

The case against Saddam Hussein before the Iraqi High Tribunal (IHT)

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“Ladies and gentlemen: We got him!”¹ With these words Paul Bremer, Chief Civilian Administrator in Iraq, opened a press conference on December 14, 2003, in which he announced the capture of former Iraqi President Saddam Hussein by American troops.²

On October 19, 2005, the first trial for the prosecution of crimes against humanity began against Saddam Hussein and seven others³ in the Iraqi High Tribunal (IHT)⁴. The subject of this so-called Dujail trial was the abduction and murder of 148 inhabitants of Dujail, a Shiite village located about 60 km north of Baghdad, after a botched assassination attempt against Saddam Hussein there on July 8, 1982. The indictment stated a total of thirteen charges⁵ against Saddam Hussein and numerous other defendants.⁶ The cases were to be

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¹ Compare, <http://www.defendamerica.mil/articles/dec2003/a121403b.html>.

² For more details of the capture, see http://www.trial-ch.org/de/trial-watch/profil/db/facts/saddam_hussein-al-majid-al-tikriti_125.html.

³ *Barzan Ibrahim Al-Tikriti*, Saddam’s half-brother and former head of the Secret Service (Mudiriyyat al-Mukhabarat al’ Amma) from 1979 to 1983; *Taha Yassin Ramadan*, former vice president and member of the Revolutionary Command Council (the highest executive and legislative body of the Iraqi Republic); *Awwad Al-Bander*, former Chairman of the (disbanded) Iraqi Revolutionary Tribunal from 1983 to 1990, and the functionaries of the Baath Party from the Dujail Region *Abdullah Kadhim Ruwayid*, *Mizhar Abdullah Ruwayid*, *Ali Dayih* and *Mohammed Azawi Ali*.

⁴ The terminology for designating the court is not unique: On the official court website (<http://www.iraq-ihl.org>) one finds the name “Iraqi High Tribunal”; the American human rights organization Human Rights Watch (<http://hrw.org/doc/?t=justice&c=iraq>) also uses this name. Sometimes the court is called Iraqi Higher Criminal Court (http://law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf).

⁵ Additional court cases: 1. The Al-Anfal trial (Campaign to eradicate the Kurds in the Kurdish region in the 1980’s); 2. Crushing the Shiite revolt of 1991; 3. Liquidation and murder of religious figures; 4. Liquidating the Al-Barzani tribe; 5. Murder and forced relocation in Iraq’s “Al-Ahwar” marsh areas; 6. Expulsion of the Shiite Kurds (Faili Kurds); 7. Misappropriation of state assets; 8. Mass execution of wholesale merchants (1992); 9. Liquidation of religious parties; 10. Various human rights violations; 11. The Halabdscha Trial; 12. The ethnic cleansing of the Kurds and Turkmen in Kirkuk.

⁶ Including, among others *Tarik Aziz* (Vice Prime Minister and member of the Revolutionary Command Council), *Muhammad Hamza al-Zubaydi* (Prime Minister), *Ali Hassan al-Majid al-Tikriti* (who attained cruel celebrity under the titles of „Chemical Ali“ and “Butcher of Kurdistan” in his positions as Chief of Security and Secretary of the Bureau for

prosecuted and adjudicated individually one after the other. Taking of evidence in the Dujail trial ended on July 27, 2006; the verdict was announced on November 5, 2006: Saddam Hussein and two other defendants⁷ were sentenced to death by hanging, four received sentences of between 15 years to life.⁸ On motion of the prosecutor, charges against one defendant were dismissed.⁹ On December 26, 2006, the IHT appellate branch denied the appeal filed in response to the verdict. The death sentence against Saddam Hussein was carried out on December 30, 2006, and on January 15, 2007, against the other two convicted persons. Further prosecution of other defendants¹⁰ is already underway on the next charge in the indictment in the so-called Anfal trial¹¹ alleging the genocide of 50,000 to 100,000 Kurds in 1988. The remaining charges against Saddam Hussein were dropped on January 8, 2007.

I. Political Regime Change

A political regime change, which can be divided into three phases, formed the initial basis for the prosecution of Saddam Hussein.

1. Phase One: The Iraq War, the Coalition Provisional Authority and the Governing Council of Iraq

The first phase of the political regime change began in March 2003 with the Iraq war (Gulf War III)¹². After two weeks of air strikes, US troops entered Baghdad on April 9, 2003. Saddam Hussein and the major figures of his regime had already fled. On April 16, 2003, the Coalition Provisional Authority¹³ – an interim civilian administration meant to assume the business of governing Iraq – was instituted under

North Iraqi Affairs), *Watban Ibrahim Hassan al-Tikriti* (Homeland Minister and Presidential Advisor), *Hashem Ahmed al-Jubouri al-Tai* (Minister of Defense), *Sabir Abdul-Aziz al-Duri* (Leader of the Military Intelligence Service).

⁷ *Barzan Al-Tikriti* and *Awwad Al-Bandar*.

