



SPECIAL REPORT

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ABOUT THE REPORT

A process is now underway in Iraq to establish a new institution, the Iraqi Special Tribunal, that will try members of the former regime for serious violations of international and Iraqi law. The United States Institute of Peace's Rule of Law Program is engaged in an ongoing effort to facilitate the development of this Tribunal in a way that contributes to justice and reconciliation in Iraq, operates efficiently, and adheres to a high standard of due process. As part of this effort, the Institute held a conference in March 2004 in Amsterdam, The Netherlands, that brought together Iraqis involved in establishing the Tribunal with experts on international criminal law and the practical operations of special tribunals from nine countries. The conference was organized by the United States Institute of Peace and co-sponsored by the Institute and the Institute for International Criminal Investigation. This report is based largely on the principal views and insights shared at the conference regarding the work that will need to be undertaken to establish the Iraqi Special Tribunal. The suggestions in this report reflect "lessons learned" from the work of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the East Timor Serious Crimes Unit, and various national judicial processes concerning accountability for mass violations of human rights and international humanitarian law. Laurel Miller of the Institute's Rule of Law Program wrote this report.

The views expressed in this report do not necessarily reflect views of the United States Institute of Peace, which does not advocate specific policy positions.

Building the Iraqi Special Tribunal

Lessons from Experiences in International Criminal Justice

Summary

- On December 10, 2003, the Iraqi Governing Council adopted the "Statute of the Iraqi Special Tribunal," providing the legal foundation and laying out the jurisdiction and basic structure for the Tribunal that will be responsible for prosecuting acts of genocide, crimes against humanity, and war crimes committed in Iraq between 1968 and 2003.
- Cases of mass violations of human rights and international humanitarian law present exceptional legal and logistical challenges due to the huge numbers of victims, witnesses, incidents, and evidentiary documents involved, as well as the legal complexities of the crimes in question. These challenges are magnified in situations such as Iraq where there is a need to build from the ground up a new judicial institution to handle the cases.
- The process of establishing the Iraqi Special Tribunal can be made smoother and more efficient by examining the lessons learned from the creation and operation of other international criminal tribunals, such as the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone, and the East Timor Serious Crimes Unit, as well as from the experiences of domestic legal processes for adjudicating mass violations of human rights and international law.
- These lessons relate both to the legal issues that will be faced by the Iraqi Special Tribunal and to the practical aspects of establishing a Tribunal that effectively contributes to justice and reconciliation, operates efficiently, and adheres to a high standard of due process.
- Legal matters that will require attention in the process of establishing the Tribunal include crafting rules of procedure and evidence, rules of detention, and sentencing guidelines. Practical matters include organization of the start-up phase, design of a management structure, and creation of a defense counsel system. Issues particular to the Iraqi Special Tribunal, such as precise definition of the role of international personnel called for in the Statute, will need to be addressed as well.

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ABOUT THE INSTITUTE

The United States Institute of Peace is an independent, nonpartisan federal institution created by Congress to promote the prevention, management, and peaceful resolution of international conflicts. Established in 1984, the Institute meets its congressional mandate through an array of programs, including research grants, fellowships, professional training, education programs from high school through graduate school, conferences and workshops, library services, and publications. The Institute's Board of Directors is appointed by the President of the United States and confirmed by the Senate.

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- Based on the experience of other similar tribunals as described by the experts at the Amsterdam meeting, this report provides recommendations concerning each of the above issues, as well as others ranging from the importance of establishing a strong public outreach program early in the Tribunal's life cycle, to the impact of defense counsel fee arrangements on the pace of trials, to the value of separating trial and sentencing phases of proceedings.

Introduction

On December 10, 2003, the Iraqi Governing Council adopted the "Statute of the Iraqi Special Tribunal" (IST). The Statute provides the legal foundation for the IST, and lays out its organization, jurisdiction, and basic procedures. Under the terms of the Statute, the IST will be independent of any Iraqi government bodies, and will have jurisdiction over specified crimes committed by any Iraqi nationals or residents between July 17, 1968 and May 1, 2003, the period of the Baath party rule. The IST will have nine appellate, at least five trial, and up to 20 investigative judges (plus up to 10 "reserve" investigative judges), as well as up to 20 prosecutors, all appointed by the Governing Council. The President of the IST will be selected by the Appeals Chamber from among its members, and an Administration Department will be headed by a Director appointed by the Governing Council. The Statute permits, but does not require, the Governing Council to appoint non-Iraqis as judges. It requires, on the other hand, that non-Iraqis be appointed to serve in "advisory capacities" or as "observers" to the Trial and Appeals Chambers, to the investigative judges, and to the prosecutors.

