

BETWEEN LIBERAL LEGAL DIDACTICS AND POLITICAL MANICHAISM: THE POLITICS AND LAW OF THE IRAQI SPECIAL TRIBUNAL

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[The author argues that the trials of Iraq's previous government before the Iraqi Special Tribunal ('IST') should be read as a particular kind of political trial: a successor trial of a prior regime, in which the political contestation revolves around the legitimization of the new order, and the delegitimation of the old. He contends that although the prevailing discourse of 'international justice' tends to deny or repress the constitutive politics of successor trials, these political tensions invariably re-emerge. The author considers evidence from a field study of Iraqi attitudes towards transitional justice, and reviews the historical and political circumstances that have shaped the creation of the IST. He concludes that the IST is afflicted by many of the same kinds of difficulties that have plagued the US invasion and occupation: international hostility, dubious legality, Iraqi ambivalence and the taint of power politics.]

CONTENTS

- I Introduction
- II Iraqi Attitudes towards Trials, 2003
- III The Iraqi Special Tribunal
- IV The Politics of the Trials
- V Conclusion

Justice is subject to dispute; might is easily recognized and is not disputed. So we cannot give might to justice, because might has gainsaid justice, and has declared that it is she herself who is just. And thus, being unable to make what is just strong, we have made what is strong just.¹

I INTRODUCTION

Frankfurt School political scientist Otto Kirchheimer noted that 'political trials' take many forms.² The defining characteristic of a political trial is not so much its distance from formal legality, as the extent to which the subject matter and context of the trial threaten to de-naturalise, and so unmask, the power-rationalising and order-legitimizing functions of the legal process. Criminal law as a social institution derives its efficacy from its ability to euphemise and authorise coercion (in the name of the Community, the People, the King). Instrumental to this successful authentication is the potential of the trial medium to elevate events and conduct from the realm of private happenings and partisan constructions into 'an official, authoritative and quasi-neutral sphere'.³ The extent to which a trial successfully vindicates and helps reproduce

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¹ Blaise Pascal, *Pensées* (W F Trotter trans, 1941 ed) No 298.

² Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (1961).

³ *Ibid* 422.

the extant social order depends on the populace's willingness to recognise the judge's entitlement to lend or withdraw legitimacy from an individual's act. The risk inherent in the application of legal procedures to irreducibly political contexts — such as the question of how to banish a prior regime from the political scene and legitimate a fragile new order — is that the very procedures which reinforce the neutrality and authoritativeness of the forum provide the political foe with an opportunity to vindicate his own conduct and impeach the successor regime's legal or political provenance. Alternatively, if the successor regime cannot resist the temptation to frame and apply the legal norms to its own advantage, the content and outcome of the trial is secured, but at the expense of any hoped-for 'third-party' effect of increased recognition for the new order's claim of political legitimacy. In either scenario, the political conflict that is the *sine qua non* of the trial inescapably shapes the parameters and consequences of the trial itself, threatening constantly to expose the court's affectations of neutrality and rationality as so many empty contrivances.

Thus, as Judith Shklar's pellucid analysis suggests, the appropriate question to ask when applying legal procedures to mediate, contain or resolve situations of extraordinary politics (national defeat, regime change, democratic imposition) is not *whether* the trial is 'legal' or 'political', but *what ends* are served and *what kind of politics* are pursued.⁴ The liberal legalism examined by Shklar is but one form of politics (which legalism qua ideology must deny as politics) that a trial may embody — although she makes a persuasive, consequentialist case that legalism was an *effective* politics in post-war Germany because its symbols and values resonated and had didactic purchase among the German elites.⁵

Kirchheimer, however, describes another form of didacticism that can be attempted by a political trial. In what could be termed a politics of manichaeism, a successor regime may use the trial medium to try to incriminate its foe's behaviour and draw a clear distinction between the turpitude of the past, and the political virtue of the present. The political past — or a segment of it — is examined in detail in order to 'shape desired images of persons and groups'.⁶ Every group of power-holders or aspirants ceaselessly tries to make identifications and projections favourable to themselves. If the political enemy has already been evicted from the political scene, then the prosecution will try to 'surround the fact of [the foe's] defeat with a wider frame of historical and moral justification'.⁷ A manichaean didactics need not result in a crude show trial,⁸ and is not wholly incompatible with a didactics of legalism, as the Tokyo and

⁴ Judith Shklar, *Legalism: Law, Morals and Political Trials* (1964) 145.

⁵ *Ibid* 156, 168–9; also contrast Shklar's assessment of Nuremberg with the Tokyo trials, to which her fundamental objection is that the Japanese did not have a European-style legalist ethos, and so no didactic impact could reasonably be expected. Nonetheless, the beneficial didactic consequences claimed for liberal legalism may be historically and socially contingent: at 180–1. The Tokyo trials were regarded as selective, unfair and manipulated to serve the Occupying Powers' political goals (such as protecting the Emperor from being implicated in offences): see John Dower, *Embracing Defeat: Japan in the Wake of World War II* (1999) 443–84.

⁶ Kirchheimer, above n 2, 422.

⁷ *Ibid*.

⁸ Arguably, all trials with an explicit pedagogical imperative are 'show trials', but the term is so fraught with historical associations that make it hard to use other than in an ironic or pejorative mode.

Nuremberg trials demonstrate.⁹ But the tension between a liberal legal didactics, aimed at inculcating the value of procedural fairness and impartial rule-following, and a manichaeic didactics aimed at justifying a successor regime, is a constant in political trials that eschew show trials.

The legal literature on international criminal trials and ‘transitional justice’ tends to assume that an admirable (and taken on its own, often desirable) liberal legalist politics is also the politics most likely to contribute to the stabilisation and legitimation of the successor regime — particularly where the new regime purports or aims to be ‘democratic’. The contention that trials, and specifically trials that meet liberal legalist standards of ‘fairness’, can contribute to a cornucopia of laudable aims such as historical clarification, individualisation of guilt, reconciliation and the restoration of the rule of law, has become a *doxa* that pervades international discussions.¹⁰ The emerging legal ‘expertise’ of transitional justice shares with legalism qua ideology a degree of blindness about the extent to which an ostensibly *technical* model of ‘international justice’ amounts to a particular mode of doing politics. International justice as a *techné* endeavours to depoliticise trials by enmeshing them in a technical expertise of legal methods and ‘international standards’, which are claimed to represent the common values of the international community. It must be noted that this tendency has been far less pronounced among anthropologists, sociologists and political scientists who have scrutinised the use of criminal trials to grapple with widespread and systematic human rights violations. Efforts to empirically assess the impact of international trials on post-conflict society have questioned the efficacy and impact of the international criminal tribunals,¹¹ while historians have cast doubt on the capacity of the trial medium to adequately represent history.¹² Anthropologists such as Richard Wilson have also examined the essential political role played by the languages of human rights and truth and reconciliation in legitimising a highly unequal post-conflict settlement in South Africa.¹³

Nevertheless, for liberal international lawyers the value of legalistic politics is still taken as largely self-evident,¹⁴ such that compliance with international

⁹ Dower’s review of the Tokyo trials suggests that the extent to which the manichaeic didactics orchestrated by the prosecution effectively precluded an accurate treatment of Japanese political history and the reasons for the Japanese entry into World War II: see Dower, above n 5, 468–71.

¹⁰ See, eg, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, UN Doc S/2004/616 (23 August 2004).

¹¹ See generally the qualitative and quantitative data presented in Eric Stover and Harvey Weinstein (eds), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (2004).

¹² See, eg, David Bloxham, *Genocide on Trial* (2001) 129; Lawrence Douglas, *The Memory of Judgment* (2001) 3.

¹³ Richard Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (2001) 1–32, 123–55.

¹⁴ Bass acknowledges this, and then proceeds to take a similar approach: Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Trials* (2000) 23. A diligent and thought-provoking exception to this tendency among legal academics is Mark Drumbl’s recent work: see, eg, Mark Drumbl, ‘Pluralizing International Criminal Justice’ (2005) 103(6) *Michigan Law Review* 101; Mark Drumbl, ‘Collective Violence and Individual Punishment: The Criminality of Mass Atrocity’ (2005) 99 *Northwestern University Law Review* 539.

practice and liberal legalist standards is assumed to render a trial 'legitimate' — and therefore politically *effective*.¹⁵ The collapsing of two different kinds of phenomena, legalistic legitimation and political legitimation, is evident in many of the criticisms of the Iraqi Special Tribunal ('IST'), which was established under the auspices of the occupying power to try members of Iraq's former government.¹⁶ But the trial of former government leaders in Iraq may prove to be an interesting case study of the tension between internationally-approved legalism and political efficacy, and between the politics of legalism and the politics of manichaeism. For a trial of a former government by a successor regime to be *politically* effective (viz to enhance public support for the successor regime and diminish remaining support for the prior regime), does it necessarily have to be a model of legalistic politics? If a trial does not conform to a didacticism of liberal legalism, and adopts instead a manichaean didacticism, might it not still contribute to the consolidation of the new regime?

In this article, I review the case of the IST, and argue that the United States-backed IST trials are torn between a liberal legalism aimed at gaining international approval and assistance, and a domestically-oriented politics concerned to portray a competent and effective successor government that can oversee a sovereign Iraqi response to the political past — and so create some distance between the political present, and the humiliating foreign invasion and occupation that enabled the break from the regime of Saddam Hussein. Part II considers the results of an interview study conducted in Iraq in July 2003, which explored Iraqi conceptions of what a legitimate or desirable trial of former regime leaders might look like. Part III reviews the historical and political circumstances of the establishment of the IST, and the competing political imperatives that have shaped the process of making the tribunal operational. Part IV reflects on how the IST trials may be perceived, and whether they will be politically effective in buttressing the domestic legitimacy of the new regime.

¹⁵ Even lawyers who are self-conscious about the politics of legalism and embrace Shklar's view that the trial medium should be seen as a particular mode of doing politics — such as Mark Osiel — tend to presume the political efficacy of legalist politics. In Osiel's work, there is much valuable reflection on the dramaturgy and performativity of the trial medium, but his concept of 'civil dissensus' (which he argues should be promoted by a trial procedure in order to render it effective in confronting and overcoming a politically divisive past) is essentially a refinement of a liberal-dialogical model of politics. It presupposes a certain kind of political subject — the reflexive and autonomy-oriented subject who is constitutive for, and constituted by, most forms of liberal political theory: see Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (1997) 36–55.

