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## THE TRIAL OF SADDAM HUSSEIN

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### Summary

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- Saddam Hussein and a number of other high-ranking Ba'athists are to stand trial for the massacre in 1982 of more than one hundred civilians in the village of Dujail. Other persons expected to appear before the Court in the future include Ali Hassan al-Majid ('Chemical Ali') and former Deputy Prime Minister Tariq Aziz.
- The Iraqi Higher Criminal Court, which will try them, is a special court established to try Iraqi nationals and residents of Iraq for crimes of genocide, crimes against humanity, war crimes and a small number of domestic Iraqi offences relating to the abuse of political power.
- The Court was originally established as the Iraqi Special Tribunal under the direction of the Coalition Provisional Authority. A new law being adopted by Iraq's Transitional National Assembly will reconstitute the Court, changing its name and making other changes designed to bring it further within the Iraqi criminal justice system.
- This paper describes the Court and addresses such questions as these:
  - Can the Court deliver fair trials, given the ongoing security crisis in Iraq, the damaged state of the Iraqi justice system, and rumours of political interference?
  - Are there sufficient due process guarantees to ensure a fair hearing for the accused?
  - Why did the Security Council not set up a tribunal? What is being done to provide international assistance for the trials?
  - Will this be a repeat of the televised Milosevic trial, with attendant possibilities for grandstanding by the accused?

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## Introduction

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The Iraqi Higher Criminal Court was established to bring to justice Iraqi nationals and residents of Iraq accused of atrocities and certain other crimes committed during the thirty-five year period of Ba'athist power. The Court was originally set up by the Iraqi Governing Council in late December 2003. At this time, Iraq was still occupied by the United States and its allies, and the Coalition Provisional Authority had to delegate special authority to the Council for this purpose. Iraq's Transitional National Assembly is in the process of adopting a new Statute for the Court aimed at legitimizing its status as an Iraqi institution. The new Statute changes the name of the Court from the Iraqi Special Tribunal to the Iraqi Higher Criminal Court and makes certain other changes designed to bring the Court more firmly within the framework of the Iraqi criminal justice system.<sup>1</sup>

On 13 December 2003, three days after the Tribunal was established, Saddam Hussein was found hiding in a small hole in the ground outside his home town of Tikrit. After he had spent six months in US custody as a 'prisoner of war,' legal authority over Saddam was transferred to the Iraqi Interim Government on 30 June 2004.<sup>2</sup> The next day he was led in chains to a Baghdad court to hear preliminary charges laid against him by Iraqi authorities. Finally, in July 2005 the Court announced that formal charges had been laid against Saddam and three others in relation to crimes committed in the village of Dujail in 1982. Although investigations into other more notorious atrocities are ongoing, the Court has confirmed that the Dujail trial will commence on 19 October, just four days after the planned referendum on Iraq's new Constitution.

On the eve of its historic first trial, this Briefing Paper explains the structure, jurisdiction, and procedure of the Iraqi Higher Criminal Court, exploring its capacity to deliver fair trials to Saddam Hussein and his Ba'athist colleagues and its credibility both within and outside Iraq. It addresses issues including the influence of international law and the role of foreign experts, the independence of the judiciary and the rights of the accused. It concludes that the groundwork for a fair and impartial process has been laid. The Court is equipped with a strong set of institutional protections and its judiciary has received extensive training on the importance of due process. International experts will also be on hand to provide guidance on the trial of complex international crimes. Whether trials are fair and impartial in practice will depend on the strength of the Court's commitment to these values, and its ability to surmount problems including political pressure and ongoing security threats.

