} To enter into effect, a CPA regulation or order needed only Bremer’s “approval or signature.”\footnote{221} It has been argued that Regulation No. 1 made Paul Bremer a temporary dictator of Iraq.\footnote{222} The CPA decision-making process “allowed little room for serious internal discussion or consultation with allies.”\footnote{223} Through the CPA, the Coalition attempted to govern Iraq in the immediate aftermath of its invasion by utilizing a streamlined process in which the Coalition’s policies could translate into Iraqi law.\footnote{224} The CPA’s top-down approach has been called “paradoxical for a body supposedly imposing liberal values.”\footnote{225}

In its capacity as the temporary governing authority of Iraq, the CPA assigned itself the power to create new Iraqi institutions.\footnote{226} Pursuant to this authority, in July 2006, Administrator Bremer signed into force CPA Regulation No. 6 which recognized the Coalition-appointed Iraqi Governing Council (IGC) as “the principal body of the Iraqi interim administration.”\footnote{227} The IGC included twenty-five Iraqi religious and political leaders, nine of whom were exiles during the Hussein era, and many of whom had coordinated with Washington in the lead-up to the invasion.\footnote{228} Despite their undeniable importance to Iraqi politics, Shiite clerics who opposed the U.S.-led occupation and former Ba’athists were conspicuously

\begin{itemize}
  \item \footnote{217} See James Dao & Eric Schmitt, President Picks a Special Envoy to Rebuild Iraq, N.Y. TIMES, May 7, 2003, at A1.
  \item \footnote{218} See Coalition Provisional Authority Reg. No. 1, § 1(2) (“The CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives . . . .”).
  \item \footnote{219} See id. § 2 (“Unless suspended or replaced by the CPA . . . laws in force in Iraq as of April 16, 2003 shall continue to apply in Iraq . . . .”).
  \item \footnote{220} Id. § 1(2).
  \item \footnote{221} Id. § 3(2).
  \item \footnote{222} See Dana Michael Hollywood, The Search for Post-Conflict Justice in Iraq: A Comparative Study of Transitional Justice Mechanisms and Their Applicability to Post-Saddam Iraq, 33 BROOK. J. INT’L L. 59, 111 (2007) (quoting Lakhdar Brahimi, the UN’s Special Envoy to Iraq, as saying “Mr. Bremer is the dictator of Iraq.”). \footnote{223}
  \item \footnote{224} See S.C. Res. 1483, supra note 3, ¶ 8.
  \item \footnote{225} Roberts, supra note 223, at 614.
  \item \footnote{226} See Coalition Provisional Authority Reg. No. 1, § 1(1), CPA/REG/16 May 2003/01 (May 16, 2003) (declaring that the CPA shall exercise powers of government “to restore and establish national and local institutions”).
  \item \footnote{227} Coalition Provisional Authority Reg. No. 6, § 1, CPA/REG/13 July 2003/06 (July 13, 2003).
\end{itemize}
absent from the IGC.\textsuperscript{229} CPA Regulation No. 6 is ambiguous as to the specific authority and responsibilities of the IGC, providing only that "the Governing Council and the CPA shall consult and coordinate on all matters involving the temporary governance of Iraq, including the authorities of the Governing Council."\textsuperscript{230} Read in conjunction with Regulation No. 1—which placed all executive, legislative, and judicial power in Iraq with the CPA—Regulation No. 6 created a figurehead-like body in the IGC, which, to a large extent, was subordinate to the will of the CPA.\textsuperscript{231}

The Tribunal that convicted Saddam Hussein began as a creation of the CPA and IGC, acting pursuant to their respective powers. With CPA Order No. 48, Administrator Bremer delegated to the IGC the authority "to establish an Iraqi Special Tribunal . . . to try Iraqi nationals or residents of Iraq accused of genocide, crimes against humanity, war crimes or violations of certain Iraqi laws."\textsuperscript{232} Reflecting the CPA's commitment to coordinate with the IGC, Order No. 48 declared that the statute establishing the Iraqi Special Tribunal (IST)\textsuperscript{233} was "discussed extensively between the Governing Council and the CPA."\textsuperscript{234} Nonetheless, critics quickly accused the IST of being an illegitimate judicial institution imposed by an occupying force in contravention of international law.\textsuperscript{235} In August 2005, the newly-elected Transitional National Assembly took the crucial step of repealing the 2003 CPA-IGC statute and passing a slightly revised statute.\textsuperscript{236} This 2005 law gave the tribunal a new name (the Iraqi High Tribunal), gave the tribunal additional authority, and extended offense definitions; but essentially the law reiterated that the Iraqi High Tribunal reflected "the will of the elected Iraqi government."\textsuperscript{237}