¹⁶ See, eg, Human Rights Watch, *Memorandum to the Iraqi Governing Council on 'The Statute of the Iraqi Special Tribunal'* (2003). See also Michael Scharf, 'Is It International Enough? A Critique of the Iraqi Special Tribunal in Light of the Goals of International Justice' (2004) 2 *Journal of International Criminal Justice* 330.

II IRAQI ATTITUDES TOWARDS TRIALS, 2003

During the 1980s and 1990s, human rights violations in Iraq were among the worst in the world.¹⁷ The scale of the violations was unique in Iraqi history. Yet, due to the difficulties of conducting research in Iraq under the government of Saddam Hussein, there were no field-based research findings which might have shed light on how Iraqis perceived and experienced this political violence, or what may have been regarded as effective and legitimate ways of dealing with the legacy of human rights violations. Even now, social and political knowledge of Iraq remains thin, and bounded by assumptions concerning the sectarian nature of politics that have never been subject to careful historical and social scientific analysis.¹⁸ As such, it is difficult to draw any firm conclusions about how the experience of human rights violations was perceived across Iraqi society, or what kinds of measures would be perceived as more ‘just’ than others. In July and August 2003, the Human Rights Center, University of California, Berkeley, and the International Center for Transitional Justice undertook a six week interview-based field study in Iraq, in an attempt to establish a baseline understanding of Iraqi attitudes about how to deal with the past.¹⁹ Due to ensuing instability and violence, the study could not be supplemented by further quantitative research (such as the use of closed-question questionnaires with a larger sample) or longer-term qualitative work.²⁰ As such, the findings should be regarded as no more than strongly indicative of a particular attitude, rather than as conclusive evidence. Nevertheless, the interviews reveal several consistent themes about how Iraqis, across different sects, regions, social classes and ethnic groups, perceived human rights violations under the former government, and how to respond to them.

While there were several important differences of emphasis, there was near-unanimity in the participants’ views that the regime of Saddam Hussein was ruthless and unjust. There was a widespread acceptance that the old order was

¹⁷ See generally Human Rights Watch, *Iraq: Background on Human Rights Conditions, 1984–1992* (August 1993) <<http://www.hrw.org/reports/1993/iraq/>> at 1 October 2005; Amnesty International, *Iraq: Victims of Systematic Repression*, AI Index MDE 14/010/1999 (24 November 1999); Amnesty International, *Iraq: Systematic Torture of Political Prisoners*, AI Index MDE 14/008/2001 (15 August 2001); Human Rights Watch, *Genocide in Iraq: The Anfal Campaign against the Kurds* (July 1993); Human Rights Watch, *Endless Torment: The 1991 Uprising in Iraq and Its Aftermath* (June 1992).

¹⁸ For a welcome departure from the usual, trite, analyses of the political implications of the Sunni–Shi’a division, see Peter Sluglett and Marion Farouk-Sluglett, *Iraq since 1958: From Revolution to Dictatorship* (1990) 190–1. The most nuanced analysis of the relation between tribe, sect and politics in Iraq is Hanna Batatu, *The Old Social Classes and the Revolutionary Movements of Iraq* (1978).

¹⁹ Human Rights Center, University of California, Berkeley, and International Center for Transitional Justice, *Iraqi Voices: Attitudes toward Transitional Justice and Social Reconstruction* (May 2004) (*Attitudes toward Transitional Justice*). The author was a co-investigator and co-author of the final report. This section draws on the data collected in the course of fieldwork. The Iraq research team was composed of Phuong Pham, Patrick Vinck, Nida Alahmad and the author. The data was analysed by a team led by Phuong Pham.

²⁰ The research was undertaken over six weeks between June and August 2003, approximately three months after the fall of Baghdad. A qualitative methodology, employing focus groups and key informant interviews, was utilised. The sample was stratified by age, gender, region, sect and ethnicity and interviews were conducted in each of the three major regions (north, centre and south) of Iraq. For further information concerning the methodology of study, see *ibid* annex 1.

characterised by repression, systematic abuse and a degeneracy of social values.²¹ Comments such as the following were representative:

What way, other than 'injustice', is there to describe the former regime? There was oppression of freedom, mouths were silenced. ... The Iraqi people were forced to join the ranks of the ruling party, or their livelihoods and jobs were to be cut off, as well as educational scholarships and travel abroad. ... If they did ask for their rights, the results were either imprisonment and torture or murder.²²

Saddam was an executioner; we could not say no to him. Anyone who said no was beheaded. The authority and the power are in his hands ... we are afraid.²³

All interviewees had experience or indirect knowledge of abuses such as denial of civil liberties (freedoms of speech, association, political activity, travel) and discrimination in education and employment on the basis of party membership, as well as forced eviction, torture, sexual violence, arbitrary detention, extrajudicial execution and mass killing. More than one respondent referred to Iraq under Saddam as a 'jail' — '[t]he whole of Iraq was in jail'.²⁴ A participant in a focus group consisting of families of the missing remarked that 'we have all been harmed and Saddam was fair in his injustice'.²⁵ Overall, focus group discussions and individual interviews in different parts of the country revealed a reasonable degree of commonality in Iraqis' consciousness of the kinds of violations that occurred in different parts of Iraq. Some respondents mentioned human rights violations against particular religious or ethnic groups in other parts of the country. For example, awareness of the scale of the violations suffered by Kurds in the north was widespread among participants interviewed in Baghdad, while some interviewees in the Kurdish north were aware of the plight of the southern Shi'a.²⁶ The near-universality of exposure to human rights violations and persecution under Saddam Hussein's regime may have fostered a sense of unity through the shared experience of suffering and injustice, inflicted in the name of an identifiable individual.²⁷

In policy analyses of Iraq, the Shi'a–Sunni division is emphasised. It is not infrequently characterised as a fundamental fault-line in Iraqi society. The research undertaken in summer 2003 suggests a more complex picture of the nature of sectarian divisions in Iraq. There is no doubt that the distinction between Shi'a and Sunni is a dimension of social consciousness in Iraq. But informants and focus groups did not widely support the idea that there is an inevitable social/political rift between Shi'a and Sunni, providing some evidence for the argument that a more meaningful division in Iraqi society under the Ba'ath was 'the one between the Takriti power-holders and the majority of the

²¹ Ibid 13.

²² Senior Sunni cleric, Baghdad, as quoted in *ibid* 13.

²³ Sunni woman, Baghdad, as quoted in *ibid*.

²⁴ Unnamed respondent, as quoted in *ibid*.

²⁵ Unnamed respondent, as quoted in *ibid* 15.

²⁶ *Ibid*.

²⁷ *Ibid*.

disenchanted and disenfranchised population, both Sunni and Shi'a'.²⁸ Marion Farouk-Sluglett and Peter Sluglett observe that there was no 'fundamentally instrumental sense in which the "Sunni" rulers of Iraq since the 1970s have tried to promote Sunni sectarianism or are "representing" Sunni Islam'.²⁹ They note that many of the Shi'a converted to Shi'ism in the recent past and were just as likely to identify with their tribal or regional groupings, or the new urban social groupings that emerged through rural-urban migration, as with their co-religionists.³⁰

The emphasis on the Iraq as a Sunni-dominated state gives rise to the misleading impression that a specifically Iraqi national identity has relatively shallow roots across different sects. In fact, as historian Eric Davis points out, from the 1930s onwards a distinctly Iraqist nationalism developed in opposition to both Pan-Arabism and monarchism, centred around the Iraqi Communist Party (ICP) and other secular parties with a statist vision of national development. Educated, urban Shi'a were among the main sources of cadres for these modernising political parties,³¹ which remained a principal vehicle for Shi'a elites' participation in politics until such parties were suppressed by the Ba'ath over the 1960s and 1970s. Their suppression left a void which came to be filled by anti-secular political movements that sought to make a Shi'a *religious* identity into the primary basis for political mobilisation.³² Parties such as the *al-Da'wa al-Islamiyya* ('Da'wa Party')³³ and later, the Supreme Council for the Islamic Revolution, had emerged in the late 1950s as responses to the Shi'a religious authorities' concern at their loss of status and influence to secular political movements, and in opposition to Marxism. Unlike their counterparts in Iran, the

²⁸ Sluglett and Farouk-Sluglett, above n 18, 197. See also *ibid* 18; Batatu, *Old Social Classes*, above n 18, 1078–9. In Eric Davis, 'Historical Memory and the Building of Democracy in Iraq: Theoretical and Conceptual Perspectives' (Paper presented at Columbia University, New York, US, 17 February 2004) 20–1 (manuscript on file with author), Davis writes:

Sunni Arabs, who constitute about 15–20% of Iraqi society, have benefitted disproportionately over a period of many centuries of Ottoman, Hashimite, and Pan-Arab rule in the accumulation of wealth and political power. Nevertheless, analysts often fail to realize that the base of the Ba'ath Party was in the rural tribal regions of the [S]unni Arab triangle. Urban [S]unni Arabs benefitted much less than their rural co-confessionals. This realization draws attention to cross-cutting cleavages within the [S]unni Arab community. Urban professionals, namely members of the middle and upper middle classes, have never been strong supporters of Ba'athism, and are frequently among the strongest supporters of participatory and democratic values. Indeed, many have supported Iraqist nationalism and its attendant historical memory.

²⁹ Sluglett and Farouk-Sluglett, above n 18, 190.

³⁰ *Ibid* 191. See also Hanna Batatu, 'Iraq's Underground Shi'a Movements: Characteristics, Causes and Prospects' (1981) 35 *Middle East Journal* 578.

³¹ Davis, 'Historical Memory', above n 28, 19. See also Batatu, *Old Social Classes*, above n 18, 700, 995. Farouk-Sluglett and Sluglett, above n 18, observe that the Shi'ism of migrants from rural areas to cities and towns in the 1940s and 1950s was

cultural and more superstitious than formally religious ... many of them were attracted to the egalitarian values and principles of the Communist Party, which was at the forefront of the national struggle between 1945 and 1958 ... the appeal of the Communist Party lay in its uncompromising calls for the overthrow of a regime that was self-evidently controlled by foreign strategic and economic interests: at 193.

³² Batatu, 'Iraq's Underground Shi'a Movements', above n 30, 578.

³³ *Al-Da'wa al-Islamiyya* is the Islamic Da'wa Party, a Shi'a organisation which supports the establishment of an Islamic state in Iraq.