The IST's subject matter jurisdiction covers the international crimes of genocide, crimes against humanity, and war crimes, which are defined in the Statute both explicitly and by reference to international conventions. The statute also incorporates jurisdiction over three specified crimes under Iraqi law involving manipulation of the judiciary, squandering of public assets, 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." The Statute requires the IST judges to adopt special rules of procedure and evidence to regulate the Tribunal's work, and also specifies provisions of Iraqi criminal law and criminal procedure law that will apply in IST proceedings.

The Rule of Law Program of the United States Institute of Peace is engaged in an on-going effort to facilitate the development of the IST in a manner that will contribute to justice and reconciliation in Iraq, operate efficiently, and adhere to internationally accepted standards of due process, which will be essential to the IST's legitimacy and impact. As part of this effort, the Institute held a conference in March 2004 in Amsterdam, The Netherlands, that brought together Iraqis involved in establishing the IST with high-level experts on international criminal law and the practical operations of special tribunals from nine countries. The conference focused on key legal and practical questions related to implementation of the IST Statute. The comments of conference participants largely reflected "lessons learned" from the work of the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR), the Special Court for Sierra Leone, the East Timor Serious Crimes Unit, and various national judicial processes concerning accountability for mass violations of human rights and international humanitarian law. Experts at the conference included practitioners who had served in judicial, prosecutorial, administrative, and defense capacities at the various tribunals, as well as others with academic expertise in international criminal justice. This report is based largely on the principal views and insights shared at the conference regarding the work that will need to be undertaken to establish the Iraqi Special Tribunal.

Following the conference, on April 20, 2004, it was announced that the first appointments to the IST were made in Baghdad. The appointments included a Director of Admin-

istration, seven investigative judges, and four prosecutors; as of this publication, only the Director of Administration has been publicly named.

'Lessons Learned' on Establishing Tribunals

The Start-Up Phase: Process, Timeline, and Staffing

Cases of mass violations of human rights and international humanitarian law, such as genocide, war crimes, and crimes against humanity, present exceptional legal and logistical challenges due to the huge numbers of victims, witnesses, incidents, and evidentiary documents that often must be considered, examined, and organized for use in court. These challenges are magnified when dealing with such cases through a special domestic process or through an ad hoc international forum that calls for building a new judicial institution from the ground up. Establishment of the IST, a new institution charged with investigating, prosecuting, and trying major complex crimes, presents the full range of legal and logistical challenges that have been faced most prominently in recent years by the ICTY, ICTR, Special Court for Sierra Leone, and East Timor Serious Crimes Unit.

Experience with other tribunals shows that the first key step will be to create a strategy that takes account of the IST's purpose and what it realistically can achieve. Each organ of the tribunal should be involved in formulating the strategy. Based on the strategy, a timeline for the IST's work should be drawn up. The Special Court for Sierra Leone, for example, established a ten-phase strategy covering start-up through trials over a period of three years. In light of the urgency with which the Iraqi people (including victims) and the international community appear to regard the IST's objectives, five years may be a reasonable timeframe for completing the IST's work; a shorter period is likely to be unrealistic. It will be important to assess realistically and communicate openly how much can be achieved in whatever timeframe is agreed upon. Other tribunals, for example in East Timor, have failed to make such a realistic assessment, leading to inordinate expectations by the public.

Once a strategy is formulated, developing an outreach program should be an immediate next step. It will be important to inform the Iraqi people of the IST's plans, including the proposed timeframe for its activity, and what the IST intends to achieve within it; if the process to be pursued by the IST is not well understood, there is a risk that the IST will not be seen as a credible contributor to justice and stability. As the work of the IST proceeds, it will be important to explain indictments that are issued, what they include and do not include, and why. Experiences elsewhere strongly indicate the importance of open and transparent public outreach. The ICTY, for example, is widely regarded to have failed to conduct effective outreach—the ICTY reached out to elements of the international community that provided its funding, but largely did not reach out to the people of the region concerned with its work. This has resulted in the ICTY lacking credibility in the eyes of many in the region and not playing the role in reconciliation that it was mandated to perform and could have played. Even today, the outreach function is not included in the budget of the ICTY and has to be separately funded through voluntary contributions. In contrast, the strong emphasis that the Special Court for Sierra Leone has placed on outreach (e.g., town hall forums around the country, ongoing communications through local media, and regular meetings and consultations with a broad range of civil society representatives) from its start is considered to have contributed significantly to its credibility among the local population. An outreach program needs to be understood from the beginning as a vital function of the IST. In addition to providing the public with information about the Tribunal, the outreach program needs also to ensure broad public access to the IST's hear-

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ings, both through provision of an adequate public gallery in the courtroom and through television and radio coverage of the proceedings.