B. Measuring Legitimacy

The traditional law of occupation, as articulated in the 1907 Hague Regulations\textsuperscript{238} and the 1949 Geneva Conventions,\textsuperscript{239} provides insight into

\begin{itemize}
\item \textsuperscript{229} See id.
\item \textsuperscript{230} Coalition Provisional Authority Reg. No. 6, \S 2(1).
\item \textsuperscript{231} Compare Coalition Provisional Authority Reg. No. 1, \S 1(2), with Coalition Provisional Authority Reg. No. 6.
\item \textsuperscript{232} Coalition Provisional Authority Order No. 48, \S 1(1) CPA/ORD/9 Dec 2003/48 (Dec. 10, 2003), available at http://www.iraqcoalition.org/regulations/20031210 CPAORD_48_IST_and_Appendix_A.pdf.
\item \textsuperscript{233} The Iraqi High Tribunal was originally named the Iraqi Special Tribunal. See Guénaël Mettraux, Comment, The 2005 Revision of the Statute of the Iraqi Special Tribunal, 5 J. Int'l Crim. Just. 287, 287 (2007). When the IGC was later dissolved and replaced by an elected Iraqi National Assembly, the Assembly replaced the statute of the IST with a partially revised statute and renamed the Tribunal the Iraqi High Tribunal. See id.
\item \textsuperscript{234} Coalition Provisional Authority Order No. 48, \S 1(1).
\item \textsuperscript{236} Id. at 404.
\item \textsuperscript{237} Id.
\item \textsuperscript{238} See Regulations Respecting the Laws and Customs of War on Land, art. 43, annexed to Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague Regulations].
\end{itemize}
the question of whether the IHT, in light of the processes by which it came into being, is indeed a legitimate tribunal. The Coalition’s occupation of Iraq had wide-ranging transformative purposes, including, but not limited to, the creation of a tribunal to try Saddam Hussein and top Ba’athist officials. Conversely, the law of occupation embraces a conservationist principle that limits the changes occupying powers can make to occupied territories. This limitation on the power of occupiers stood in potential conflict with the Coalition’s transformative goals for Iraq, including the creation of a tribunal to try members of the old regime. Nonetheless, a careful interpretation of the law of occupation suggests that the creation of the IHT fits within its boundaries.

For example, Article 43 of the Hague Regulations constrains the power of an occupier to ignore the laws of an occupied territory. It provides:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Article 43 contains the “unless absolutely prevented” escape clause that allows for flexibility in practice and has left room for changes in the law of occupied countries in the past. For example, the nature of fascist laws in Germany and Italy “absolutely prevented” the Allies from keeping those laws in place during the Allied post-World War II occupation. Furthermore, the establishment of a tribunal to try Ba’athist officials for atrocities inflicted on the Iraqi people can be seen as a “measure[ ] . . . to restore . . . public order and safety.” Professor Jeremy Rabkin argues that, in this vein, local justice for past horrors can work to bring about stable democracy devoid of lingering resentments. Likewise, Professor Michael A. Newton contends that because the essence of occupation law is the obligation to restore peace, safety, and public order, the IHT is warranted “under the inherent occupation authority of the Coalition” to restore

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240. See Newton, supra note 212, at 870-71.
241. See Roberts, supra note 223, at 605-18 (discussing the “ambitious transformative policy of the CPA” and its tension with traditional law of occupation).
243. See Roberts, supra note 223, at 580 (“[O]ccupying powers should respect the existing laws and economic arrangements within the occupied territory, and should therefore, by implication, make as few changes as possible.”).
244. See id. (discussing “potential conflicts between the conservationist principle on the one hand, and transformative goals on the other”).
245. See Newton, supra note 212, at 870.
246. Hague Regulations, supra note 238, art. 43.
247. See Roberts, supra note 223, at 587.
248. See id.; see also Newton, supra note 212, at 870.
249. Hague Regulations, supra note 238, art. 43.
250. See Rabkin, supra note 122, at 765-66.
public calm and stability in Iraq.\textsuperscript{251} Though Article 43 embodies a principle of conservation, its escape clause provides a source of legitimacy for the IHT.\textsuperscript{252}