Iraqi Shi'a clerical hierarchy had not played an active role in Iraqi politics,³⁴ and their sense of marginalisation by the wave of nationalist-led secularisation in the middle of 20th century led a younger generation of *marja'iyah* (supreme legal authorities) to advocate the creation of an Islamic polity and economy. Such expressly religious political movements lacked a substantial popular following until the 1970s, although the charismatic and religious authority of leading *mujtahids* gave them a role in articulating opposition to the Ba'athist regime after 1968. Nevertheless, from the 1970s, the Shi'a political Islamists were regarded as a real threat to the Government not because of their numerical strength, but because of their lack of susceptibility to infiltration and control. The success of the Khomeini revolution in Iran emboldened the Da'wa Party to commence a campaign of terrorist acts and assassination attempts, culminating in a daring attempt on the life of Saddam Hussein during his visit to the town of Dujail in 1982. With the outbreak of war with Iran, and uncertain of the extent of support for the Shi'a Islamist underground, the regime adopted a posture of suspicion and repression toward Shi'a religious authorities and an attitude of mistrust toward those Shi'a populations which were considered susceptible to Islamist influence.³⁵

The point of this short excursus on the Sunni–Shi'a division in Iraq is to highlight the complexity of Iraqi national consciousness, and its specific historical determinants. The place of sect and ethnicity in Iraqi politics cannot be treated as identical to or substantially the same as that in other polities in the Middle East, such as Lebanon or Iran. This is not to suggest that real, material, bases for conflicting interests do not now exist, most tangibly in the looming struggle over Kurdish autonomy and the extent of Kurdish control of oil resources. The politicisation of the division between Kurds and Arabs is long-standing, dating back to the waning years of the British Mandate and having hardened through several decades of internal armed conflict between the two main Kurdish political parties — the Kurdistan Democratic Party ('KDP') and Patriotic Union of Kurdistan ('PUK') — and the central government.³⁶ Moreover, sect-based identities can (and indeed have) *become* a basis for political mobilisation in post-Saddam Iraq.³⁷ Rather, it is to urge a careful scrutiny of assumptions that unreflectively correlate political attitudes with sect and that draw conclusions about the political effects of a policy based on these assumptions. Such an approach is important in order to make sense of the way Iraqis answered questions about who suffered under the previous regime, and what kind of a response to the regime's human rights violations was thought to be desirable. It is also essential in order to try to grasp the political implications of trials of the former regime under the current arrangements, and in the current environment.

Participants in the 2003 focus group discussions supported the idea of trials, although it appears that, for some of those who suffered most under the regime, retribution was a key motivation. However, there was a common theme across

³⁴ Eric Davis, 'Domino Democracy: Challenges to US Foreign Policy in a Post-Saddam Middle East' in Alan Curtis (ed), *Patriotism, Democracy and Common Sense* (2004) 207.

³⁵ See, eg, Charles Tripp, *A History in Iraq* (2002) 235–8.

³⁶ *Ibid* 213, 243–4, 271–6.

³⁷ See below n 142.

different regions, sects and ethnicities — that responsible individuals be punished *according to law*, through a court process.³⁸ A trial was seen as a means of guaranteeing the public knowledge of the regime's conduct, and of giving some satisfaction through public accountability. A reasonable minority of interviewees did not believe in the notion of a 'fair trial', and they felt that leaders of the old order should be tried in accordance with the same harsh laws that they once applied to everyone else. There was a widespread sense that 'everyone knows that Saddam is guilty, so what is there to prove?':

They will not be punished the same way they acted with the people; rather, they will be tried by a just judiciary inside Iraq.³⁹

They must be judged. There must be a legal trial.⁴⁰

Oppressed Iraqi citizens should be given the chance to stand before the court, and sentences should be based on what they have to say.⁴¹

A trial. At least everyone will feel that he gets his due. The least thing is imprisonment, and to put them on television to say that they killed, executed and buried people and that nobody knew of this.⁴²

God willing, it will not need a trial. God willing, like the killing of his sons. In this case, we will not need a court or lawyers or judges; Saddam is a criminal.⁴³

Do you need more proof? ... It is obvious that they are criminals.⁴⁴

Participants identified Saddam Hussein personally with the injustices and violations that were committed. Others referred to by interviewees were Ali Hassan al-Majeed ('Chemical Ali', who oversaw the Anfal Campaign against the Kurds), Izzat Ibrahim al-Douri (Vice-Chair of the Revolutionary Command Council), Uday and Qusay Hussein (sons of Saddam Hussein, killed by Coalition forces in July 2003), as well as groups like 'the national leadership' and 'the Cabinet'.⁴⁵ Interviewees also attributed responsibility to other states, and the international system as a whole, citing previous support for Saddam Hussein from the US and Arab states, and the failure of the United Nations to prevent human rights violations.⁴⁶

Comments showing a lack of trust in the US concerned two issues: the US history of support for the Ba'athist regime, and the post-war chaos and degradation in living conditions commencing with the beginning of the occupation. The failures of post-war planning left a legacy of bitterness and suspicion concerning US intentions, while the daily problems associated with

³⁸ *Attitudes toward Transitional Justice*, above n 19, 26.

³⁹ Shi'a man, Baghdad, as quoted in *ibid* 28.

⁴⁰ Shi'a woman, Najaf, as quoted in *ibid* 26.

⁴¹ Sunni man, Baghdad, as quoted in *ibid* 26.

⁴² Sunni woman, Mosul, as quoted in *ibid* 26.

⁴³ Kurdish lawyer, Erbil, as quoted in *ibid* 27.

⁴⁴ Representative, Da'wa Party, as quoted in *ibid* 27.

⁴⁵ *Ibid* 27.

⁴⁶ *Ibid* 29.

occupation by a foreign military force had, even by July 2003, eroded any goodwill arising out of the defeat of the Ba'athists.⁴⁷

The legacy of 'Iraqist' nationalist thought and the feelings of humiliation from being under foreign occupation to some extent explain the near unanimous opinion among interviewees that trials of the former regime should occur within Iraq and under Iraqi control. International 'assistance' of a technical kind was acceptable, but the overwhelming majority of interviewees demanded that the final decision-making power of the court be in Iraqi hands.⁴⁸ Apart from a distrust of international influence and the occupying forces, an often-voiced reason for this emphasis on an Iraqi process was that Iraqis understood the suffering and oppression inflicted by the regime, and so Iraqis should sit in judgment over its perpetrators. The demand for Iraqi control of the judicial process can be understood as part of a wider demand to allow Iraqis to govern themselves. This is a reaction to the absence of self-determination that characterises not only the occupation but also the previous three decades of dictatorship. Beginning the process of 'solving our own problems' is thus part of the process of reclaiming national sovereignty. Among Iraqi lawyers and judges, professional and national pride was at stake, together with a desire to restore the reputation of the Iraqi legal system, which was damaged by the dictatorship's 'revolutionary' (that is, political) courts.⁴⁹

Attitudes towards US involvement in future trials were more ambivalent, and tended to vary across regions. Although they were skeptical of US motives for being in Iraq, Kurds accepted US involvement in the trial process.⁵⁰ Shi'a and Sunni respondents from Baghdad had a negative view of the US as an occupying power, and so expressed distrust of a US-dominated trial process.⁵¹ Respondents in the southern region also expressed this mistrust. Despite serious deficiencies in the old legal system, many interviewees thought that there were enough uncorrupted and competent lawyers and jurists within Iraq to reconstitute a legal system in which the population could have confidence.⁵²

As noted above, revenge and retribution were an important part of Iraqis' desire to try Saddam Hussein and other senior Ba'athists. Thus, support for the death penalty was overwhelming; some even desired a means of prolonging the suffering of detested figures such as Saddam Hussein and Ali Hassan al-Majeed, for example through torture.⁵³

Overall, the attitudes of interviewees towards an international role in trials of the former regime appear driven by conflicting feelings: a mistrust of international politics, resentment toward the international community, and disappointment, mistrust and wounded national pride in respect of the US as an occupying power; a desire for fair trials, but a demand for speedy and vengeful justice; a demand for an Iraqi-controlled process, but mixed feelings toward judges and lawyers from the old regime. Responses, even from lawyers,

⁴⁷ Ibid 30.

⁴⁸ Ibid 31.

⁴⁹ Ibid 32.

⁵⁰ Ibid 39.

⁵¹ Ibid 40.

⁵² Ibid 34.

⁵³ Ibid.

indicated little specific knowledge of other countries' experiences of trials for mass atrocity, or of recent advances in international criminal law institutions and practice.⁵⁴

A judicial sector assessment by the Coalition Provisional Authority ('CPA') and a separate assessment by the UN both concluded in 2003 that the Iraqi judicial system did not have the technical capacity on its own to conduct trials of this magnitude,⁵⁵ implying that some form of external assistance would be required in order to meet human rights and evidentiary standards.⁵⁶ But the attitudes of interviewees to international involvement considered above suggest that international actors and standards do not benefit from any *prima facie* legitimacy in the eyes of Iraqis, and that the perceived legitimacy of the trial process within Iraq will be closely connected to domestic political developments. The relevant political factors could be only tenuously related to the trials themselves, but may nevertheless inform perceptions of the competence of the process. For example, the efficacy of the new Iraqi political institutions in preserving security, restoring basic services and improving economic conditions is critically important to the Government's ability to demand respect for its authority. A government that is regarded as lacking competence in providing services and restoring normality is also likely to be regarded as untrustworthy and incompetent in the administration of the trials.

III THE IRAQI SPECIAL TRIBUNAL

In the immediate aftermath of the fall of the Ba'athist government, it became apparent that the US-led occupying administration had no coherent strategy for dealing with the legacy of human rights violations in Iraq. The failure of Coalition forces to protect civilian infrastructure and maintain law and order in the wake of the government's collapse extended to an inability to protect sites of relevance to future prosecutions.⁵⁷ These sites included a dozen mass graves that were immediately identified by Iraqis upon the retreat of Iraqi security forces, and the archives of domestic intelligence agencies. Although approximately nine linear miles of government documents were seized by Coalition forces and transferred to Qatar for review by the Iraq Survey Group ('ISG') (which was mandated to look for evidence of weapons of mass destruction), a very large number of documents were taken from government archives, intelligence directorates and Ba'ath Party offices by an array of Iraqi groups and individuals. These included political parties (such as the Da'wa Party, the Iraqi National Congress and the ICP) seeking information about members and relatives disappeared by the regime, bereaved individuals trying to locate information about missing relatives, and newly-formed human rights associations. Each of these entities held the documents for their own purposes, and with little concern for preserving the integrity of the documentation in order to assist future

⁵⁴ *Ibid* 50.

⁵⁵ Iraq Judicial Assessment Team, *Report of the Iraq Judicial Assessment Team* (June 2003) 6–7; World Bank–UNDG Legal Needs Assessment Mission to Iraq, *Sectoral Report* (August 2003) 17–18. The author contributed to the World Bank–UNDG report.