A third early priority should be development of a sound information management system based on the priorities of the investigative judges and prosecution. Time and money will be wasted if the IST develops its own system from the ground up; rather, it would be prudent to look at the systems adopted by other tribunals and select the best, bearing in mind the lessons learned concerning information management through difficult experience at other tribunals. The ICTY, for example, underestimated in its early period the importance of creating effective means and procedures for storing, reviewing and analyzing documents, resulting in inefficiencies and delays. In addition to acquiring appropriate software and technical mechanisms for document management, an analysts unit should be put in place to review and assess documents.

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Dealing with documentary evidence will be a huge task in the Iraq context (reportedly, there are about nine miles of documents to be reviewed), and therefore should begin promptly. However, it will be exceedingly important not to rush into putting evidence into a database before determining how the evidence and the database system will need to be used. The ICTY, for instance, has changed its document management system several times, and each time has had to scan the documents into the new system and renumber millions of pages. Moreover, the ICTY did not develop a plan for systems for the whole tribunal, and only now is working to bring the office of the prosecutor, judges' chambers, and registry together into a single "enterprise" system.

The IST's document management system should be designed with the use of documents in court proceedings kept in mind, as well as the need to use the same documents in multiple proceedings simultaneously. At the ICTY, for example, a poorly designed system reportedly resulted in \$1.5 million being spent just in the search for exculpatory documentary evidence to turn over to the defense in the Milosevic case.

Ensuring an adequate legal framework (i.e., a basis in the substantive law applied in Iraq) for prosecution of the crimes within the IST's jurisdiction should be an early priority as well. The legal framework should fully specify the elements of the crimes within the IST's jurisdiction (i.e., genocide, crimes against humanity, war crimes, and certain crimes under Iraqi law), the elements of the underlying acts (e.g., murder, persecution, sexual violence, etc.), the forms of individual criminal responsibility (e.g., planning, ordering, instigating, etc.), and the defenses available to the accused. Analysis of all documents and evidence should then follow this framework, ensuring that all information to be entered into any system is reviewed and tagged as it relates to these legal elements.

Developing a staffing structure for the IST will be another key task in the start-up phase. Creating the structure should follow crafting of the overall strategy for the IST, as it should be based on the strategy, rather than the other way around. If large numbers of personnel are hired before the strategy is established, it is likely that they will be inappropriately or underutilized, will complicate the development and implementation of a clear strategy, and may be difficult to dismiss. In East Timor, for example, a radical revision of the Serious Crimes Unit's strategy after a large number of staff were hired who could not be readily dismissed led to such problems in proper utilization of personnel. In Sierra Leone, in order to avoid such problems, the Special Court hired a core staff of seven for the start-up phase, including a chief of investigations, chief of prosecutions, operations officer, and special assistant; after the first 30 days, the Special Court's strategy and timeline were reviewed and adjusted, and hiring of additional staff began. Establishment and publicizing of transparent recruiting procedures that emphasize the need for practical judicial and legal experience should help the IST to resist political pressures on the hiring of personnel.

Another priority in the start-up phase should include arranging security for the IST's personnel. Efforts in this regard are already underway in Iraq. Security will be a dominant issue not only for the IST's personnel, but also for many Iraqis with whom they will need to engage in order to conduct their work. Specifically, a strong witness protection program will need to be in place as soon as investigators begin contacting witnesses.

In addition, written protocols will be needed that spell out how the various elements of the IST are to conduct their work, in order to regularize procedures and ensure consistency in the IST's work overall. For example, protocols are needed to describe how to take a witness statement, and how to handle evidence (such as forensic evidence from a mass grave) in order to ensure that it is usable in court.

Finally, to the extent non-Iraqis who do not speak Arabic will be involved in the IST's work, very high quality translators and interpreters will be needed; recruitment and training of these individuals should be included among the start-up tasks. Ensuring quality translation and interpretation has been a significant challenge at other tribunals.

Management Structure

Efficient operation of the IST will require careful attention in the development stage of the tribunal to the design of an effective management structure. The management structure should be designed to ensure both the coherence of the IST as a whole and the independence of its three branches (the judiciary, the Prosecutions Department, and the Administration Department). Other tribunals have employed a coordination council, in which the heads of the branches meet regularly to resolve management issues, as a key element of the structure.

While independence of the branches is important (the judiciary, for example, should not have management or budgetary control over the Prosecutions Department in order to preserve the integrity of the legal process), and while communication and cooperation among the leaders of the branches is essential, making clear who will be in charge overall of setting the policy direction for the IST will be key. Without a clear chain of authority, conflicts, confusion, and deadlocks can result. Presently, the IST Statute is unclear on this point. In Sierra Leone, for example, the Special Court has a senior management board on which the different branches are represented, but it is clear that the chief prosecutor has the dominant role in setting the Special Court's direction, and that the president has a relatively limited role. For the IST, the president, chief investigative judge, or chief prosecutor could have the leading role, so long as the determination is clear.