The Fourth Geneva Convention of 1949 slightly revised the law of occupation, allowing for occupiers like the Coalition to more easily justify changes to the institutions of occupied territories.\textsuperscript{253} The Fourth Geneva Convention includes provisions particularly applicable to changes to an occupied territory's court system.\textsuperscript{254} Article 64 reads:

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil [sic] its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.\textsuperscript{255}

Expanding on Article 43 of the Hague Regulations, the second paragraph of Article 64 functions as an escape clause, explicitly allowing changes to the occupied country's penal laws in cases of military and political necessity, and to fulfill the object and purposes of the Convention.\textsuperscript{256} The preamble of CPA Order No. 48 includes such a justification, expressing a determination "to prevent any threat to public order . . . and to promote the rule of law."\textsuperscript{257} CPA Order No. 48, therefore, is a valid modification of Iraqi law by the Coalition pursuant to its authority under occupation law. Professor Carlos Yordan has interpreted the Fourth Geneva Convention as requiring the occupying power "to rule the territory with existing governmental institutions."\textsuperscript{258} Yet, Yordan's analysis does not recognize the flexibility permitted by the language of the Convention. Arti-

\begin{itemize}
  \item \textsuperscript{251} See Newton, \textit{supra} note 212, at 868.
  \item \textsuperscript{252} Id. at 872-73.
  \item \textsuperscript{253} See Roberts, \textit{supra} note 223, at 587-88 (opining that the 1949 Geneva Convention was a "modest modification" of the Hague Regulations allowing for "more scope for changes in the existing local laws").
  \item \textsuperscript{254} See Fourth Geneva Convention, \textit{supra} note 239, art. 64.
  \item \textsuperscript{255} Id. (emphasis added).
  \item \textsuperscript{256} See Newton, \textit{supra} note 212, at 871, 874-75. (characterizing the underlying purpose of the Fourth Geneva Convention as seeking "to alleviate the suffering of the civilian population and ameliorate the potentially adverse consequences of occupation subsequent to military defeat").
  \item \textsuperscript{257} Coalition Provisional Authority Order No. 48, pmbl., CPA/ORD/9 Dec 2003/48 (Dec. 10, 2003).
\end{itemize}
Article 64 requires that existing courts continue to function, but does not explicitly prohibit the formation of additional tribunals for reasons encompassed by its second paragraph. CPA Order No. 48 may have pushed the limits of traditional occupation law as articulated in the Fourth Geneva Convention, but it does not plainly violate the Convention.

Article 47 of the Fourth Geneva Convention further provides for changes to domestic legal structures. The provision reads:

Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.

Article 47 implicitly sanctions changes introduced into the institutions of an occupied territory, so long as they do not deprive protected persons of the benefits of the Convention. It is hard to see how the formation of an accountability mechanism would deprive Iraqis of the benefits of the Geneva Convention. In all, the law of occupation does not by itself delegitimize the Coalition’s efforts to try Saddam Hussein in Iraq. The exceptions regarding the prohibition on structural changes to an occupied territory’s institutions have, in a sense, swallowed the rule so that substantial elimination, alteration, and formation of institutions have been widely practiced.

Along with the law of occupation, the International Military Tribunal in Nuremberg, established by the Allies as occupiers of Germany, serves as precedent that suggests that the IHT is a legitimate institution. Much like the Coalition controlled post-invasion Iraq via the CPA, the Allies governed post-war Germany through a Control Council. Control Council Law No. 10 provided the legal basis for the Nuremberg Trials. Article III authorized “[e]ach occupying authority, within its Zone of Occupation” to arrest and try those accused of crimes laid out in the Nuremberg Charter. The IMT, like the IHT, was the product of non-democratic promul-

259. Fourth Geneva Convention, supra note 239, art. 64.
260. See id. art. 47.
261. Id.
262. See Newton, supra note 212, at 874-75 (interpreting Article 47 to allow for “sweeping changes”).
263. See Roberts, supra note 223, at 587 (noting that “the basic requirement to respect the existing legal framework of a territory has long been under pressure,” particularly where the occupied territory had previously “been under dictatorial or extremist rule”).
264. See id. at 588-89.
267. See id. art. III(1)(a), reprinted in Ferencz, supra note 266, at 493.
gations imposed upon an occupied territory—demonstrating the legal realities of occupation. Nonetheless, occupation law did not prevent the United Nations from adopting the Nuremberg Principles in the aftermath of the trials.