⁵⁶ *Attitudes toward Transitional Justice*, above n 19, 50.

⁵⁷ See, eg, Council on Foreign Relations, *In the Wake of War: Improving US Post-Conflict Capabilities*, Independent Task Force Report 55 (July 2005) 4.

prosecutions. It also raises the possibility that the authenticity of documents and their provenance cannot be verified. A November 2004 report from Human Rights Watch concluded that:

What Human Rights Watch did see and learn, however, gave rise to serious concern about the integrity of many of these documents in terms of their potential evidentiary value in trial proceedings. The complete failure to take any steps to prevent or minimize the extensive looting and wanton destruction of government buildings in those crucial early days in April 2003 led to the widespread removal of state archives from government buildings by unknown individuals or groups, and which are now virtually impossible to trace ...

Neither political parties nor NGOs have had the requisite expertise, and in many cases the resources and tools, to handle documents in the manner most likely to ensure their evidentiary value for future trials. According to [Iraq Memory Foundation Documentation Director] Mneimneh, documents have been wrongfully processed, reshuffled, written on, and inadvertently destroyed (such as through fire) simply because those handling them have not followed correct procedures.⁵⁸

In mid-June 2004, with the establishment in Baghdad of the US-staffed Regime Crimes Liaison Office ('RCLO') to support the IST, more concerted efforts were made by the CPA and Iraq's interim administration to centralise the storage and processing of documentation. It is unclear whether these efforts were successful in convincing political parties and others to turn over the documents they held. According to reports filed by the RCLO with the US Congress, by October 2004, a documentation database had been established at the ISG headquarters in Qatar to enable RCLO staff to review the documentation there, for use in criminal prosecutions of former government officials.⁵⁹ Because the documentation held by the ISG was classified when it was seized, access for the purposes of criminal investigation requires either a declassification review for each category of document, or that the investigators hold the appropriate level of security clearance.⁶⁰ In practice, this means that only US investigators will have the opportunity for determining whether or not a given document is relevant (either as incriminating or exculpatory evidence) to the criminal investigation.

The ad hoc approach to the preservation of documentary evidence was replicated in respect of sites containing much potential forensic evidence. In dozens of locations throughout Iraq, Iraqis began exhuming graves that they believed contained the remains of missing relatives. Coalition Forces had no orders, and apparently did not have the necessary personnel, to prevent the spontaneous exhumations or protect the gravesites, giving rise to disturbing scenes of distraught Iraqis digging up suspected graves with backhoes and other agricultural equipment. In May 2003, villagers dug up 2000 sets of remains from sites at al-Hillah, south of Baghdad, commingling skeletons and disturbing materials found with the bodies in a desperate attempt to identify family

⁵⁸ Human Rights Watch, *Iraq: State of the Evidence* (November 2004) 13–15.

⁵⁹ Department of State, *Quarterly Update to Congress: Section 2207 Report on Iraq Relief and Reconstruction* (October 2004) I–28 ('October 2004 Quarterly Update').

⁶⁰ Discussions with RCLO lawyer (Bellagio, Italy, November 2004).

members.⁶¹ At the end of the process, many of these remains were simply reburied without being identified, and crucial forensic evidence was lost in the process. Under pressure from human rights NGOs such as Human Rights Watch, the CPA hastily prepared a *Mass Graves Action Plan* in the summer of 2003, but lacked both the personnel and the financial resources to implement it as the number of identified mass graves rose to over 200. The implementation of the plan was also impeded by the rapid deterioration of the security situation after the bombing of the UN compound in Baghdad on 19 August 2003, leading to the withdrawal of the International Red Cross and the termination of its training program for Iraqi forensic scientists. By the time the CPA was dissolved in June 2004, no program had been designed to apply DNA analysis to the identification of remains and no full-scale exhumation of a mass grave had taken place anywhere in Iraq.⁶² The Iraqi Bureau of Missing Persons envisaged by the CPA's *Mass Graves Action Plan* had not been established.

The absence of serious US planning for a strategy to deal with the legacy of grave human rights violations is particularly striking in light of the US Government's emphasis on the brutality of the Ba'athist regime as a justification for the invasion of Iraq. Furthermore, the lack of planning was compounded by the administration's continued vacillation regarding the proper role for multilateral organisations and international actors in occupied Iraq.⁶³ The CPA's manifest lack of necessary personnel and expertise in a variety of sectors heightened the urgency for contributions from other countries and organisations. At the same time, the US government manoeuvred to ensure that a substantive political coordination mandate would not be granted to the UN in occupied Iraq,⁶⁴ and that the US would retain

something akin to plenary power within the transition; if a controversy were to arise as to which component of the transition is properly to perform some specific function, it would seem to be [the occupying power's] task definitively to allocate competence.⁶⁵

In light of the international polarisation in the aftermath of the US decision to invade Iraq, such an approach was not conducive to encouraging powerful allies to put aside their objections and contribute to the stabilisation of Iraq. This political environment conditioned the process of determining a policy for the trial of former government leaders in Iraq.

Over the summer of 2003, CPA officials insisted that any trial process be 'Iraqi-led', but no mechanism for inclusive deliberation and consultations among Iraqi stakeholders was set in place.⁶⁶ The rhetoric of an 'Iraqi-led' process appears to have been used by the CPA and US officials in Washington to deflect

⁶¹ See Human Rights Watch, *The Mass Graves of al-Mahawil: The Truth Uncovered* (May 2003).

⁶² Human Rights Watch, *State of the Evidence*, above n 58, 30–1.

⁶³ For a review of the twists and turns of this process, and its roots in inter-agency disputes, see Simon Chesterman, 'Bush, the United Nations and Nation-Building' (2004) 46 *Survival* 101.

⁶⁴ Larry Diamond, 'What Went Wrong in Iraq' (2004) 83(5) *Foreign Affairs* 34, 46–7.

⁶⁵ Thomas Grant, 'The Security Council and Iraq: An Incremental Practice' (2003) 97 *American Journal of International Law* 823.

⁶⁶ See, eg, Thom Shanker and Neil Lewis, 'US Wants Iraqis to Judge Hussein', *The New York Times* (New York, US), 1 August 2003, 1.

demands for greater international involvement and oversight of trials. The resistance to significant UN involvement seems to have been in part an extension of the wider US desire to retain political control over transitional processes, and in part due to hostility to internationalised justice mechanisms in the mould of the International Criminal Court.⁶⁷ Proposals to create a joint Iraq–International Commission of Experts to engage in consultations and make recommendations were rejected.⁶⁸ Instead, a committee of the US-appointed Iraqi Governing Council (‘IGC’) was created to examine the issue.⁶⁹ The committee was headed by Dara Nuruddin, a respected judge who had achieved fame in Iraq by holding a decree of the Revolutionary Command Council unconstitutional during the 1990s.⁷⁰ When he refused to retract his ruling, he was dismissed and imprisoned. An experienced jurist whose integrity was beyond reproach, Nuruddin nevertheless admitted in meetings with UN staff members and international human rights NGOs that he had limited knowledge of international criminal law. The committee established by the IGC was composed of IGC members or their nominees, but like most of the many committees spawned by the IGC, it deliberated little and decided even less. While CPA officials referred to the committee as evidence of a ‘consultative process’, the actual drafting of a regulation creating a tribunal was undertaken by Salem Chalabi, nephew of Ahmad Chalabi and self-appointed ‘legal advisor’ to the IGC.⁷¹ In a meeting in Baghdad in August 2003 at which the author was present, Chalabi stated that he had assumed responsibility for drafting the statute of a proposed court because Judge Nuruddin was busy with his other duties on the IGC. Although Chalabi’s legal experience was in mergers and acquisitions and financial transactions, he appears to have maintained control over the drafting process through to December 2003, when the *Statute of the Iraqi Special Tribunal* was promulgated by Paul Bremer.⁷² CPA Legal Advisors indicated in private meetings in August 2003 that they had seen drafts of the *IST Statute* proposed by Chalabi, but denied requests from international human rights NGOs to review and comment on the text. In late September 2003, a delegation from Human Rights Watch was told that the consultation process was over and all that remained was ‘fine-tuning’ before the text was sent to Coalition Provisional Administrator Paul Bremer for signature.⁷³ In the interim, a team of CPA lawyers commenced work

⁶⁷ Eric Stover, Hanny Megally and Hania Mufti, ‘Bremer’s “Gordian Knot”: Transitional Justice and the US Occupation of Iraq’ (2005) 27 *Human Rights Quarterly* 830, 839.

⁶⁸ This proposal was put by UN Special Representative Sergio Vieira de Mello: see UN News Centre, ‘Statements and Press Remarks: Briefing to the Security Council by Sergio Vieira de Mello’ (Press Release, 22 July 2003). Vieira de Mello was killed in the bombing of the UN compound in Baghdad on 19 August 2003: see UN News Centre, ‘Top UN envoy Sergio Vieira de Mello Killed in Terrorist Blast in Baghdad’ (Press Release, 19 August 2003).

⁶⁹ Brian MacQuarrie and Bryan Bender, ‘Iraqis Weigh Trials for Regime Figures’, *The Boston Globe* (Boston, US), 16 July 2003, 1.

⁷⁰ Discussions with Iraqi lawyers (Baghdad, Iraq, July 2003).

⁷¹ Shortly after the fall of the Ba’athist regime, Salem Chalabi — who grew up in exile — created a law firm which promoted itself as offering legal advice to prospective foreign investors in Iraq: see Craig Gordon and Knut Royce, ‘Iraqi Business Ties Raise Questions’, *Newsday* (New York, US), 5 October 2003, 7.

⁷² Annexed to Coalition Provisional Authority (Iraq), *Delegation of Authority regarding an Iraqi Tribunal*, Order No 48, CPA/ORD/9 Dec 2003/48 (2003) (‘*IST Statute*’).

⁷³ Stover, Megally and Mufti, above n 67, 839.

on developing an investigation and prosecution strategy for cases that would be brought before the tribunal, a tacit acknowledgment that, despite rhetoric of an 'Iraqi-led process', there was little confidence in the technical capacities of the Iraqi legal profession and judiciary.