Attention also will be needed to ensure that the branches of the IST have comparable resources and staffing in both quality and quantity. Disparities in the strength and degree of organization among the different elements of the IST will weaken the tribunal overall. In East Timor, for example, the reputation of the Serious Crimes Unit remains clouded by the fact that the tribunal started with a very strong prosecutorial branch but weak defense counsel system and understaffed judicial branch.

The organizational structure of the IST will need to take account of the importance of providing services to victims and witnesses with whom IST personnel will interact. One option is to place a victims and witnesses unit within a neutral element of the IST, such as the administrative branch, in order to avoid any appearance of deals with witnesses to do favors in exchange for testimony. Another option is to establish such a unit under the authority of the Chief Investigative Judge, or in the Prosecutions Department, recognizing that prosecutors or investigative judges may be well-placed to communicate with and assist victims and witnesses because of their early contact and relationships with them. At the Special Court for Sierra Leone, for example, the witness management unit is placed within the Office of the Prosecutor. This unit is responsible for assessing the risk to witnesses, arranging their protection (to include moving them and their families out of the country, when necessary), re-checking their stories, and maintaining contact with them.

At the ICTY, the Office of the Prosecutor and the defense handle witnesses during the pre-trial phase, and the victims and witnesses section of the Registry (i.e., administrative branch) handles all witnesses once a trial is underway. The Registry's services include support (transportation, accommodations, making available social workers), protection, and other logistics. The Registry considers ensuring the safety of the approximately 700 witnesses who appear at the ICTY each year to be its highest priority. Protection techniques

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include use of pseudonyms, voice distortion and shielding of faces during live testimony, closed court sessions, and redaction of transcripts to prevent disclosure of names. One witness at the ICTY early on testified in complete anonymity (i.e., the defense was not told the witness's identity), but this practice was greatly criticized on legal grounds and not repeated. A small number of witnesses and their families have been relocated to other countries, pursuant to agreements between the ICTY and those countries, and in some cases have been given new identities.

The IST may wish to consider establishing field offices, specifically in Kuwait and Iran, similar to the field offices that the ICTY, for example, operates in the capitals of the states of the former Yugoslavia. Such offices provide a useful base from which investigators can work and conduct interviews, as well as a capacity for liaison with local officials. Field offices can be small, while providing a bridgehead to which additional staff can be deployed as needed. Unlike the ICTY, which has authority under Chapter VII of the UN Charter, the IST would need to conclude agreements with countries in which it wished to establish field offices.

Coordination Between Investigative Judges and Prosecutors

The IST Statute maintains the system of investigative judges now operating in Iraq, under which such judges gather evidence and issue subpoenas, arrest warrants, and indictments with respect to individuals whom they are investigating. At the same time, the Statute seeks to enhance the currently weak role of prosecutors in the Iraqi legal system, in particular by providing that a prosecutor assigned to a case "shall have the right to be involved in the investigative stages" of that case, in addition to prosecuting the case at trial. In this way, the IST Statute appears to combine elements of the current Iraqi legal system with elements of other systems in which prosecutors play a much more significant role. A difficulty with this approach is that the distinction between the respective roles of the investigative judges and the prosecutors is insufficiently clear. For example, does the right to be "involved" in the investigative stages of a case permit a prosecutor to engage in collecting evidence for use at trial, or is the investigative judge uniquely responsible for that task? Such lack of clarity could be a serious threat to the effective functioning of the IST. Creating active, competing roles for both prosecutors and investigative judges within one system could undermine the effort to maintain a unified strategy that all parts of the IST follow. At a minimum, this approach will require extraordinary cooperation between the chief investigative judge and the chief prosecutor.

Experts' views vary as to whether a civil law type system, in which investigative judges play the dominant role in investigating and preparing a case for trial, or a common law type system, in which prosecutors play the leading role, is more suited to the current situation in Iraq. Some consider that the investigative judge system normally has the merit of minimizing discrimination between poor and wealthy defendants (because the investigative judge collects evidence on behalf of both the prosecution and defense equally, and defendants need not use their own resources to investigate avenues of defense). But it can be questioned whether in Iraq today it will be realistic to expect investigative judges to look for exculpatory evidence on behalf of, as an example, Saddam Hussein—and therefore whether an adversarial system would be more appropriate. On the other hand, maintaining the investigative judge system now in place in Iraq could be most efficient, because a change in the system would require significant re-training of judges and lawyers accustomed to the civil law tradition. In addition, trials tend to be shorter and there is less need to test evidence in court under an investigative judge system, because there is judicial involvement from the start of the case, and because a good investigative judge can carefully define the scope of a trial. In contrast, the process of examination and cross-examination of witnesses in the common law system can be very time-consuming. Consequently, in light of the huge scope of time, crimes, and documents with which the IST will have to contend, an investigative judge system may be more practical and cost-efficient.