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## Charges against the Ba'athists

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Saddam Hussein and other Ba'athist leaders stand accused of serious crimes including genocide and crimes against humanity. Preliminary charges laid against Saddam in July 2004 referred to, among other

things, the Anfal campaign against the Kurds in 1988, the gassing of Kurdish villagers in Halabja in 1988, the invasion of Kuwait in August 1990, the suppression of the Kurdish and Shia uprisings in the aftermath of the 1991 Gulf War and the killings of thousands of political activists over a thirty-year period. On 17 July 2005, the Court's chief investigative judge announced at a press conference that formal charges had been laid against Saddam and three other high-ranking Ba'athists including former Vice President Taha Yassin Ramadan and the former head of the intelligence service, Barzan Ibrahim Hassan al-Tikriti (also Saddam's half-brother).<sup>3</sup> The charges relate to the massacre of 143 civilians in the town of Dujail following an assassination attempt on Saddam in 1982. The chief investigative judge has indicated that further charges relating to events such as the Anfal campaign and the crushing of Kurdish and Shia rebellions will be laid in the coming months.

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## A domestic court?

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Unlike Slobodan Milosevic, whose current trial in The Hague is a thoroughly international process, Saddam Hussein and his colleagues will be tried in their homeland before a court that forms part of Iraq's domestic legal system. Whereas the International Criminal Tribunal for the former Yugoslavia was established by resolution of the United Nations Security Council, is operated wholly by international judges and prosecutors and applies international law, the Iraqi Higher Criminal Court was established by Iraqi authorities (although it was initially a product of the foreign occupation), is staffed overwhelmingly by Iraqis and relies heavily on Iraqi criminal law. Despite this strongly local flavour, a number of key international elements have been built into the Court's structure and practice. For example, the Statute makes provision for international advisers and there is an option (which may not be exercised) for international judges to be appointed to the Court's judiciary. The definitions of most of the crimes that the Court has power to try are based on settled international definitions and the judges may rely on international case law to assist them in reaching their decisions.

A fusion of international elements into an otherwise domestic legal process has come to be known as the 'hybrid' approach to criminal justice. Other contexts of 'transitional justice' where hybrid processes have been adopted include East Timor, Kosovo and Cambodia. Each of these courts has a varying degree of international involvement. While they may lack international engagement to the extent enjoyed by the United Nations tribunals set up by the Security Council after the conflicts in the former Yugoslavia and Rwanda, hybrid tribunals are attractive, for reasons including their lower cost and their proximity to affected populations. They also provide important opportunities for building capacity among local judges and lawyers, thereby contributing to the rehabilitation of local legal institutions.

The model chosen for Iraq has less of an international element than these precedents. From the moment of Saddam Hussein's capture by Coalition

forces, it became clear that the Iraqi wish was for his trial to be essentially Iraqi. 'Iraqis should deal with the crimes of Iraqis' was the call by one member of the Governing Council, and this view was shared by the United States. President George W. Bush said that, after all, 'They [the Iraqis] were the people who were brutalized by this man.' And yet, a purely domestic Iraqi process was rejected by the Court's architects. In part this reflected widespread scepticism about the ability of the Iraqi justice system to conduct the complex trials associated with international crimes. But it also reflected demands for international participation in the trial of a man who is charged with crimes of universal concern.

In the years prior to the current conflict, human rights organizations had called on the United Nations Security Council to create an international tribunal for Iraq along the lines of those established for the former Yugoslavia and Rwanda. But without the possibility of arresting the key perpetrators, these proposals met with little success. There remained calls for a truly international court to be set up. But now that a permanent International Criminal Court has been established, the ad hoc approach, associated with considerable expense and delays, has largely fallen out of favour. The International Criminal Court itself is unable to try Saddam Hussein and other Ba'athist leaders because Iraq is not a party to its Statute and, although non-parties may by special declaration accept the Court's jurisdiction, the Court cannot try crimes committed before 1 July 2002, the date on which the Statute entered into force. Thus virtually all of the atrocities committed during the period of Saddam Hussein's rule lie beyond the reach of the International Criminal Court. One way or another, the Iraqi Higher Criminal Court is undoubtedly more of an Iraqi than an international court. In practice, however, there has been and will no doubt continue to be a significant international, or at least US, contribution.