On 10 December 2003, the *IST Statute* was signed by Paul Bremer. Although called a 'statute', the founding document for the IST was in fact an order of the occupying power, promulgated in purported exercise of the occupant's authority under the *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949*⁷⁴ and the *Hague Regulations*.⁷⁵ The *IST Statute* created a court with a temporal jurisdiction from 1968 to 1 May 2003,⁷⁶ and with substantive jurisdiction over Iraqi nationals who are alleged to have committed genocide, crimes against humanity and war crimes. The *IST Statute* incorporates the definitions of these crimes as found in the *Rome Statute of the International Criminal Court*.⁷⁷ The *IST Statute* also confers jurisdiction on the tribunal to try certain crimes found in a 1958 Iraqi law. These crimes, which have the colour of political offences, are 'the attempt to manipulate the judiciary', 'wastage of national resources', and 'the abuse of position ... that may lead to the threat of war or the use of armed force against an Arab nation'.⁷⁸

The Administrator, prosecutors and lead defence counsel are required to be of Iraqi nationality.⁷⁹ A provision permits the discretionary appointment of non-Iraqi judges,⁸⁰ but no international judges have been appointed. International personnel may (or in some clauses, 'shall') be appointed by the Administrator as 'advisors' to the judges, prosecutors and defence.⁸¹ The process for the selection and appointment of international advisers is unspecified, except that advisers must be individuals of good character and with experience in the practice of international criminal law. The exact role of advisers, who they report to and in what way they are to exercise their observation and mentoring functions are also

⁷⁴ Opened for signature 12 August 1949, 75 UNTS 973 (entered into force 21 October 1950) ('*Geneva Convention IV*').

⁷⁵ *Hague Convention (IV) respecting the Laws and Customs of War on Land, Annex to the Convention, Regulations respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907, (1910) UKTS 9 (entered into force 26 January 1910) ('*Hague Regulations*').

⁷⁶ *IST Statute*, above n 72, arts 1(b), 10. It is unclear why the temporal jurisdiction ceases on 1 May 2003. The date has no particular significance, except that it coincides with President George W Bush's (premature) declaration of the end of major combat in Iraq.

⁷⁷ Opened for signature 26 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*Rome Statute*').

⁷⁸ Ibid art 14. The provenance of these offences is unclear, but their date of origin and their tenor suggest that they were introduced as a means of prosecuting former government leaders after the overthrow of the monarchy in 1958. These trials, known as the 'Mahdawi trials' after the military officer who presided over them, were classic 'political trials' in the sense that they were concerned with trying the monarchists for their disloyalty and disservice to the nation: Eric Davis, *Memories of State: Politics, History and Collective Identity in Modern Iraq* (2005) ch 5. That these laws should be recovered and incorporated into the *IST Statute* suggests that the Mahdawi trials continue to have resonance in Iraqi memory as a 'people's court' that vindicated opposition to the monarchy. Anecdotally, I was surprised to find that focus group participants — including many born after 1965 — did on occasion refer to the Mahdawi trials as an example of the 'people's justice' that should be visited upon the Ba'athist leaders.

⁷⁹ *IST Statute*, above n 72, art 28.

⁸⁰ Ibid art 4(d).

⁸¹ Ibid arts 6(b), 7(n), 8(j), 18(b), 20(d)(2).

unspecified. The United States Institute of Peace comments that

it is difficult to envision how an effective role could be crafted for observers or monitors appointed by the IST itself, as it is doubtful whether such persons would be independent of the IST ... Monitors appointed by the judicial system being observed would lack credibility at least from an international perspective.⁸²

The *IST Statute* stipulates that trials are to occur in accordance with the general principles of Iraqi criminal law, including the *Penal Code* (1969) (Iraq) and the *Law on Criminal Proceedings* (1971) (Iraq). Iraqi criminal law penalties are thereby applicable, including the death penalty. Iraqi criminal procedure is modelled on mid 20th century French civil procedure, in which an investigative judge has principal responsibility for interviewing witnesses, examining evidence and forming a view as to the strength of the case against the accused.⁸³ If the judge is satisfied with the evidence against the accused, he then refers the case to trial before a trial chamber, which decides the case based on their review of the investigative dossier and any further inquiries that the chamber chooses to pursue.⁸⁴ The role of the prosecutor is limited, and the defence's entitlement to call witnesses and introduce new evidence at the trial stage depends on the discretion of the chamber.⁸⁵ Implicitly, much depends in this model on the diligence of the investigative judge in collecting not only incriminating evidence, but also potentially exculpatory evidence, and for assessing the evidence with an open mind.⁸⁶ The accused and his lawyer may be present (subject to the discretion of the investigative judge) at the collection of evidence and deposition of witnesses, but may not subject the witness to questioning.⁸⁷ The accused may submit comments on the evidence to be included in the trial dossier.⁸⁸ The trial court is entitled, in its discretion, to treat all witness testimony in the investigative dossier as having been given at trial.⁸⁹ The *IST Statute* attempts to strengthen the rights of the accused by stipulating his right to confront witnesses,⁹⁰ but this is in direct conflict with existing Iraqi criminal procedure and it is unclear which norm would prevail — particularly in light of the status of the *IST Statute* as an edict of the occupying power. The *IST Statute* also authorises the court to issue its own rules of evidence and procedure, which presently remain unfinalised. The most recent rules⁹¹ suggest that Iraqi criminal procedure law will be the default rules governing the process, although some

⁸² Laurel Miller, United States Institute of Peace, *Building the Iraqi Special Tribunal: Lessons from Experiences in International Criminal Justice*, Special Report 122 (June 2004) 8.

⁸³ See John Bell, Sophie Boyron and Simon Whittaker, *Principles of French Law* (1998) 128–9.

⁸⁴ *Ibid*; see also *Law on Criminal Proceedings* (1971) (Iraq) [39], [130].

⁸⁵ *Law on Criminal Proceedings* (1971) (Iraq) [168], [172], [181].

⁸⁶ See Salvatore Zappala, 'The Iraqi Special Tribunal's Draft Rules of Procedure and Evidence: Neither Fish nor Fowl' (2004) 2 *Journal of International Criminal Justice* 855, 861.

⁸⁷ *Law on Criminal Proceedings* (1971) (Iraq) [57].

⁸⁸ *Law on Criminal Proceedings* (1971) (Iraq) [63].

⁸⁹ *Law on Criminal Proceedings* (1971) (Iraq) [172].

⁹⁰ *IST Statute*, above n 72, art 20(5).

⁹¹ *Revised Version of the Iraqi Special Tribunal Rules of Procedure and Evidence* (2004) (Iraq). The rules are drafted pursuant to *IST Statute*, above n 72, art 16. It is unclear how a subordinate regulation, authorised by an edict of the occupying power, can effectively alter existing Iraqi criminal procedure law.

provisions seek to strengthen the obligation on the investigative judge to gather exculpatory evidence and require the prosecution to disclose evidence against the accused at least 45 days before the case goes to trial.⁹² Trial judges' wide discretion to manage proceedings, and to admit any evidence they see fit, is generally preserved, but the rules add to the legal complexity of the proceedings by introducing a further set of composite norms.⁹³

The normative structure of the IST, the *IST Statute* and rules readily evince the conflicting political imperatives that underlie the trial process in Iraq. On the one hand, the *IST Statute*, in its form, language and substantive jurisdiction, is drafted in a manner that reflects at least an aspiration to meet the requirements of international legalism and gain international legitimacy. On its face, the founding document of the IST is not the instrument of a crude show trial and contains much language that embraces a commitment to liberal legalist standards of fairness and impartiality. On the other hand, the documents creating the IST — and the abovementioned context of its drafting and promulgation — reflect a desire to maintain a credible appearance of Iraqi national control, and an Iraqi sovereign people reckoning with the former regime. The audience for this set of political messages is the population of Iraq, and the inclusion of offences from an earlier set of successor trials (the Mahdawi trials)⁹⁴ indicates a desire to leave room for a politics of manichaeism, in which the principal accusation against the former regime is not its violation of international legal norms but its political failures in bringing the calumnies of war, impoverishment and occupation on the nation. US acquiescence in this arrangement can be similarly read as serving multiple political purposes: the IST can serve as a counter-example to the trend towards the internationalisation of such trials; its appearance of Iraqi management and control presents a potentially convincing alibi against accusations of US-imposed 'victors' justice'; and the trials may be managed so as to minimise the risks of disclosing information embarrassing to the US concerning its previous relations with the Ba'athist government,⁹⁵ and maximise the trials' potential to contribute to the legitimacy of the new US-backed government.

Whether these competing kinds of politics are able to coexist as the trials actually unfold remains to be seen. The IST's legalist aspirations expose it, on pain of performative contradiction, to serious legalist critiques. Principal among these are that the constitutive document of the tribunal was an invalid exercise of the occupant's authority under international law and so is without effect on the pre-existing laws of Iraq, and that the *IST Statute*'s application of certain international crimes is retroactive in a manner that violates both international law and Iraqi law. The CPA regulation containing the *IST Statute* amends existing Iraqi criminal law to introduce three new offences that did not previously exist in the *Penal Code* (1969) (Iraq), and purports to abolish the constitutional

⁹² See, eg, *Revised Version of the Iraqi Special Tribunal Rules of Procedure and Evidence* (2004) (Iraq) [42], [60].

⁹³ Zappala, above n 86, 858.

⁹⁴ See above n 78.

⁹⁵ For a collection of declassified documents detailing the nature the US–Iraq relationship in the 1980s, see George Washington University, National Security Archive, *The Saddam Hussein Sourcebook: Declassified Secrets from the US–Iraq Relationship*, <<http://www.gwu.edu/~nsarchiv/special/iraq/index.htm>> at 1 October 2005.

immunities of government officials. It also amends Iraqi criminal procedure in various ways, as considered above. The authority of an occupying power to legislate for an occupied territory is circumscribed by the obligation to 'restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'.⁹⁶ *Geneva Convention IV* limits the competence of the occupying power to change penal laws to circumstances where it is necessary to fulfil its obligations under the *Convention*, protect its own forces or maintain order in the occupied territory.⁹⁷ The occupant can constitute its own military courts to try violations of international humanitarian law, but cannot create a new domestic legal mechanism to do so. Hence, there is a credible legal argument that

the Iraqi Special Tribunal, established by the Interim Governing Council (whose conduct is attributed to the occupying powers) on 10 December 2003 could not today try Iraqis accused of international crimes, as it was not lawfully constituted, except if the new Interim Government of Iraq established it again.⁹⁸

At the time of writing (late August 2005), a draft law had been introduced into the Transitional Iraqi National Assembly, to adopt the *IST Statute* into Iraqi law.⁹⁹ However, the draft law also sought to amend the *IST Statute* in order to bring the IST under the control of the Higher Judicial Council and to alter criteria for the dismissal of judges.¹⁰⁰ Controversy over these proposed amendments, and the supervening constitutional crisis, appears to have delayed the passage of the law.