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Regardless of the approach ultimately applied, it will be important to ensure that offices of individual investigative judges and offices of individual prosecutors do not work as separate and isolated units. The need to share information and work jointly both among and between prosecutors and investigative judges is particularly acute when dealing with complex state crimes, which are not individual acts, but all part of one fabric.

Establishment of a Defense Counsel System

Legal aid for indigent defendants is likely to be an expensive element of the IST. At the ICTY, for example, legal aid consumes about ten percent of the budget (\$10-\$13 million per year), and is used for at least some of their expenses by more than 90 percent of the accused. The Special Court for Sierra Leone, due to its relatively limited budget, established a ‘public defender’ office within the Court structure that administers the defense counsel system. The chief public defender (who serves on the senior management board) and the three lawyers on her staff arrange flat fee contracts for defense counsel. In most cases, the fee is \$300,000 per defense team.

Based on hard-won experience at other tribunals, experts recommended that the IST pay lump sum fees (based on the complexity of the case) to defense counsel in installments, rather than hourly fees. At the ICTY, an hourly fee system was employed for the first eight to nine years, and this system was too often abused. The hourly fee system also was considered to have contributed to the slow pace of proceedings because defense counsel had no incentive to work expeditiously. Delays at both the ICTY and ICTR were sometimes the result of defense attorneys drawing out proceedings unnecessarily in order to maintain an income flow.

A recent improvement in the defense counsel system at the ICTY has been to establish a “closed list” of attorneys from which accused persons may choose representatives (previously, the accused could add attorneys of their choice to the “open” list). This change has allowed more careful vetting of the qualifications of defense counsel. The ICTY also intends to put in place soon more rigorous experience requirements for those who seek to be on the list.

A defense counsel system will need to be established at least by the time indictments are first issued—and perhaps even earlier, while investigations and interrogations are underway, particularly if an adversarial system is to be employed. The defense counsel regime should provide defense teams with the same type of resources (e.g., investigation capacity) as those of the prosecution, but not necessarily the same level or amount of resources, as the prosecution bears the burden of proof in a case.

The defense counsel system is considered to have been the weakest link in the structures of all of the previous recent tribunals. The IST would do well, therefore, to begin early to organize the system, particularly as members of the defense bar will likely require considerable training before they are ready to appear in court in the types of cases the IST will handle.

The IST would benefit from establishing a code of conduct for defense lawyers. Among the problems that have been encountered at the ICTY and ICTR were a number of cases of defense counsel illegitimately splitting their fees with their clients in exchange for being selected for a case. Grandstanding by defense counsel is another problem that has affected proceedings in various forums. In domestic proceedings in Rwanda, for example, it was often difficult to find qualified local lawyers willing to defend those accused of genocide, but some foreign lawyers who appeared instead turned proceedings into political shows.

Recalcitrant defendants who refuse professional legal counsel (such as Slobodan Milosevic, as well as some former junta members tried in Argentina) present a different challenge that the IST may well encounter. Staff at the ICTY debated intensely how to deal with Milosevic; civil law lawyers argued that counsel should be appointed for him even if he refused, whereas common law lawyers disagreed on the ground that counsel must be instructed by the client. The tribunal’s compromise—appointing *amicus curiae*—is considered by experts not to have worked well. The best way to prevent politics from becoming the dominant dimension of the trials at the IST may be to appoint strong judges who

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will stop any political shows early on, and who will control the proceedings to exclude any attempt at grandstanding or any defense presentation not pertinent to the specific charges.

Role of International Personnel in the IST

As noted above, the IST Statute permits the Governing Council to appoint non-Iraqis as judges, and requires the appointment of non-Iraqis to serve in “advisory capacities” or as “observers” to the Trial and Appeals Chambers, to the investigative judges, and to the prosecutors. A variety of experts have expressed the view that robust non-Iraqi participation in the IST would contribute significantly to its legitimacy and credibility in the eyes of the international community, and could also encourage international financial support. Some have suggested further that a mix of foreign and Iraqi judges should be appointed to the IST, because international crimes are at issue—crimes against all of humanity, not only the Iraqi people, and because of lack of experience with international criminal law among Iraqi judges. A credible process for appointment of foreign judges would be needed. Among the many options would be selection by the UN Secretary General; nomination or appointment by a committee of presidents of the ICTY, International Court of Justice, and International Criminal Court; or nomination or selection by some other combination of leaders of such institutions and/or non-governmental organizations.