The United Nations continues to have a role in legitimizing judicial efforts in occupied territories. In the case of Iraq, the Coalition sought to legitimize its efforts in the eyes of the international community to persuade UN Member States and NGOs to assist in its transformative agenda. This goal led the Coalition to seek after-the-fact ratification of its occupation, as well as authorization of and support for its policies at the UN Security Council. The Coalition largely succeeded, as the Security Council passed Resolution 1483, "recognizing the specific authorities, responsibilities, and obligations under applicable international law of [the United States and the United Kingdom] as occupying powers." The Security Council, inter alia, "affirmed the need for accountability for crimes and atrocities committed by the previous Iraqi regime" and "encouraged international efforts to promote legal and judicial reform." Resolution 1483 largely accomplished the Coalition's tripartite goal of achieving recognition as a legitimate occupier of Iraq, encouraging contributions to the reconstruction of Iraq and providing an impetus for trying Saddam Hussein in Iraq.

In August and October of 2003, the Security Council issued two important follow-up resolutions on Iraq: Resolutions 1500 and 1511, which ratified further CPA efforts. Despite the fact that the IGC consisted solely of Coalition appointees and excluded several political interests opposed to Coalition policy, the IGC gained Security Council recognition. Resolution 1500 "[welcomed] the establishment of the broadly representative Governing Council of Iraq on 13 July 2003 as an important step towards the formation by the people of Iraq of an internationally recognized, representative government that will exercise the sovereignty of Iraq." Resolution 1511 reiterated the themes of Resolution 1483: again

268. See Newton, supra note 212, at 870 (commenting that the escape clause of Article 43 of the Hague Regulations allowed the Allies to make broad changes in defeated Axis countries and did not force the Allies to respect fascist institutions and laws).

269. See Yordan, supra note 258, at 93 ("For the Bush administration, a new resolution was necessary to legitimize its plans to transform Iraq and to call on other states to contribute peacekeepers and to help finance post-war efforts.").

270. For an analysis of the negotiations leading up to Security Council pronouncements regarding post-invasion Iraq, see id. at 88-92. 271. S.C. Res. 1483, supra note 3, pmbl. (emphasis added).

272. Id.

273. Id. ¶ 8(i).

274. See id. pmbl., ¶ 8(i). But see Yordan, supra note 258, at 93 (asserting that the "UN did not fully capitulate to American interests").


276. See supra notes 227-231 and accompanying text for a discussion of CPA Regulation No. 6.

277. S.C. Res. 1500, supra note 275, ¶ 1.

278. Id.
recognizing the Coalition as the legitimate, though temporary, occupier of Iraq; urging a transfer of sovereignty to a representative Iraqi government as quickly as possible; and encouraging contributions to humanitarian, reconstruction, and police training efforts. 279

The Dujail Trial Chamber Opinion, in which the IHT convicted Saddam Hussein, offers crucial language defending its legitimacy:

And as been [sic] clarified to us, 280 the Temporary Coalition Government is considered a transitional authority in Iraq until achieving full sovereignty according to article (43) of The Hague Laws of 1907: the orientation of the occupier is to respect the language, norms and traditions of the occupied country. And whereas the Coalition Government had the legal authority to amend the Iraqi Local Law according to the conditions determined in paragraph (64) of Geneva Convention for protecting the people, and according to the decision of the Security Council number (1483). 281

The IHT reached the conclusion that the Geneva Convention permitted the Coalition’s authorization and backing of the Tribunal. 282 It supported its conclusion with favorable pronouncements by the Security Council, 283 of which the United States and the United Kingdom are veto-holding Permanent Members. 284