The problem of retroactivity was pressing at Nuremberg, but was effectively side-stepped by stressing the moral necessity of prosecuting German atrocities¹⁰¹ and the relative novelty of trying to hold national leaders accountable for acts of state.¹⁰² The contemporary principle of non-retroactivity builds on the development of international criminal law norms since Nuremberg, and permits the retroactive application of an international law norm in domestic law provided the norm was recognised in international law at the time of the conduct constituting the offence.¹⁰³ In the case of the IST, there is a plausible claim that this narrower concept of non-retroactivity has been violated. The *IST Statute* applies international criminal law definitions as formulated in the *Rome Statute* to conduct as far back as 1968. While unproblematic in the case of genocide, the definitions in the *Rome Statute* of crimes against humanity and of war crimes in a

⁹⁶ *Hague Regulations*, above n 75, art 43.

⁹⁷ *Geneva Convention IV*, above n 74, arts 64–78.

⁹⁸ Marco Sassoli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (forthcoming 2005) 16 *European Journal of International Law* (citations omitted).

⁹⁹ Al-Iraqiyah TV, 'Iraq MPs Seek Shake-Up of Saddam Court', *BBC Monitoring Middle East*, 13 July 2005.

¹⁰⁰ *Ibid.* Also based on discussions with Hanny Megally, Middle East Director, International Center for Transitional Justice (New York, US, July 2005).

¹⁰¹ For the clearest articulation of this problem and its resolution, see Hans Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?' (1947) 1 *International Law Quarterly* 153. See also the discussion in David Luban, *Legal Modernism* (1994) 352–4.

¹⁰² As Luban puts it, retroactive law violates no legitimate expectations where the alternative is no law at all: Luban, above n 101, 356.

¹⁰³ See *International Covenant on Civil and Political Rights*, opened for signature 26 December 1966, 999 UNTS 171, art 15(2) (entered into force 23 March 1976).

non-international armed conflict cannot be regarded as reflecting customary international law before (at the earliest) 1990.¹⁰⁴ It is unclear whether crimes against humanity did not require a nexus with an armed conflict before 1990,¹⁰⁵ and whether violations of common art 3 of the *Geneva Conventions*¹⁰⁶ in an internal armed conflict resulted in individual criminal liability.¹⁰⁷ The application of the *IST Statute*'s definition of these crimes to acts committed between 1968 and 1988 might reasonably be argued to violate the principle of *nullum crimen sine lege* in a manner that is not susceptible to same justification that was proffered at Nuremberg.

At the level of practical reality, the claim that the IST represents an 'Iraqi-led' process is tenuous. The CPA's judicial sector assessment undertaken in June 2003,¹⁰⁸ and a later UN assessment mission,¹⁰⁹ both concluded that the forensic capacity for large-scale criminal investigations was non-existent, knowledge of international legal developments outside Iraq very limited, and that judges and attorneys had no experience with investigating and trying crimes on the scale of crimes against humanity and genocide.¹¹⁰ In the absence of these technical capacities, and a source of funding, any Iraqi-led tribunal was likely to be heavily dependent on foreign assistance.¹¹¹ In January 2004, then National Security Advisor Condoleezza Rice authorised the Department of Justice to send a team of prosecutors and investigators, drawn from several US agencies, to provide the investigative and prosecutorial expertise necessary to prepare cases

¹⁰⁴ *Rome Statute*, above n 77, arts 7–8. For a review of the different definitions of crimes against humanity, see Olivia Swaak-Goldman, 'Crimes against Humanity' in Gabrielle Kirk McDonald and Olivia Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts* (2000) vol 1, 145.

¹⁰⁵ Yuval Shany, 'Does One Size Fit All? Reading the Jurisdictional Provisions of the New *Iraqi Special Tribunal Statute* in the Light of the Statutes of International Criminal Tribunals' (2004) 2 *Journal of International Criminal Justice* 338, 344.

¹⁰⁶ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 31, art 3 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 85, art 3 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War of August 12 1949*, opened for signature 12 August 1949, 75 UNTS 135, art 3 (entered into force 21 October 1950); *Geneva Convention IV*, above n 74, art 3 (collectively, '*Geneva Conventions*').

¹⁰⁷ See *Report of the Group of Experts for Cambodia Established pursuant to General Assembly Resolution 52/135*, 19–22, UN Doc A/53/850 (16 March 1999); Steven Ratner and Jason Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (2nd ed, 2001) 96–205.

¹⁰⁸ See Iraq Judicial Assessment Team, above n 55.

¹⁰⁹ World Bank–UNDG Legal Needs Assessment Mission to Iraq, above n 55, 14.

¹¹⁰ These conclusions were confirmed by my own interviews with Iraqi judges in Baghdad and Erbil.

¹¹¹ This reality was also acknowledged in an update to Congress which declared that 'Currently, Iraq lacks the professional and technical investigative and judicial expertise to [prosecute crimes against humanity and war crimes] on its own, and therefore needs Coalition assistance': Department of State, *Quarterly Update to Congress: Section 2207 Report on Iraq Relief and Reconstruction* (January 2004) 43 ('*January 2004 Quarterly Update*').

for trial.¹¹² In late 2003, US Congress appropriated US\$75 million as part of the Iraq Relief and Reconstruction Fund to bankroll investigations and prosecutions of former government officials in Iraq.¹¹³ Recently expanded to US\$128 million,¹¹⁴ the appropriation supports the operations of the RCLO, which formally comes under the authority of the US Ambassador to Iraq. Although claimed to play only a 'support role' under the *IST Statute*,¹¹⁵ quarterly reports to Congress make clear that the RCLO's staff of over 50 have played a leading role in all aspects of the operations of the IST, including: the building of the courtroom;¹¹⁶ the conduct of exhumations;¹¹⁷ interviews with 'High Value Detainees';¹¹⁸ review of seized documents and preparation of an evidence database;¹¹⁹ and training of IST staff.

International assistance from non-US sources has been limited, due to European Union countries' unwillingness to assist with a process that applies the death penalty, and lingering ill-will arising from the US reluctance to give multilateral organisations a meaningful role in the management of post-war Iraq.¹²⁰ Similar factors inhibited UN involvement with the IST. In early 2004, then US representative to the UN John Negroponte wrote directly to the UN Secretary-General requesting permission to second UN personnel from the international criminal tribunals and the Special Court of Sierra Leone. Wary that this amounted to an attempt to engage the expertise of UN institutions and lend international credibility to the IST while simultaneously rejecting a partnership role for the organisation, the Secretary-General rejected the request and has prohibited UN employees from assisting the IST in its current form.¹²¹

The process for the selection and appointment of Iraqi staff to the IST has been opaque. In April 2004, Salem Chalabi was appointed the IST's Director of Administration.¹²² Fears that the court would be susceptible to power struggles within Iraq's new ruling factions seemed confirmed when Chalabi was forced out of his post in September 2004 after being indicted for attempted murder by

¹¹² BBC News, *US War Crimes Experts Sent to Iraq* (7 March 2004) <http://news.bbc.co.uk/2/hi/middle_east/3540153.stm> at 1 October 2005; Suzanne Goldenberg, 'US Helps Iraq Prepare for War Crimes Trials', *The Guardian* (London, UK), 8 March 2004, 15.

¹¹³ Department of State, *January 2004 Quarterly Update*, above n 111, 43.

¹¹⁴ Department of State, *Quarterly Update to Congress: Section 2207 Report on Iraq Relief and Reconstruction* (April 2005) 30.

¹¹⁵ See comments of then RCLO head Greg Kehoe, in Vanessa Blum, 'A Slow Search for Justice in Iraq', *Legal Times* (Washington DC, US), 24 January 2005, 1.

¹¹⁶ *October 2004 Quarterly Update*, above n 59, I-28.

¹¹⁷ Ibid; Department of State, *Quarterly Update to Congress: Section 2207 Report on Iraq Relief and Reconstruction* (January 2005) I-41 ('*January 2005 Quarterly Update*').

¹¹⁸ Department of State, *Quarterly Update to Congress: Section 2207 Report on Iraq Relief and Reconstruction* (July 2004) I-24; Department of State, *October 2004 Quarterly Update*, above n 59, I-28: 'The RCLO has continued investigations of high value detainees (HVDs). More than 30 HVDs have been interviewed. IST investigators have *been involved* in the investigative process' (emphasis added).

¹¹⁹ Department of State, *October 2004 Quarterly Update*, above n 59, I-28; Department of State, *January 2005 Quarterly Update*, above n 117, I-41.

¹²⁰ Confidential discussions (Bellagio, Italy, 2004).

¹²¹ Discussions with UN officials (New York, US, February 2004).

¹²² Peculiarly, the announcement of his appointment was made by the spokesperson for Ahmad Chalabi's political faction, the Iraqi National Congress: 'US-Trained Lawyer to Head Court that Will Try Saddam', *Agence France Presse*, 22 April 2004.

an Iraqi judge.¹²³ The charges against Chalabi were unfounded, but reflected the degree to which control of the tribunal was politicised through its connections with exile groups.¹²⁴ Chalabi was replaced by an official known to be close to then Prime Minister (and political rival of Ahmad Chalabi) Ayad Allawi.¹²⁵ With the exception of the Chief Investigative Judge, the other tribunal staff remain anonymous in order to protect them and their families from insurgent attacks. However, the assassination of an investigative judge and his son in March 2005 revealed that the judge had been a political prisoner and torture victim under the Ba'ath, and that he was a 'high ranking member' of the PUK — one of the two main Kurdish political parties that waged a guerrilla war against the central government for three decades.¹²⁶ The political affiliations of the murdered judge raise the question of whether tribunal appointments have been made on the basis of a quota arrangement between the political parties now governing Iraq. These concerns have been amplified by a recent report that 'about half' of the IST judges 'are linked to previously underground opposition groups'.¹²⁷

With Ahmed Chalabi's return to power as Deputy Prime Minister in the government formed after the January 2005 elections, a second struggle over control of the IST erupted. On 20 July 2005, the De-Ba'athification Committee (established and largely controlled by Ahmad Chalabi) issued orders for the removal of nine senior staff of the IST, including the Administrator (Registrar).¹²⁸ It was claimed that the nine were dismissed on the basis of their prior membership of the Ba'ath Party, although this appears to take no account of the fact that membership of the party was a precondition for judicial service

¹²³ Nancy Youssef, 'Salem Chalabi Reportedly Removed from Post Overseeing Saddam Trial', *Knight Ridder News Service*, 7 September 2004.