Political circumstances in Iraq suggest that appointment of foreign judges currently is not likely, however. The provision permitting the appointment of foreign judges, a last-minute addition to the Statute, reportedly was strongly urged on the Governing Council by the CPA, and has not been warmly welcomed. It is unclear what the attitude of a new post-June 30 interim government may be with respect to the appointment of foreign judges. In addition, it is unlikely that the CPA's suspension of the death penalty will be continued after the planned June 30 transfer of authority in Iraq, making it doubtful that any UN organs would be willing to play a role in appointing IST judges.

Aside from the issue of appointing foreign judges, clear definition is needed of the role envisioned for the non-Iraqi nationals required by the Statute to be appointed “to act in advisory capacities or as observers . . . , and to monitor the protection by the Tribunal of general due process of law standards” as well as the “performance” of particular elements of the Tribunal. These individuals are to be appointed by the IST's President, Chief Investigative Judge and Chief Prosecutor to function within their respective departments. The provisions on this subject in the IST Statute require considerable elaboration in the anticipated rules of procedure or elsewhere. A principal question raised by the Statute provisions is to whom would “observers” or “monitor[s]” be accountable. While the Iraqi effort to invite outside scrutiny and to ensure that the IST adheres to international standards is commendable, 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, and whether they would have a forum outside the IST in which to raise any concerns. Monitors or observers appointed by the judicial system being monitored/observed would lack credibility at least from an international perspective. One alternative would be to provide for the selection, appointment, and payment of the foreign monitors by a non-Iraqi organization or committee, to ensure their independence even while carrying out their observer duties from within the Tribunal. Another option would be simply to invite external groups to carry out monitoring instead. In this regard, steps should be taken to promote local civil society, so that Iraqi groups, complemented by foreign organizations, can take a leading role in monitoring the IST. Under this latter scenario, instead of operating as observers or monitors, the non-Iraqi personnel appointed to the IST should be involved in its ongoing work, for example, by providing advice and training on substantive international criminal law.

A question the IST probably will need to address is whether to accept secondments of non-Iraqi personnel from foreign governments, international organizations, or NGOs,

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or whether to recruit and hire such personnel directly. Accepting secondments or gratis personnel would save money; the Special Court for Sierra Leone, for example, has saved about \$1 million per year in personnel costs in this manner. However, such personnel generally have loyalties to the place to which they will return, and will often experience pressure to report back to their sending state or organization. In some cases, though, secondees may actually be more independent than persons directly hired, because they know they have a job to return to. The lack of independence of seconded personnel can be minimized by (1) insisting on having at least three candidates for each position open to non-Iraqis; (2) reserving the right to reject any candidates and to dismiss any foreign personnel without appeal; and (3) requiring at least a one-year commitment from any foreign personnel accepted. If the security situation permits, accepting non-Iraqi interns should be considered also, as they are inexpensive and can be valuable (interns have been used effectively at the Special Court for Sierra Leone, for example), but they should be required to serve at least six months in order to be effective.

Role of International NGOs in Assisting the IST

Experience with other tribunals shows that non-governmental organizations could provide valuable help to the IST. Such support could include (1) direct assistance with tasks such as forensic work at mass graves; (2) providing “lessons learned” from other tribunals; (3) rallying support from outside actors (such as governments who might provide funding); (4) providing friendly and discreet advice; (5) providing consultants in the start-up phase to assess needs; (6) training; (7) legal research support; (8) help with outreach; and (9) independent monitoring.

Assistance from international NGOs was crucial for the Serious Crimes Unit in East Timor, as they filled gaps that the UN did not anticipate (e.g., NGOs paid for 35 interpreters), and prepared useful legal briefs. Local NGOs and civil society groups can play an important role as well. In Sierra Leone, an advisory council of civil society representatives explains the role of the Special Court to their communities and provides feedback to the Court as to how its work is perceived. In addition, the Special Court’s registrar holds monthly stakeholders’ meetings involving senior personnel of the Court and representatives of international and national NGOs; the Court uses these meetings to request help in particular areas as well as to keep others informed. The Special Court also has established a consortium of academic institutions that provides useful legal support to the trial and appellate divisions.

Rules of Procedure and Evidence

Though the IST judges have the authority under the Statute to decide upon the rules of procedure and evidence, it will be important for them to consult with the investigative judges, prosecutors, defense bar, and administrative arm of the tribunal in developing the rules. This is a lesson learned through experience at the ICTY and ICTR, for example, which eventually established committees for consultation among the branches on rule changes.