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## Political and legal context

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While there have been calls for further 'internationalization' of the Iraqi Higher Criminal Court, the international elements that it does have carry with them risks. The politics surrounding the establishment of the Court have raised concerns in particular about the level of American influence. The United States decided not to prosecute Saddam as a 'prisoner of war,' although it was entitled to do so under the laws of war,<sup>4</sup> thus avoiding the inevitable accusations of victor's justice that plague trials of deposed leaders conducted by invading powers. Instead it agreed to hand Saddam over to the Iraqi authorities for trial. Behind the scenes, however, lawyers from the United States and the United Kingdom are known to have contributed significantly to the drafting of the original Statute of the Court, and the establishment of the Court under the Coalition Provisional Authority could not have proceeded without Washington's approval. The US Department of Justice has committed US\$75 million towards the Court's start-up and it is largely with the assistance of

the US Justice Department's Regime Crimes Liaison Office that the investigations and the preparation for the prosecutions are taking place. Irrespective of its veracity, the perception of the Court as a disguised vehicle for US retribution is likely to colour Saddam Hussein's defence. He has already insisted that his trial will be a political show trial. 'I do not want to make you feel uneasy,' he told the judge during the proceedings in July 2004, 'but you know this is all theatre by Bush to help him with his election campaign.'

In recent months the Iraqi Transitional Government has consolidated its control over internal affairs and American influence appears to have subsided. Concerns about the independence of the Court are now focused on political pressure emanating from the Iraqi leadership. There are rumours that the Court has been pressured to try and convict Saddam as quickly as possible. Political leaders hope that the trial will be interpreted by the Iraqi people as a sign of progress and control in the current climate of chaos. Privately, they also hope it will quell Sunni resistance by undermining the high stature Saddam still enjoys amongst loyalist segments of the Sunni community. It is thought by many that these political considerations explain why the Court has decided to press ahead with the Dujail trial notwithstanding the fact that investigations into other more dramatic crimes are still months away from completion.

Another challenge levelled at the Court concerns its fundamental legality. Modelling his performance on Milosevic's virulent rejection of the legitimacy of the International Criminal Tribunal for the former Yugoslavia, Saddam Hussein has already insinuated that the Iraqi Higher Criminal Court was established under dubious legal authority. During his initial court appearance in July 2004, he asserted the continuing existence of his presidency of Iraq and challenged the legitimacy of a judicial process established 'by order of the invasion forces'. The same themes have dominated media interviews given by Western lawyers claiming to represent Saddam. The theoretical support such claims have attracted reflects ongoing controversy about the legality of the invasion of Iraq in March 2003. Indeed concerns about the legal validity of the Court's original Statute are said to have motivated the Transitional National Assembly to reconstitute the Court under a new, unequivocally local law. It is hoped this move will forestall arguments raised by the defence that the Court lacks legal authority to conduct the trials.

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## Jurisdiction of the Court: who may be prosecuted and for what crimes?

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### People

The Court may try 'any Iraqi national or resident of Iraq'. In some respects this jurisdiction is restrictive. For example, members of the 'coalition of the willing' have been insulated from prosecution for possible war crimes committed during the course of the conflict. In keeping with the jurisdiction of international criminal

tribunals, 'legal' (i.e. non-natural) persons, including corporations, have also been placed beyond the Court's reach. In other respects, the Court's 'personal' jurisdiction is expansive. The International Criminal Tribunals for the former Yugoslavia and Rwanda may try only those 'persons responsible for serious violations', while the Special Court for Sierra Leone may try only those bearing 'the greatest responsibility' for relevant crimes. No such limitation applies to the Iraqi Higher Criminal Court. So far, fears that the Court will become mired in trials of 'small fish' seem unfounded as investigations have concentrated on high-ranking members of the Ba'athist regime. Besides Saddam Hussein other Ba'athist leaders expected to stand trial before the Court include former Ba'ath party regional commander Ali Hassan al-Majid ('Chemical Ali'), former Deputy Prime Minister Tariq

Aziz and former Deputy Prime Minister and Vice President Taha Yasin Ramadan.