To what extent do Security Council Resolutions confer legitimacy upon the CPA and, consequently, upon the IHT as an institution established by the CPA? Professor Achilles Skordas argues that the legitimacy of what he dubs a “hegemonic intervention” depends on “the institutional support of, and acceptance by, the international community.” 285 Skordas contends that the conceptual framework of the UN Charter calls for assessing the legitimacy of a given use of force as either an illegitimate threat to international peace and security or a legitimate means of restoring peace. 286 In his view, Security Council Resolutions on post-invasion Iraq reflect “the UN’s indirect, albeit unwilling, endorsement of the US interventionist policies.” 287 The effect of these Resolutions, according to Skordas, is to render the Coalition occupation a legitimate means of restoring peace,

279. S.C. Res. 1511, supra note 275, ¶¶ 1, 6, 8.
280. The submissive tone of this introductory phrase is worth noting. Does it suggest that the American assistance provided to the IHT ordered the Iraqi judges on this particular point?
281. Al-Dujail Trial Chamber Opinion, supra note 182, at 3.
282. See id. at 40-42.
284. The five Permanent Members of the Security Council are the five major victors of World War II: Russia, France, China, the United Kingdom, and the United States. See U.N. Charter art. 23, para. 1. Each holds a veto with which it can defeat any Security Council Resolution. See id. art. 27, para. 3.
285. See Skordas, supra note 283, at 416.
286. See id. at 421-24, 442; see also U.N. Charter art. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”).
287. See Skordas, supra note 283, at 439.
as opposed to a threat to peace.\textsuperscript{288}

Carlos Yordan reaches a similar conclusion. He suggests that, through Resolution 1483, the Security Council revised the law of occupation to align the law with the international community’s growing preference for the neo-liberal values espoused by the Coalition in its justification for post-war transformation of Iraqi society.\textsuperscript{289} According to Yordan, the Security Council did not merely succumb to U.S. pressure, rather the Security Council articulated the international community’s belief that sustainable peace and security is best achieved by transforming faltering societies into those that emphasize representative government and economic liberalization.\textsuperscript{290} Equally important to Yordan’s assessment is the Security Council’s demand that the CPA work with an administration representative of the Iraqi people and take Iraqi interests into consideration, a concern which he argues helped to put Resolution 1483 in line with the Fourth Geneva Convention.\textsuperscript{291} Consider that the creation of an independent judicial organ in post-invasion Iraq reflects neo-liberal values,\textsuperscript{292} and that majority Iraqi sentiment favored trial and harsh punishment for Saddam Hussein and his cohorts in Iraq.\textsuperscript{293} Through this lens, the CPA’s plan to try Saddam Hussein at the IHT was a legitimate effort.

Professor Farhad Malekian offers a much different analysis of the legitimacy of the IHT. He finds fault with several aspects of the Tribunal’s makeup. For example, he argues that the administration of justice by judges and prosecutors who were victims of Hussein’s regime threatened the impartiality of the Tribunal.\textsuperscript{294} Malekian argues that, due to the international nature of many of Hussein’s crimes, a stronger international element was necessary at Hussein’s trial to represent the international community as a stakeholder.\textsuperscript{295} He directs an equally harsh criticism at the selective prosecution of Saddam Hussein by a tribunal monopolized by U.S. political interests.\textsuperscript{296} An overarching theme of Malekian’s argument is that international criminal law “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.”\textsuperscript{297} At the heart of this principle is an appeal for world leaders to abandon age-old power politics and

\textsuperscript{288} See id. at 442.
\textsuperscript{289} See Yordan, supra note 258, at 92.
\textsuperscript{290} See id. at 92-93.
\textsuperscript{291} See id. at 93.
\textsuperscript{292} Id.
\textsuperscript{293} See Newton, supra note 212, at 895 (“The Iraqi people almost universally support the concept of prosecuting Saddam and other Ba’athist officials inside Iraq rather than simply allowing an external tribunal to exercise punitive power.”).
\textsuperscript{294} See Malekian, supra note 85, at 697.
\textsuperscript{295} See id. at 697-98. Malekian also challenges the competence of the Iraqi judges, alleging that their knowledge of international law came from a crash course taught in London by the occupying powers. See id. at 697 n.111.
\textsuperscript{296} See id. at 692 & n.96 (“[I]nternational criminal law should apply to those governments, such as the United States, which participated in Hussein’s international criminal actions.”).
\textsuperscript{297} Id. at 675.
uses of force when enforcing international criminal law.\textsuperscript{298}