In formulating the rules, it will be necessary to decide how trials at the IST should be conducted—for example, what role examination and cross-examination of witnesses will play. In particular, it will be important to determine to what extent the trials will rely on the “oral tradition” of live witness testimony, or on the use of witness statements (the ICTY, for example, now permits the introduction at trial of witness statements, except when the witness’s testimony directly pertains to the conduct of the accused and the defense wishes to cross-examine). These issues will bear on the length of trials.

The rules also will need to address how evidence is to be tested in court. The ICTY and ICTR, for example, have adopted a very open approach to what can be presented as

Experience with other tribunals shows that non-governmental organizations could provide valuable help to the IST.

evidence in court, along the lines of a civil law system. Those tribunals have no hearsay rule for excluding evidence, for instance; instead, judges use their discretion to consider the probative value and reliability of evidence, and decide how much weight to accord it.

The rules should specify the degree of disclosure of evidence to the defense that will be required. The ICTY rules, for example, do not require the prosecutor to turn over the entire case file to the defense, unless the defense does the same, but they do require the prosecutor to turn over exculpatory evidence. If the IST retains the investigative judge system, then reciprocal disclosure of evidence will not be needed, as the investigative judge will collect evidence on behalf of both sides.

The provisions on pre-trial procedures in the rules should make clear how, at the pre-trial stage of the proceedings, the issues and cases can be narrowed as much as possible, in order to ensure that trials are not too lengthy. For example, the procedures for the Special Court for Sierra Leone require presentation of a defense statement during pre-trial, based on which the court can narrow the issues for trial.

Either the rules of procedure and evidence or a separate document laying out the elements and theories of individual liability for the crimes within the IST's jurisdiction should specify the permissible theories of defense. This will give clear notice to the accused at the outset, will help the prosecution set the direction of cases, and will provide a very helpful guide to judges on the IST. Some experts have cautioned that the pertinent ICC documents should not be used as a model, as they are too detailed and contain some points that are not universally accepted by international lawyers.

The rules will need to address clearly the position of the accused at trial—i.e., whether he will be permitted to speak in court only if he takes the stand as a witness (as in the common law legal system), or will be permitted to make a statement, about which the judge can decide the probative value, without actually appearing as a witness (as in the practice of the ICTY).

Utilizing as models the rules of other tribunals likely will be of some, but limited, value to the IST. As it will be important for Iraqi judges, prosecutors, and defense counsel to understand well the procedures, the rules should be grounded in Iraqi law. Even within wholly domestic processes for prosecuting regime crimes, however, there is precedent for departing from standard and established rules. For example, in the domestic prosecutions in Argentina of former junta members, the country's regular code of criminal procedure was not used, and special procedures were developed instead to accommodate the masses of information and huge numbers of victims involved as compared to ordinary crimes. Particularly to the extent that the rules depart from established Iraqi law, very detailed explanations and clarity in the rules will be essential.

It is probable that the IST will, at times, wish to close proceedings to the press and public when confidential witnesses appear, or perhaps when especially sensitive evidence is introduced. The circumstances in which closed court sessions are permitted should be specified in the rules, but should be very limited, as the closure of proceedings is likely to affect seriously the public perception of the fairness of the process.

Among the many other issues that the rules of procedure and evidence will need to address, several that merit particular attention, in light of experience at other tribunals, include: (1) provision for live witness testimony from remote locations (e.g., via video hook-up) in order to facilitate witness protection; (2) flexibility in the evidence rules so that circumstantial evidence of deaths that occurred many years ago can be introduced (the existing rules for ordinary crimes probably do not accommodate such a scenario); (3) clarity as to whether provisional release pending trial will be allowed, even if release seems out of the question under current circumstances in Iraq, as the circumstances may change; (4) provision for any foreign governments that provide evidence to the IST to require protection of the confidentiality of such evidence on national security grounds; and (5) clarity as to what privileges not to disclose information will apply (the question of privileges has been the subject of much litigation at the ICTY—for example, as to whether journalists or the ICRC may assert a privilege).

Rules of Detention

At present, Iraqi authorities do not have control over detainees being held in Iraq who are likely to be targets for prosecution and trial by the IST. Once Iraqi authorities do gain such control and commence investigations, including questioning, of such persons, rules of detention will need to be in place both to ensure the reasonableness of the conditions of detention and to prevent troublesome conduct by detainees. Among other things, such rules should address the permissible length of time between indictment and trial, regulation of visits to detainees, conditions for meetings between detainees and defense counsel, access for accused persons to materials needed to prepare their defenses, and access to means of communication. The detention rules of the ICTY probably would serve as a useful model for the IST, even though the detention practice at the ICTY has been problematic (accused persons have waited up to two years in detention for trials that often last a year or more).