### Crimes

The Court has jurisdiction to try a limited range of international and Iraqi crimes. The relevant international crimes are genocide, crimes against humanity and war crimes, defined in terms that mirror almost exactly the definitions provided in the Rome Statute of the International Criminal Court. Three domestic Iraqi offences relating to the abuse of political power have also been included (see Box 1). Interestingly, among the three Iraqi offences is 'the abuse of position and the pursuit of policies that may lead to the threat of war or the use of armed forces of Iraq against an Arab country'. This is an Iraqi variant of the crime of aggression, a crime so controversial that

#### BOX 1: CRIMES WITHIN THE JURISDICTION OF THE IRAQI HIGHER CRIMINAL COURT

Article 1 paragraph 2 of the Statute gives the Court power to try 'any Iraqi national or resident of Iraq' accused of certain crimes 'committed since July 17, 1968 and up until and including May 1, 2003, in the territory of the Republic of Iraq or elsewhere'.

The crimes that the Court may try are set out in Articles 11–14 of the Statute.

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group:

1. killing members of the group;
2. causing serious bodily or mental harm to members of the group;
3. deliberately inflicting on the group conditions calculated to bring about its physical destruction in whole or in part;
4. imposing measures intended to prevent births within the group; and
5. forcibly transferring children of the group to another group.

This definition is lifted from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The same definition appears in the Rome Statute of the International Criminal Court.

Crimes against humanity comprise a category of crimes prosecuted by the Nuremberg Tribunal, but further defined in the Rome Statute of the International Criminal Court. They cover acts including murder, deportation, torture, rape and persecution 'of any identifiable group or a collectivity of population on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law'.

The war crimes listed in the Statute of the Iraqi Higher Criminal Court include attacks upon civilians, extensive destruction of property, use of poisoned weapons and gases, rape, torture, wilful killing and the taking of hostages. They are almost identical to those set out in the Rome Statute of the International Criminal Court.

The 'Iraqi' offences within the jurisdiction of the Court relate mainly to the abuse of political power. They are set out in Article 14 as follows:

'The Court shall have the power to prosecute persons who have committed the following crimes:

First: The attempt to manipulate the judiciary or to influence the functions of the judiciary.

Second: The wastage and squander of national resources, pursuant to *inter alia* the provisions of Article 2 (g) of the Law punishing those who conspire against the security of the homeland and saboteurs of the regime Law No. 7 of 1958.

Third: The abuse of position and the pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country, in accordance with Article 1 of Law No. 7 of 1958.'

If, during a prosecution for genocide, crimes against humanity or war crimes, the elements of the crime are not established, the Court may instead try the crime under Iraqi criminal law if satisfied that the act in question was punishable under Iraqi law at the time of its commission.

no international definition has yet been agreed. The inclusion of this crime within the Court's Statute raises the possibility that Iraq's aggressive wars against Iran (1980–88) and Kuwait (1990–91) may come before the Court in some form, setting an important international precedent.

Of all the crimes the Ba'athists are accused of, charges of genocide in connection with the Anfal campaign against the Kurds in 1988 are likely to attract the greatest attention. Despite its categorization by some as the 'crime of crimes', however, genocide is notoriously difficult to prosecute because of the need to prove a specific intent to destroy, in whole or in part, the persecuted group. It took the International Criminal Tribunal for the former Yugoslavia seven years to secure its first, and to date only, genocide conviction arising out of the attacks on Muslims in Bosnia and Herzegovina, and even this conviction was reduced on appeal to the lesser crime of aiding and abetting genocide. Efforts to prove Milosevic's culpability are said to be floundering for lack of strong evidence of his direct involvement in ordering genocide. Commentators are already predicting similar evidential problems for Saddam Hussein's likely genocide trial given his refusal throughout his leadership to sign his name to implicating orders.