Many scholars saw the IHT as an isolated institution in a war zone, barely propped up by the Coalition’s military presence.\textsuperscript{299} Yet, the application of force by states and an asymmetric power balance reflecting that force seem to be here to stay. The United Nations played a minimal role in the transitions taking place in Iraq.\textsuperscript{300} Though the Security Council encouraged an international effort to supply troops and other assistance,\textsuperscript{301} Member States backed away.\textsuperscript{302} The United States and the United Kingdom were largely alone; the UN Envoy retreated from Iraq as the insurgency raged.\textsuperscript{303} Assassinations, death threats, boycotts, and turnover on the bench all stood to potentially derail the IHT.\textsuperscript{304} Still, the Coalition remained determined to secure a functioning tribunal in Baghdad during an ongoing insurgency, which was itself a show of military force and control.\textsuperscript{305}

Considering the events surrounding the invasion and occupation of Iraq, the legitimacy of the IHT appears better measured on a continuum than as a binary choice between legitimate and illegitimate. Greater cooperation at the international level and prior Security Council authorization would have increased legitimacy. The lack of prior Security Council authorization for the Iraq War reflects a failure of unanimous support for the endeavor among the Permanent Members of the Security Council, as well as a lack of general support among the ten other voting Members.\textsuperscript{306} Although this lack of support detracts from the legitimacy of developments

\textsuperscript{298} See id. at 721.

\textsuperscript{299} See Sylvia de Bertodano, Were There More Acceptable Alternatives to the Iraqi High Tribunal?, 5 J. INT’L CRIM. JUST. 294, 296 (2007) (discussing “ample evidence of the extreme conditions under which this court has had to work” due to “operating on the ground in Baghdad”); see also Curtis F.J. Doebbler, Comment, An Intentionally Unfair Trial, 5 J. INT’L CRIM. JUST. 264, 269 (2007) (commenting on the assassinations of, assaults on, and threats to defense lawyers).

\textsuperscript{300} See Christopher Marquis, Bush Faces New Obstacles in Keeping Allies’ Support, N.Y. TIMES, July 31, 2004, at A8 (discussing how the UN pulled out of Iraq after a car bomb killed seventeen people in August 2003).

\textsuperscript{301} See S.C. Res. 1511, supra note 275, ¶¶ 13-14 (authorizing “a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq” and urging “Member States to contribute assistance under this United Nations mandate, including military forces, to the multinational force referred to in paragraph 13 above”).

\textsuperscript{302} See Richard W. Stevenson, Bush in Europe to Rally Support for Iraq Policy, N.Y. TIMES, June 4, 2004, at A16 (“The White House has played down the possibility of any substantial diplomatic progress on dealing with Iraq, saying it does not expect NATO or any individual European nations to send many additional troops to Iraq.”).


\textsuperscript{304} See de-Bertodano, supra note 299, at 296.

\textsuperscript{305} See Richard Boudreaux, Hussein Takes Stand, Urges Iraqis to Fight U.S.—Trial Descends into Chaos; Judge Postpones Proceedings, S. Fla. SUN-SENTINEL, Mar. 16, 2006, at 15A.

\textsuperscript{306} See U.N. Charter arts. 23, 27 paras. 1, 3 (noting that each member of the Security Counsel has one vote and that any non-procedural decisions are “made by an affirmative vote of nine members including the concurring votes of the permanent members”).
in Iraq, including those involving the IHT, it does not completely delegiti-
mize the effort. International consensus is not the only consideration in
assessing legitimacy.

Despite the lack of steadfast political will at the international level, the
United States led an elaborate military-political effort in Iraq, relying on its
global position of power and self-authorization.\textsuperscript{307} Once the United States
had already used force and had seemingly taken control of Iraq, the Security
Council faced a decision that strikes at the heart of its responsibilities
under Chapter VII of the UN Charter.\textsuperscript{308} Article 39 advises: "The Security
Council shall determine the existence of any threat to the peace, breach of
the peace, or act of aggression and shall make recommendations, or decide
what measures shall be taken in accordance with Articles 41 and 42, to
maintain or restore international peace and security."\textsuperscript{309}