¹²⁴ While he occupied the post of Administrator, Salem Chalabi frequently spoke directly to the press and showed a distinct willingness to publicly discuss the contents of sub judice evidence which had been collected against Saddam Hussein and others. Such loquacity strained the IST administration's appearance of impartiality. See, eg, National Public Radio, 'Judges Chosen for Saddam Trial', *All Things Considered*, 21 April 2004.

¹²⁵ Stover, Megally and Mufti, above n 67, 842.

¹²⁶ Robert Worth and Edward Wong, '13 Iraqi Soldiers are Killed in 2 Separate Bombings', *The New York Times* (New York, US), 3 March 2005, 12.

¹²⁷ Neil MacDonald, 'Saddam Tribunal Moves to Purge Ba'ath Loyalists', *Financial Times* (London, UK), 19 July 2005, 12: the former chief investigative judge of the Baghdad Central Criminal Court claimed that 'about half' of the IST's judges were linked to political groups opposed to the Ba'athist government, while an Iraqi Justice Ministry adviser is quoted in the same article as stating that '[t]he final decision was for the American experts to say this guy is to be a judge'.

¹²⁸ John Burns, 'Hussein Tribunal Shaken by Chalabi's Bid to Replace Staff', *The New York Times* (New York, US), 20 July 2005, 9.

under the old regime and did not necessarily imply an ideological commitment to the government of Saddam Hussein. A further 19 individuals were named as former members of the Ba'ath Party and alleged to be ineligible to hold their positions at the IST, including the Chief Investigative Judge.¹²⁹ If all 28 individuals are dismissed, it is unclear who would replace them as the IST attempts to commence its first trial. It also raises the question of whether any new appointments would be individuals favoured by Chalabi and his faction. At the time of writing, the outcome of the new power struggle remained unclear,¹³⁰ having been overshadowed by the political conflict around the drafting of a new national constitution.

Despite initial claims that trials would start in spring 2004, investigations proceeded slowly between April and December 2004 due to the deteriorating security situation. The RCLO's lead lawyer admitted in November that poor security had prevented the conduct of exhumations and the taking of witness statements in most parts of Iraq, except the Kurdish Regional Government-controlled north. Due to the high costs of securing exhumation sites and protecting personnel, one mass grave exhumation in al-Hatra cost over US\$7 million and had exhausted the exhumation budget of the RCLO.¹³¹ In January 2005, a US\$53 million increase in the RCLO's budget was authorised which enabled it to complete a further exhumation in al-Muthanna province (southern Iraq) at a cost of US\$6 million, and commence one in al-Amarah (eastern Iraq).¹³² The IST appears to have had some difficulty in protecting witnesses,¹³³ and relies on foreign security contractors and US personnel for the protection of investigative sites, evidence facilities and the construction of the court building.

IV THE POLITICS OF THE TRIALS

The tableau presented by Saddam Hussein's first court appearance in July 2004, when he was formally notified of the charges against him and remanded in custody, exemplified the risks inherent in using legalist forms to win political recognition for a new regime. The proceedings took place at the US military base Camp Victory, but were carefully managed to ensure that no US

¹²⁹ John Burns, 'Ignoring US, Chalabi Pursues Attempt to Fire Hussein Judge', *The New York Times* (New York, US), 27 July 2005, 12.

¹³⁰ Edward Wong, 'Iraqi Leader Vows to Block Purges on Hussein Tribunal', *The New York Times* (New York, US), 29 July 2005, 9; Neil MacDonald, 'Baathist Purge May Stall Hussein Trial', *Christian Science Monitor* (Boston, US), 28 July 2005, 6.

¹³¹ Discussions with RCLO lawyer (Bellagio, Italy, November 2004).

¹³² Department of State, *Quarterly Update to Congress: Section 2207 Report on Iraq Relief and Reconstruction* (July 2005), 1–28–9. Two further exhumations were due to commence in September 2005.

¹³³ 'Committee to Investigate Assassination of Witness', *Al-Sabah al-Jadeed*, 31 May 2005, as reported in Institute for War and Peace Reporting, *Iraq Press Monitor* No 251 available at <http://www.iwpr.net/archive/ipm/ipm_251.html> at 1 October 2005.

soldiers would appear in television footage. US personnel demanded that news crews at the hearing unplug their sound cables, but the cameramen only pretended to comply while continuing to record.¹³⁴ The reasons for trying to silence the dialogue between the judge and Hussein soon became apparent. Defiant and confident, Hussein declared himself to be President of the Republic, and asked which law was being applied to him.¹³⁵ He questioned the judge's legal authority to prosecute someone for acts committed in his capacity as President of the Republic and Commander-in-Chief, and justified the invasion of Kuwait as a defence of Iraq's national interests. He impugned the legal authority of the judge as an emanation of American power. All subsequent footage of Saddam's court appearances has been released without sound. The silencing of Saddam's court appearances reflects the dilemma of achieving a fixed pedagogical purpose through a political trial, in which political conduct will be susceptible to several plausible historical interpretations. This is well summarised by Koskeniemi:

This is the paradox: to convey an unambiguous historical 'truth' to its audience, the trial will have to silence the accused. But in such, it ends up as a show trial. In order for the trial to be legitimate, the accused must be entitled to speak. But in that case, he will be able to challenge the version of the truth represented by the prosecutor and relativize the guilt that is thrust upon him by the powers on whose strength the Tribunal stands.¹³⁶

Every didactic trial is both 'real' and 'staged', but where the staging becomes self-evident, the trial's ultimate basis in force is unmasked and its symbolic impact may dissipate.¹³⁷ A savvy defendant will do his utmost to bring about this unmasking by demonstrating that the prosecution's narrative is *at least as much of a political interpretation* as his own defence. As Kirchheimer observes, a political defendant may adjust his demeanour in court to achieve a proximate tactical advantage, but will always maintain a fixed star — his political goals. In essence, his justification is identification with his cause.¹³⁸

The requirements of legalism act as a form of self-restraint on the temptation to 'over-stage' the trial. With 18 months of intensive training by their US advisers, it is quite possible that the IST's Iraqi judges will have achieved sufficient mastery of contemporary international criminal law principles, forensic

¹³⁴ Robert Fisk, 'US Decided What the World Could See and Hear at Saddam Trial', *The Independent* (London, UK), 3 July 2004, 30.

¹³⁵ FDCH e-Media, 'Transcript: Saddam Hussein Court Hearing', *The Washington Post*, (Washington DC, US), 1 July 2004 available at <<http://www.washingtonpost.com/wp-dyn/articles/A20462-2004Jul1.html>> at 1 October 2005.

¹³⁶ Martti Koskeniemi, 'Between Impunity and Show Trials' (2002) 6 *Max Planck Yearbook of United Nations Law* 1, 35.

¹³⁷ Kirchheimer, above n 2, 215.

¹³⁸ *Ibid* 19.

techniques and trial methods to conduct technically competent trials. But no such training has been provided to defence lawyers, who under the *IST Statute* must be Iraqi practitioners¹³⁹ and who only gained semi-regular access to their clients 12 months after the investigations commenced. Access is particularly difficult because ‘high value’ defendants are held at the US military base Camp Cropper, which is accessible only via the dangerous ‘Route Irish’ leading to the airport. The lawyers do not have a practical capacity to visit their clients at will, because access to Camp Cropper requires advance permission from and coordination with US forces. As a result of Iraqi criminal procedure’s emphasis on the collection of evidence through the investigative judge, the under-resourced defence lawyers may have lost valuable opportunities to comment on evidence received by the investigative judge, request the judge to interview witnesses on behalf of the defence, or comprehend and question the forensic evidence compiled in the trial dossier. Lawyers have complained that no court documents have been provided to them, and that they have been unable to review any of the Iraqi Government documents seized by Coalition forces and likely to form an important basis of the trials.¹⁴⁰ On the current scenario, it appears that inequality of arms between the prosecution and defence will be a significant issue, and one that will undermine the trials’ aspirations to a didactics of legalism. Where the inequality of competence and resources between defence and prosecution is so great, the power dynamics upon which the proceedings rest are inevitably exposed.

The transitional government formed after the January 2005 elections has not had significant success in stabilising Iraq or improving the delivery of essential services.¹⁴¹ The insurgency has not abated and there are disturbing indications of

¹³⁹ Above n 72, arts 18(c), 20(c)(2).

¹⁴⁰ See CNN, *Tariq Aziz’s Lawyer Criticizes Proceedings* (23 June 2005) <<http://cnn.at/2005/WORLD/meast/06/23/tariq.aziz/index.html>> at 1 October 2005; Ibon Villedabeitia, ‘Saddam Defence Team Kept in the Dark — Chief Lawyer’ *Reuters*, 17 June 2005; John Leyne, BBC, *Saddam Lawyers ‘Left in the Dark’* (10 June 2005) <http://news.bbc.co.uk/2/hi/middle_east/4079248.stm> at 1 October 2005. See also William Langewiesche, ‘Ziad for the Defense’, (2005) 295(5) *The Atlantic Monthly* 65, 65–72: Langewiesche notes that assumption among tribunal officials is that ‘there are public defenders already in Baghdad who are agreeably anonymous, who comply with the nominal requirements of a defense, and who can be counted on not to gum up the procedures or go wild in public’: at 72.