In addition to its power to prosecute crimes on behalf of the Iraqi state, the Iraqi Higher Criminal Court may also hear civil cases brought by Iraqi individuals and families who suffered as a consequence of crimes committed by the former regime. This power has been added by the Court's new Statute and is designed to bring direct redress in the form of compensation to the victims of Ba'athist brutality. It is hoped this mechanism will bring the Court closer to the Iraqi people while at the same time enhancing its role as a forum for establishing the historical record of Ba'athist violence. This latter function is likely to prove significant if, as is rumoured to be the case, the Court opts for a small number of criminal prosecutions for leading figures in a bid to speed up the process and limit opportunities for political grandstanding by the accused.

### **Committed when?**

The Court's jurisdiction is solely retrospective. It may try the crimes described above only if they occurred during the thirty-five year period of the Ba'ath regime, i.e. from 17 July 1968 when the coup took place until 1 May 2003, the day US President Bush declared 'major hostilities' at an end following the Coalition invasion of Iraq in March 2003. Compared with other international and hybrid criminal tribunals, the Court's temporal jurisdiction is extremely long. The International Criminal Tribunal for Rwanda, for example, deals with atrocities that occurred only in 1994, while the Special Court for Sierra Leone may only try specified crimes committed from 1996 onwards.

### **Committed where?**

Accused persons may be tried for crimes committed in Iraq and 'elsewhere'. The Court has therefore been granted extra-territorial jurisdiction. For example, this permits the Court to try crimes committed in Iran or

Kuwait. During his court appearance in July 2004, Saddam challenged the notion that his activities in Kuwait were extra-territorial, claiming defiantly that 'Every Iraqi knows Kuwait is part of Iraq'.

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## **The Court's judges**

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The process of appointing judges to the Court's judiciary has been highly problematic. Because of security concerns, Iraqi authorities have refused to announce the names of appointees. The identity of the judge who handled the preliminary charges against Saddam Hussein was withheld in most Iraqi and international media. Reportedly, a number of senior Iraqi judges declined invitations to sit on the Court after death threats were made against them and, despite tight security, a judge and a lawyer employed by the Court were fatally shot in March 2005. Nevertheless, the secrecy surrounding the appointments process has also fuelled rumours about politicization. Members of the Ba'ath Party are precluded from employment at the Court, although as critics point out, victims of Saddam's repression were among those considered for appointments to the bench, raising issues of bias in the other direction. Salem Chalabi, speaking publicly about his dismissal as General Director of the Court, accused the Interim Prime Minister Ayad Allawi of attempting to take 'political control' of the Court, a process that others claim has extended to the selection of judges. This issue was recently reignited when the Iraqi parliament announced plans to review the 'credentials' of the Court's judges, prosecutors and staff. Despite these threats, the new Statute preserves appointments made under the previous arrangements, thereby providing continuity and a degree of stability for the Court.

One of the most controversial provisions of the Statute permits, but does not require, the appointment of international judges where another state is party to a complaint. This means that foreign judges could be invited to join the Court in the event that it tries crimes connected with the aggressive wars against Iran or Kuwait. Under the original Statute, the option to appoint international judges was not limited to proceedings involving another state. The narrowing of this arrangement under the new Statute reflects efforts to anchor the process more firmly in the Iraqi justice system. Allegedly, the original provision dealing with international judges was inserted at the insistence of the Coalition Provisional Authority and met a cool reception in Baghdad. The Minister of Justice at the time remarked publicly: 'The presence of foreign judges will undermine [Iraqi] sovereignty and would undercut the value of the Iraqi judiciary.' Human rights organizations and the international justice community, however, argued that international involvement was crucial to alleviate reservations within and outside Iraq about the capacity of the Iraqi judiciary to dispense justice in accordance with international standards.