Establishing good conditions of detention will provide an opportunity to demonstrate the distinctions between a democratic government and a dictatorship. Many UN documents set out widely recognized principles for detention conditions. The most important priority with respect to conditions will be to ensure that prisoners are not abused. Also, leadership figures should be detained separately from the rank and file, in order to avoid organized trouble-making and to protect some prisoners from others, but distinctions should not be drawn between the comfort level in detention of “big fish” and “small fish.”

The detention rules should provide for monitoring communications of detainees in order to avoid disclosure of sensitive information or documents, or of the identity of any confidential witness, and in order to limit the ability of detainees to direct witness intimidation. Two detainees of the Special Court for Sierra Leone, for example, have attempted to foment rebellion from their cells. Attorney-client communications should not be monitored, however; any abuse of such confidentiality by attorneys can properly be dealt with only through contempt proceedings against the offending attorneys.

Arranging for external monitoring of conditions of detention would go a long way toward establishing the credibility and fairness of the IST's detention rules and practices. Based on its broad experience in this area, the International Committee of the Red Cross would be best placed to perform this function.

Sentencing Guidelines

Though the IST Statute does not address this issue, creation of sentencing guidelines for the IST judges will be important in particular to ensure comparable results across trials conducted in different trial chambers. Notably, the ICTY, which has been criticized for inconsistent sentencing, has only recently set up a working group of judges to establish sentencing guidelines. Such guidelines also may be helpful in determining sentences for international crimes that do not have penalty provisions under Iraqi law. The IST Statute refers to “international precedents” as a factor to be considered in sentencing in such cases, but experts regard these precedents as too inconsistent to be useful guides.

The IST's procedures should provide for sentencing proceedings to be conducted separately from trial proceedings, most essentially in the death penalty context, due to the different kinds of witnesses and evidence needed in those phases. Separation of the phases also will enable judges to consider sentences more dispassionately. The Special Court for Sierra Leone employs such a separation, but the ICTY does not (a fact that some experts consider unfortunate). The time gap between the phases need not be great (possibly only days or a week), and sentencing hearings could in many cases be limited to one day.

Under the terms of current Iraqi law as referenced in the IST statute, penalties may include capital punishment. Very specific guidelines for imposition of the death penalty, if it is to be available, will be extremely important in order to ensure its fair and consistent application. For example, a unanimous (rather than the usual majority) vote of judges should be required for imposition of the death penalty, and extra latitude should be pro-

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For more information on this topic, see our website (www.usip.org), which has an online edition of this report containing links to related websites, as well as additional information on the subject.

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vided to defendants in presenting evidence against imposition of the death penalty.

Making available the death penalty for cases before the IST is likely to pose a variety of complications for the operation of the IST and its ability to fulfill its mission. For example, the IST might wish to consider the negative impact wide application of the death penalty could have on the reconciliation process in Iraq if most of those prosecuted are from one particular ethnic or religious group. In light of such a consideration in Rwanda, which has prosecuted over 6,000 genocide cases, the death sentence, though lawful, has been carried out only upon one occasion, and has been subject to a moratorium on its use for about six years. In addition, some have suggested that rejection by the IST of the death penalty for Saddam Hussein and other leading figures would signal a major change in the Arab world, and that life imprisonment of such persons would have the benefit of serving as a daily reminder that they have been punished for their crimes. In Sierra Leone, where local law provides for capital punishment but the rules of the Special Court do not, Court officials have emphasized in their outreach efforts that the convicted perpetrators will be compelled every day of their lives to think about what they did to cause their imprisonment, and believe this message has resonated with the population. Finally, the availability of the death penalty could lead many foreign governments, international organizations, and international NGOs that oppose the death penalty to be reluctant or unwilling to provide assistance to or share information with the IST.

Conclusion

The process of establishing the IST from the ground up presents the full range of legal and logistical challenges that have confronted over the last decade the ICTY, ICTR, Special Court for Sierra Leone, and East Timor Serious Crimes Unit. This process can, however, be made smoother and more efficient by examining and applying the lessons learned—often through adverse experience and initial error—from the creation and operation of these other international criminal tribunals, as well as from the experiences of domestic legal processes for adjudicating mass violations of human rights and international law. This report and the conference on which it is largely based represent an initial step toward collecting the lessons that are likely to be useful to the IST. Further such steps, and continued engagement between Iraqis responsible for the IST and international experts, will facilitate the development of an IST that contributes to justice and reconciliation in Iraq, operates efficiently, adheres to a high standard of due process, and achieves credibility in the eyes of the Iraqi people and the international community.



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