¹⁴¹ See, eg. Farnaz Fassihi, ‘Iraq’s Sunnis Remain Key Part of Insurgency — Hopes Fade that Elections Would Divide and Conquer Disparate Movement’, *The Wall Street Journal* (New York, US), 19 May 2005, 12; Patrick Cockburn, ‘Diary from Mosul’, *London Review of Books* (London, UK), 19 May 2005, 34–5; CNN, *More than 8,000 Iraqis Killed in Insurgent Attacks* (30 June 2005) <<http://edition.cnn.com/2005/WORLD/meast/06/30/iraq.main/>> at 1 October 2005; Andy Mosher and Bassam Sebt, ‘Another Year of Living Misery in Baghdad’, *The Washington Post* (Washington DC, US), 24 June 2005, 1; Rami Khouri, ‘Rebuilding a Stable, Peaceful Iraq Will Be a Slow, Generation-Long Process: Interview with Toby Dodge’, *The Daily Star* (Beirut, Lebanon), 1 July 2005; Borzou Daragahi, ‘A Tenuous Grip on Sovereignty’, *Los Angeles Times* (Los Angeles, US), 28 June 2005, 8; Jonathan Finer and Omar Fekeiki, ‘Tackling Another Major Challenge in Iraq: Unemployment’, *The Washington Post* (Washington DC, US), 20 June 2005, 10; Niko Kyriakou, ‘Development: Life in “Liberated” Iraq a Disaster, UN Report Says’, *Inter Press Service*, 13 May 2005.

a real risk of sectarian violence for the first time in Iraq's history.¹⁴² The new government has started to look to the trials as a potential source of much-needed legitimisation, and there have been several instances in which government officials have demanded a rapid beginning and end to the trial of Saddam.¹⁴³ High level government officials have also made statements prejudicial to the accused, insisting that their guilt is self-evident and that trials should therefore not last long.¹⁴⁴ To its credit, the IST has refused to announce a timetable at the behest of the Government, but it is clearly feeling the pressure to bring the trial of Saddam Hussein forward. In June 2005, it announced that Saddam would be included

¹⁴² The causes of rising sectarian tension in Iraq are complex, but I would suggest two main reasons. First, the governance arrangements instituted by the occupiers in the first two years of the occupation empowered political parties whose ideology and platform were sect-based (see, for example, the discussion of the Da'wa Party, above n 33 and accompanying text) and which had a strong interest in encouraging (and rewarding) political mobilisation along the lines of sect affiliation. The formation of a transitional government dominated by these parties appears to have accelerated the process, with sect-based militia forces (such as the Badr Brigades) coming to dominate security services and receiving state support for their own vigilante activities. As noted above, Sunni domination of the Iraqi State was not predicated on a sectarian ideology or a politics of 'Sunni identity', and as a result the Sunni in post-war Iraq lacked forms of political mobilisation and representation outside of discredited state structures. They were rapidly marginalised by better-organised Shi'a religious parties and exile factions in terms of access to new institutions and resources, and learned a lesson about the necessity of organising on the basis of sect-affiliation. 'Sunni' representative groups have subsequently emerged, strengthening the political influence of the Sunni clergy to an unprecedented extent. Antagonism has also been increased by the terrorist tactics of Salafist and Wahhabist groups among the (diverse) insurgency, which regard the Shi'a as apostates and have targeted mosques.

The second cause is more diffuse, but pervasive. As Iraq analyst Toby Dodge observes, the chaos and insecurity that has gripped Iraq since April 2003 have destroyed many basic means of survival and stability for much of the population. Local level networks and institutions become a substitute source of protection and subsistence, and a vehicle for access to essential resources. These networks operate at the level of the street, the neighbourhood and township, and legitimise their increased influence through the language of religious authority and kinship. Strong incentives are created to foreground a sectarian or regional identity over other bases of political organisation, even in the absence of any real ideological commitment at the individual level: see Khouri, above n 141.

¹⁴³ See 'Talabani: Saddam to Stand Trial within Two Months', *Al-Sabah al-Jadeed*, 1 June 2005, as reported in Institute for War and Peace Reporting, *Iraq Press Monitor* No 253 available at <http://www.iwpr.net/archive/ipm/ipm_253.html> at 1 October 2005; 'Barzani Calls for Speedy Trial for Saddam', *Al-Mutamar*, 8 June 2005, as reported in Institute for War and Peace Reporting, *Iraq Press Monitor* No 258 available at <http://www.iwpr.net/archive/ipm/ipm_258.html> at 1 October 2005; 'Speed Up Saddam's Trial, Allawi Tells Court', *Reuters*, 17 August 2004; 'Former Saddam Henchmen to Face Trial from Next Week: PM', *Agence France Presse*, 15 December 2004; 'Iraqi FM Hopes for Saddam Trial by Year's End', *Agence France Presse*, 21 June 2005.

¹⁴⁴ In an interview in June, Abdul Aziz al-Hakim, leader of the Supreme Council of the Islamic Revolution in Iraq (SCIRI), stated: 'There is no doubt Saddam deserves more than just execution': 'Iraq Shi'ite Leader Wants Insurgents Wiped Out', *Reuters*, 24 June 2005; Hassan Jabur Ayyal, 'Saddam Trial Needs to Find Him Guilty', *Al-Bayan*, 31 May 2005 as reported in Institute for War and Peace Reporting, *Iraq Press Monitor* No 255 available at <http://www.iwpr.net/archive/ipm/ipm_255.html> at 1 October 2005, (*Al-Bayan* is an organ of the Da'wa Party).

among those charged in relation to events in Dujail, a reversal of its earlier position that Hussein would not be among the first tried.¹⁴⁵

The assumption implicit in the government's demand for a speedy trial is that a 'manichean politics' which reveals the crimes associated with the past regime will be an effective politics. This is plausible, if we consider the results of the interview study undertaken in 2003. The demand for speedy retribution was strong among participants in the 2003 study, and the process of public accusation and remonstrance against the Ba'athist leaders could well have a galvanising and cathartic effect among the Iraqi population. Because the post-war environment has been so turbulent and insecure, a trial which methodically exposes the atrocities committed under the previous regime may provide the first opportunity for many Iraqis to collectively discuss and recall their experiences. Nevertheless, the strategy could also backfire. An emphasis on denunciation and exposé invites a more open consideration of the political context of the trials and their provenance, which will inevitably raise the question of the American role in the trials. As noted above, as early as 2003, suspicion of US interference in the trial process was high and polls on Iraqi attitudes towards US forces strongly suggest that general mistrust of US intentions has only increased.¹⁴⁶ The undeniably substantial American role in the tribunal may undermine the credibility of the trials' political message, as it raises the suspicion that the tribunal has been manipulated in order to conceal the US' own association with the government of Saddam Hussein throughout the 1980s. The participants in the 2003 interview study showed considerable awareness of this history. Attention to the US role in the trials may also inhibit the population's willingness to identify with the trials as acts embodying a sovereign and self-governing Iraqi people, and so diminish — rather than enhance — the propensity to see the new Iraqi government as effective and competent.

A potentially more divisive political challenge is that the tribunal could be regarded as driven by a sectarian and party-political agenda. As noted above, there are grounds to suspect that appointments to the tribunal have been made on the basis of affiliations with parties forming the new ruling coalition. Some of

¹⁴⁵ The IST has announced its intention to prosecute Saddam Hussein and some of his most notorious lieutenants in relation to fourteen incidents. According to a list obtained by Associated Press, and published in '14 Incidents Saddam Will Be Tried on', *Associated Press*, 6 June 2005, these are: the 1987–88 Anfal campaign, a depopulation plan in which hundreds of thousands of Kurds were killed or expelled from northern Iraq; mortar bombardment of Kirkuk; the events of 1991 in southern Iraq (Saddam's suppression of a Shi'ite uprising following the US-led Gulf War in Kuwait); the massacre of Dujail (the 1982 execution of at least 50 Iraqis in a Shi'ite town 50 miles north of Baghdad, in retaliation for a failed assassination attempt against Saddam); forced emigration of the Fayli Kurds, thousands of whom were pushed from northern Iraq into Iran; events in Halabja (a Kurdish town where a chemical weapons attack killed an estimated 5000 people in 1988); the execution of 8000 members of the Barzani tribe (a powerful Kurdish clan to which the current KDP leader, Massoud Barzani, belongs); the 1990 invasion of Kuwait, which Iraqi forces occupied for seven months until being expelled by a US-led coalition during the 1991 Gulf War; execution of prominent religious figures; execution of prominent political figures; crimes against religious parties; and the drying of the southern marshes, which caused great suffering among the thousands of Shi'ites living and fishing in the area.

¹⁴⁶ For a compilation of polls of Iraqi opinion, see Michael O'Hanlon and Adriana Lins de Albuquerque, Brookings Institution, *Iraq Index: Tracking Variables of Reconstruction and Security in Post-Saddam Iraq* (2005) <<http://www.brookings.edu/dybdocroot/fp/saban/iraq/index20050630.pdf>> at 1 October 2005.

these parties, such as the Da'wa Party and the two principal Kurdish parties, suffered directly at the hands of the Ba'athist regime and pursue a politics which is expressly based on sect and ethnic identity. There is no doubt that Kurds and the southern Shi'a were the victims of the worst mass violence inflicted by the Ba'athist government, but a case-selection which prioritises these events at the expense of other (albeit smaller) incidents may be perceived as driven by a retributivist politics of sect or ethnicity and therefore not credible. This perception seemed unlikely in 2003, when participants in the interview study generally rejected a sect-based interpretation of victimhood and emphasised a common national experience of suffering. But the intensification of sectarian and ethnic politics since 2003¹⁴⁷ makes such a reading possible. The first case scheduled to be tried by the tribunal concerns neither of the worst campaigns of violence, but focuses on the murder and disappearance of several hundred persons in Dujail. While certainly worthy of prosecution at some stage, the prioritisation of the Dujail case may prompt questions about whether the tribunal has chosen to focus on crimes which targeted members and supporters of political parties that now control the government. The Dujail events arose out of an assassination attempt on Saddam Hussein by members of the Da'wa Party, in part out of retaliation for his attack on Iran. Support for the Da'wa Party was reportedly strong in Dujail,¹⁴⁸ although the town itself had a mixed population of Sunni and Shi'a denominations.

V CONCLUSION

In this article, I have argued that the trials of the IST should be read as a particular kind of political trial: a successor trial of a prior regime, in which the political contestation revolves around the legitimisation of the new order, and the delegitimation of the old. I have contended that although the prevailing discourse of 'international justice' tends to deny or repress the constitutive politics of successor trials, these political tensions invariably re-emerge. In the case of the IST, they take the form of a strong tension between an aspiration to liberal legalist politics, and a politics of manichaeism driven by an imperative to stabilise the precarious post-war order in Iraq. I have traced the circumstances leading to the creation of the IST and the political decisions and disputes that shaped its form and evolution. I have argued that it is reasonably regarded as a US dominated institution, the reception of which among the Iraqi population is very uncertain. Its ability to stand as a model of liberal legal values and didactics is questionable, while its efficacy as a means of legitimising the new order may run afoul of the sectarian politics of post-war Iraq. Overall, the IST appears to be afflicted by many of the same kinds of difficulties that have plagued the US invasion and occupation: international hostility, dubious legality, Iraqi ambivalence and the taint of power politics. Only time will tell what kind of a legacy it will leave.

¹⁴⁷ See above n 142.

¹⁴⁸ John Burns, 'A Town that Bled under Hussein Hails His Trial', *The New York Times* (New York, US), 3 July 2005, 1. The *New York Times* story varies significantly from another account, which describes the ambush on Hussein's motorcade as lasting two hours and claiming the lives of several of his bodyguards: see Said Aburish, *Saddam Hussein: The Politics of Revenge* (2000) 221.