Clearly, three decades of Ba'athist power have caused great damage to the once strong Iraqi judiciary. The highest judicial authority in Iraq, the Council of Judges, was abolished in 1979 and the courts were brought firmly under executive control. Corruption was

**BOX 2: STRUCTURE OF THE COURT**

The Court has one or more trial chambers ('Criminal Courts'), each composed of five judges, and an appeals chamber ('Cassation Commission') with nine members. Investigative judges are responsible for conducting pre-trial investigations.

According to the terms of the Statute, members of the Court's judiciary must be of 'high moral character, integrity and uprightness' and must have experience in criminal law. They must meet the criteria for appointment under the Judicial Organization Law No. 160 of 1979.

All trial, appellate and investigating judges are appointed by the Iraqi government following nomination by the Council of Judges.

Judges may be disqualified if they are convicted of a felony, make false representations or fail to carry out their duties. The decision to disqualify a judge is taken by the Judges and Prosecutors Affairs Committee, an elected committee comprising five judges and prosecutors.

International experts may be appointed to assist the judges with international law issues and the experience of similar tribunals. These experts are appointed on the advice of the international community including the United Nations.

The Court also possesses a Prosecutions Department and an Administration Department.

rampant and those judges who dared to defy political orders were dismissed and in some cases imprisoned. Following a legal needs assessment mission in August 2003, the United Nations Office of the High Commissioner for Human Rights concluded that the Iraqi legal system was 'chronically dysfunctional' and 'not capable of rendering fair and effective justice for violations of international humanitarian law and other serious criminal offences involving the prior regime'.

A series of reforms initiated by the Coalition Provisional Authority has gone a considerable way towards restoring confidence in the Iraqi judiciary. A Judicial Review Committee established in June 2003 vetted each of Iraq's 860 judges and prosecutors, removing and replacing a total of 176 personnel. Control of the judiciary has been transferred from the Ministry of Justice to the newly re-established Council of Judges, ensuring that the judiciary once again functions as a separate branch of government. Judicial salaries have been significantly increased to tackle the risk of corruption. In addition, a series of training programmes has been launched for Iraqi judges and prosecutors in areas including human rights, international law and constitutional law. For example, the UK Department for International Development has provided £2.1 million funding for a 'Support to Justice Sector' programme administered by the International Legal Assistance Consortium that is providing training in international human rights law to over 800 Iraqi judges, lawyers and prosecutors. In early May 2004, twenty-eight Iraqi judges and Ministry of Justice officials travelled to The Hague to discuss the 'Rule of Law' in Iraq with leading jurists including the recently retired Lord Chief Justice of England and Wales, Lord Woolf, and US Supreme Court Justices Anthony Kennedy and Sandra Day O'Connor. Several other training sessions, delivered by the International Bar Association and shrouded in secrecy for security reasons, have been held in the UK and elsewhere throughout 2005. The Court's judges have been faced in these sessions with mock trial exercises designed to

prepare them for the complex international legal issues that are likely to arise in the forthcoming trials.

The Statute also provides for the appointment of international experts tasked with advising the judges on points of international law and the experience of other international and hybrid tribunals. The presence of international advisers has provided some reassurance about the Court's competence to try complex international crimes. However, their role has been controversial. The original Statute made the appointment of international experts mandatory and guaranteed them a crucial role in monitoring compliance by the judiciary with the Court's rules of due process. Reportedly, the Iraqi legal profession found this supervision offensive, and under the new Statute the appointment of international advisers is discretionary and their official monitoring role has been removed. In practice, however, the advisers are still likely to play an important role. It appears that most of the international experts assisting the Court's judiciary have been provided by the US government and they are thought to be the only ones to have access to important evidence that has been classified 'for American eyes only'.