The Security Council's recognition of the Coalition (the Authority)\textsuperscript{310}
as "occupying powers"\textsuperscript{311} reflects its legal-political position: the Security
Council forced to react to significant institutional upheaval that had
already occurred. As Resolution 1483 suggests, the Security Council, in
light of its Chapter VII responsibilities, believed that recognizing the
authority of the United States and the United Kingdom in Iraq would help
maintain and restore peace and security under the circumstances.\textsuperscript{312} The
alternative appeared to be to embolden and perpetuate the insurgency,
which the Security Council viewed as a threat to peace.\textsuperscript{313} As Professor
Yordán has observed, on an ideological level the majority of UN Member
States favored the neo-liberal values espoused by the Coalition over Islamic
fundamentalism and other ideas competing for prominence in Iraq.\textsuperscript{314}
Resolution 1483 and the subsequent international position on Iraq were
fundamentally an adjustment to a new power reality.\textsuperscript{315}

\begin{footnotes}
\item[307] See John Dermody, \textit{Note, Beyond Good Intentions: Can Hybrid Tribunals Work
\item[308] See U.N. Charter art. 39.
\item[309] Id.
\item[310] S.C. Res. 1483, supra note 3.
\item[311] Id.
\item[312] See id.
\item[313] See Letter from Colin L. Powell, U.S. Sec'y of State, to Laura L. Baja, Jr., Presi-
1546 (June 8, 2004) ("As recent events have demonstrated, continuing attacks by insur-
gents, including former regime elements, foreign fighters, and illegal militias challenge
all those who are working for a better Iraq."); see also S.C. Res. 1511, supra note 275,
pmbl. ("[r]eaaffirming its previous resolutions . . . on threats to peace and security caused
by terrorist acts").
\item[314] See Yordán, supra note 258, at 92-93; see also S.C. Res. 1546, supra note 313,
pmbl. ("Welcoming the commitment of the Interim Government of Iraq to work towards a
federal, democratic, pluralist, and unified Iraq, in which there is full respect for political
and human rights . . . [and] [a]ffirming the importance of the rule of law, national
reconciliation, respect for human rights including the rights of women, fundamental
freedoms, and democracy including free and fair elections.").
\item[315] See KENNETH KATZMAN, \textit{CONG. RESEARCH SERV., IRAQ: U.S. POST-SADDAM GOVERN-
\end{footnotes}
For the United States and its Coalition allies, with power came responsibility. As occupier of Iraq, the United States, acting through the CPA, had the obligation to act in the best interests of the Iraqi people.\textsuperscript{316} Thus, the degree to which the IHT comported with Iraqi notions of justice must factor into a legitimacy analysis. In this vein, Professor Frédéric Mégret has characterized the relationship of crimes and societies in terms of "ownership."\textsuperscript{317} Mégret's theory takes into account what he calls "a feeling of entitlement that permeates debates about who should judge whom."\textsuperscript{318} Applying this framework to the trial of Saddam Hussein, Mégret argues that Hussein's crimes can be said to "belong" to the Iraqi people, who suffered at the hands of their former dictator.\textsuperscript{319} Professor Jeremy Rabkin likewise rejects internationalism as a source of a tribunal's legitimacy, arguing that "[t]he most compelling justice comes from a court system which can claim to speak in the name of the society where the victims suffered."\textsuperscript{320} In light of these sources, the IHT gained legitimacy through the support of the elected Iraqi Transitional National Assembly\textsuperscript{321} and through its distinctly Iraqi makeup.\textsuperscript{322} However, the extent of any departure by the United States from its legitimate supporting role to achieve its goals at the expense of Iraqi interests would detract from the IHT's legitimacy.\textsuperscript{323}

In sum, a measure of the IHT's legitimacy should take into account: 1) the level of international support for the invasion of Iraq and subsequent transformative developments there, best indicated by prior Security Council authorization; 2) the degree to which the IHT comports with Iraqi preferences for delivering justice upon Saddam Hussein; and 3) the level of integrity, transparency, and sensitivity to Iraqi rights shown by the United States in its military-political effort in Iraq. The IHT cannot be assessed in a vacuum. It must be considered as one among many CPA-created and

\textsuperscript{316} See Fourth Geneva Convention, \textit{supra} note 239, arts. 4, 27; Hague Regulations, \textit{supra} note 238, arts. 43, 46; see also S.C. Res 1483, \textit{supra} note 3, pmbl. ("recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers") (emphasis added).


\textsuperscript{318} \textit{Id.} at 739.

\textsuperscript{319} \textit{Id.} at 750. However, Mégret also notes that Saddam Hussein openly defied international law, which suggests that the trial should have been partially internationalized. See \textit{id}.