In addition to trial and appellate judges, the Court's judiciary includes investigative judges in charge of conducting pre-trial investigations of persons accused of crimes within the Court's jurisdiction. Although they may appear unfamiliar to lawyers trained in the common law tradition, investigative judges have long been a feature of the Iraqi legal system and reflect the influence of the 'inquisitorial' judicial model evident in France and many other countries. Whereas in common law systems criminal investigations are carried out under the authority of public prosecutors, in 'inquisitorial' systems the authority is in the hands of investigative judges. Investigative judges at the Iraqi Higher Criminal Court are appointed on the same terms as their trial and appeals chamber colleagues. They may begin investigations on the basis of evidence received from

any source including non-governmental organizations and law enforcement agencies and, when satisfied that a *prima facie* case exists, will issue an indictment. Once they commence, the actual trials will follow the more familiar format of prosecution and defence. Investigative judges may be assisted by international experts appointed by the Chief Investigative Judge. In March 2004, the US Justice Department's Regime Crimes Liaison Office provided 50 investigators and lawyers to assist with the process of drawing up indictments. Their contributions became visible in mid-October 2004 when US forensics and legal experts revealed to the international media the gruesome mass graves excavated in Hatra, northwestern Iraq.

As with the Court's judiciary, prosecutors may be assisted by international experts appointed by the Chief Prosecutor.

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### **Punishment and the question of the death penalty**

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The sentences which the Court will be able to award are those specified under domestic Iraqi law. The difficulty here lies in a decision by the Iraqi Interim Government to reinstate capital punishment for certain offences following its suspension by the Coalition Provisional Authority. While there is clearly strong support for the death penalty among the Iraqi population, it cannot be imposed by international tribunals and its availability to the Iraqi Higher Criminal Court has generated criticism from human rights groups and leaders such as the United Nations Secretary-General Kofi Annan and UK Foreign Secretary Jack Straw. Because of the death penalty, European investigators have reportedly refused to contribute to mass grave excavations and a number of states have declined to commit funds to the Court. Lawyers for Saddam Hussein applied to the European Court of Human Rights seeking remedies against the UK for its alleged involvement in Saddam's transfer to a jurisdiction in which he faces the death penalty, action which is claimed to be in violation of European human rights law. (In June 2004 the European Court refused to grant the interim measures sought by Saddam Hussein, but suggested that he was free to pursue his application on the merits.) Further complications are likely given the opposition of Iraqi President Jalal Talabani to capital punishment. It is suggested he will delegate the task of signing any death warrant to a deputy.

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### **Will the Ba'athists receive due process?**

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To a large extent, the credibility of the forthcoming trials will hinge on the Court's commitment to procedural fairness. The Statute includes a number of important guarantees including the presumption of innocence, the right to remain silent, the right to raise defences and the right to be tried without undue delay. Further due process protections are outlined in the Court's Rules on procedure and evidence

gathering. Perhaps the most important protection afforded by the Rules is a Defence Office specifically tasked with 'ensuring the rights of the accused'. The Office's responsibilities include ensuring that accused persons in detention have access to assistance, and providing legal advice to those who cannot afford to pay for it. The Office is also in charge of ensuring that defence counsel have access to adequate facilities for preparing the defence. These developments should provide reassurance to critics who, in the early days of the Court, voiced concerns about the scant attention to defence arrangements in the Statute, and reports that Saddam Hussein and others had been prevented from meeting with their legal advisers. However, lawyers who claimed to represent Saddam before their recent dismissal by his family continued to complain of poor access to their client. During recent questioning at the Court Saddam has been accompanied by his principal Iraqi lawyer.

The Rules also guard against political grandstanding of the sort that has dominated Milosevic's defence before the International Tribunal for the Former Yugoslavia. There is no specific procedure for assigning professional counsel to an accused person whose attempts to represent him- or herself are proving detrimental to the overall progress of the trial. However, the Court may order an accused person to leave the court room if his or her conduct is persistently disruptive. Tight controls have also been placed on media coverage of proceedings. Recording and photography within the Court is prohibited unless specifically authorized by it. And although the proceedings are open to the media and to the public, they may be closed if publicity will prejudice the interests of justice.

To the extent that the Statute and the Rules are silent on procedural matters, proceedings before the Court are governed by the Iraqi Criminal Procedure Code of 1971. Initially this was controversial given inconsistencies between the Code and certain international due process standards. In particular, human rights organizations expressed alarm at provisions of the Code permitting courts to use, in some circumstances, confessions obtained from torture. On the day prior to its dissolution, the Coalition Provisional Authority amended the Code and any such confessions will not be usable in a court. The Rules on procedure and evidence gathering build upon this protection by requiring judges to assess whether any confession was given 'wilfully and freely'. The Coalition Provisional Authority also established a series of new rights including the right to counsel and the right against self-incrimination. Together, these amendments and the Rules provide a robust set of institutional due process protections. But the protections are by no means perfect. For example, there are concerns over the absence of any requirement that guilt will have to be proved 'beyond reasonable doubt', and it appears that trials may take place in the absence of the accused.

Moreover, the existence of rights on paper is no guarantee that they will be available in practice, and there is much speculation over whether the Court will prioritize speedy convictions over due process. There

are fears that the Court is already turning a blind eye to breaches of fair trial guarantees. For example, Saddam's principal Iraqi lawyer claims he was not served with the prosecution's evidentiary file and witness list 45 days prior to the trial, as required by the Rules. He has asked the Court to set back the trial date on the basis that this has prejudiced the defence. There are concerns also about the adequacy in practice of the witness protection scheme. In a context of deteriorating security in Iraq, this may discourage witnesses for the prosecution from testifying. Whether the Court will check lapses of this sort remains to be seen. However, ongoing judicial training, the immense publicity surrounding the trials, and the advisory role of international experts give some grounds for hope that with the commencement of trials, the Court's judges will seize their important role as champions of due process.

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## Conclusions

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The trial of Saddam Hussein before the Iraqi Higher Criminal Court is set to become one of the most significant criminal trials in history. The circumstances

of his fall from power and the uncertainty surrounding the commencement of his trial mean that the event is already deeply coloured by political debate. The security situation in the country is obviously a big challenge to any trial. A pressing issue is whether the trial process can be elevated sufficiently above politics to guarantee fairness and impartiality. The decision to try Saddam Hussein before an Iraqi court was welcomed by many as a check on 'victor's justice' and a milestone event in the reconstruction of Iraqi society. While doubts persist about certain aspects of the Court, including ongoing American influence and rumoured interference by Iraqi politicians, a number of developments should provide some comfort to the Court's domestic and international critics. Encouraging signs include extensive judicial reforms, robust due process guarantees and the advisory role of foreign experts. The imminent trial of Saddam Hussein will reveal whether optimism is justified, but until then a cautious vote of confidence in the Court could itself contribute to a positive momentum without diluting demands for a process that meets the highest standards of justice.

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## Endnotes

<sup>1</sup> An unofficial English translation of the new Statute is available at [www.law.case.edu/grotian-moment-blog/documents/IST\\_statute\\_unofficialenglish.pdf](http://www.law.case.edu/grotian-moment-blog/documents/IST_statute_unofficialenglish.pdf). The previous Statute is appended to Coalition Provisional Authority Order Number 48 'Delegation of Authority Regarding an Iraqi Special Tribunal', 10 December 2003. It is available at <http://www.iraqispecialtribunal.org/en/about/statute.htm>.

<sup>2</sup> Saddam Hussein's status as a 'prisoner of war' was brought to an end by his transfer to Iraqi legal custody. He remains in the physical custody of US forces pursuant to an agreement with the Iraqi authorities.

<sup>3</sup> The names of further defendants appear to have been added later.

<sup>4</sup> Article 82, 1949 Geneva Convention III Relative to the Treatment of Prisoners of War.

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