\textsuperscript{320} Rabkin, \textit{supra} note 122, at 775.

\textsuperscript{321} See Higonnet, \textit{supra} note 235, at 404 (arguing that the democratically-elected Transitional National Assembly's statute leant legitimacy to the IHT).

\textsuperscript{322} See \textit{id.} at 401-02 (noting that the IHT "closely resembles a domestic court"); see also Newton, \textit{supra} note 212, at 896 (opining that the IHT "represents a return to the first principles of international criminal law because it is grounded in the fertile soil of state sovereignty"); Rabkin, \textit{supra} note 122, at 776 ("Why wouldn't an Iraqi government be the most proper authority to impose justice on Saddam and his fellow criminals? Why wouldn't Iraqi justice be most reassuring to ordinary Iraqis?").

\textsuperscript{323} See Higonnet, \textit{supra} note 235, at 404. (commenting on "extensive U.S. participation"); see also Dermody, \textit{supra} note 307, at 80-81 (arguing that disciplined involvement by the occupier in a tribunal's proceedings "demonstrate[s] to the international community that the intervening actor is dedicated to the rule of law, which may dispel lingering concerns about the motivation of an intervention").
U.S.-funded institutions. CPA Order No. 48 authorizing the IHT must be considered as one of many CPA laws.324

The IHT fails in the first element of the above test, seeing as the IHT was almost completely an institution of tripartite origin: the United States, the United Kingdom, and Iraq.325 There was little international support for the invasion and sparse international involvement in the IHT proceedings.326 Nevertheless, the IHT does draw legitimacy from the second element. For example, the death penalty, particularly by hanging, is part of Iraqi legal culture.327 Moreover, the judges' panel was entirely Iraqi.328 In addition, the IHT Trial Chamber Opinion makes frequent reference to the Iraqi Penal Code and the incorporation of international law into Iraqi law.329 As to the third consideration, the analysis of the level of integrity, transparency, and sensitivity to Iraqi rights requires multiple volumes of careful assessment beyond the scope of this Note.

Conclusion

Saddam Hussein's downfall affirms the preeminence of states in the world political order. In the case of Iraq, the United States proved once again that a Security Council mandate is not a precondition to the use of force in the current international climate.330 Once the U.S.-led Coalition occupied Baghdad, the Security Council was forced to weigh its options in the face of upheaval. The Security Council determined that in light of its Chapter VII obligations, supporting the U.S. agenda in Iraq held the most promise for restoring peace and security to Iraq, the region, and ultimately the world.331 The Security Council was probably right in this assessment, considering that the alternative—defying the United States—might be tantamount to encouraging Islamic fundamentalists to take control of Iraq. Self-authorized political moves by independent states forced the Security Council to, in effect, exercise damage control.

The IHT, in this framework, was one of the many Coalition initiatives that the circumstances compelled the Security Council to support.332

326. See id. at 401; see also Some U.S. Allies Rethink Iraq Commitments as Violence Grows, supra note 303, at A9.
328. Scharf, supra note 179, at 259.
329. See Al-Dujail Trial Chamber Opinion, supra note 182, at 35 (discussing how an international convention on civil and political rights became part of Iraqi law when Iraq ratified in 1971); id. at 43 (concluding that the Fourth Geneva Convention became part of Iraqi law when Iraq ratified in 1956).
330. See discussion supra Part III.
331. See supra notes 310-315 and accompanying text.
332. See supra notes 310-315 and accompanying text.
How far Security Council backing goes in legitimizing the IHT, then, is a question of degree. If one's concept of legitimacy is completely divorced from power politics, absence of selective prosecution, strict application of international standards of due process, and life imprisonment as the maximum penalty, even Security Council Resolution 1483 cannot provide legitimacy to the IHT. However, if one views obtaining the backing of the Security Council as a threshold that provides legitimacy regardless of the Security Council's reason for supporting the effort, then the IHT is indeed a legitimate institution.

Either way, the U.S.-backed Iraqi High Tribunal sets the precedent that states can bypass the Security Council and rely on military force to prosecute ousted government officials. Threats of Permanent Member vetoes will continue to prevent the Security Council from creating ad hoc tribunals in all but the clearest of circumstances. The IHT suggests that the future of international criminal law will be heavily tied to state-based politics.