⁸ *Abdullah Kadhim Ruwayid*, *Mizhar Abdullah Ruwayid*, and *Ali Dayih* were each sentenced to 15 years imprisonment; *Taha Yassin Ramadan* was sentenced to life imprisonment. This verdict was meanwhile suspended by the IHT Appellate Court on the ground the penalty was too lenient and remanded for new sentencing. It is anticipated that the First Trial Panel of the IHT will impose the death penalty against him as well (<http://www.spiegel.de/politik/ausland/0,1518,460412,00.html>).

⁹ *Mohammed Azawi Ali*.

¹⁰ Including *Ali Hassan al-Majid al-Tikriti* and *Sabir Abdul-Aziz al-Duri*.

¹¹ The term “Anfal” means an Iraqi Army extermination campaign against the Kurds.

¹² The First Gulf War is the Iran-Iraq war (September 1980 to August 1988); the Second Gulf War is the Iraq war against Kuwait and the Coalition Forces (August 1990 to February 1991).

¹³ CPA, see <http://www.cpa-iraq.org/>.

the leadership of Jay Garner. Some six weeks after the first bombing of Baghdad, US President George W. Bush declared the end¹⁴ of military operations in Iraq in an official speech given on May 1, 2003, on the aircraft carrier "Abraham Lincoln." Five days later Ambassador Paul Bremer was called to head the Coalition Provisional Authority and to relieve the predecessor civilian administrator Jay Garner.¹⁵ On May 22, 2003, acting under the authority of Chapter VII of the United Nations Charter¹⁶, the UN Security Council gave the U.S. and Great Britain, as victorious powers in the Iraq war, the green light to administer and rebuild Iraq (Resolution 1483¹⁷), including the formation of a transitional administration with the goal of later handing over the political fate of the country to a democratically legitimized government. In order to accomplish the mandate of UN Security Council Resolution 1483 (particularly resolution item No. 9) that a democratic system of government should ultimately develop, on July 13, 2003, the Governing Council of Iraq¹⁸ was formed under the administrative guidance of the Coalition Provisional Authority.

The Governing Council of Iraq has 25 members selected to reflect the relationships between ethnic and religious groups in Iraq¹⁹. The new committee took over the business of governing for one year and was intended to install ministers, facilitate the roll up to elections as well as constitute a commission to draft a transitional constitution.²⁰ The head of the Coalition Provisional Authority retained veto power over the decisions of the Governing Council of Iraq. In general, he was expected to give his consent in all dealings with the Governing Council of Iraq.²¹

The UN Security Council addressed the development of the political process in Iraq in Resolution 1500.²² It endorsed the partisan ethnic and religious composition of the Governing Council of Iraq as an important step towards creation of

an internationally recognized government by the people, with the power to exercise unrestricted Iraqi sovereignty. Moreover, in the same resolution it decided on a timeframe of 12 months to establish the United Nations Iraq Assistance Mission.²³ On October 16, 2003, the UN Security Council took up the Iraqi situation once again and reemphasized its readiness to support the development process in Iraq. As a result, it authorized the multinational troops present in Iraq to use all available measures to assure and maintain security and stability in Iraq, i.e., to create the necessary conditions to guarantee the safety of the United Nations Iraq Assistance Mission, the Governing Council of Iraq, and other interim Iraqi administrative institutions.²⁴ Factually, this was the first time in the history of the United Nations that military troops were sent into a country without an express mandate of the United Nations and then transformed into a multinational peace force.²⁵

During its time in power, the Governing Council of Iraq created the framework for a political development process. On November 15, 2003, in cooperation with the Coalition Provisional Authority²⁶, it established a timeline for the Iraqi people to gradually assume responsibility over their own affairs. The agreement contemplated the following timeline: By June 30, 2004, the Coalition Provisional Authority led by Paul Bremer was to be relieved of transitional governing responsibility. By February 28, 2004, the Governing Council of Iraq was to prepare a draft of a transitional constitution²⁷ which would govern the competencies and structures of the state for the period from June 30, 2004, (the so-called transfer of power) until the creation of a government legitimized by the Iraqi people and a permanent constitution.

From that point on, the political development process in Iraq took the following shape: On March 8, 2004, the Governing Council of Iraq implemented the Transitional Constitution for Iraq. On June 1, 2004, it appointed a new presidency and government which were to assume government responsibilities from the Coalition Provisional Authority on June 30, 2004. On June 8, 2004, UN Security Council Reso-

¹⁴ <http://www.netzeitung.de/servlets/page?section=1110&item=237485>.

¹⁵ Compare, <http://www.cpa-iraq.org/bremerbio.html>.

¹⁶ Available at: <http://www.un.org/aboutun/charter/index.html>.

¹⁷ Available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N03/368/53/PDF/N0336853.pdf?OpenElement> (English); http://www.un.org/Depts/german/sr/sr_02-03/srband02-03.pdf (German).

¹⁸ GCI; for a description of the Governing Council of Iraq, see: Coalition Provisional Authority Regulation number 6: Governing Council Of Iraq; available at: http://www.iraqcoalition.org/regulations/20030713_CPAREG_6_Governing_Council_of_Iraq_.pdf.

¹⁹ The Committee is made up of 14 Shiites, five Kurds, four Sunni Arabs, one Turkmen, and one Christian; compare, <http://www.netzeitung.de/spezial/irak/246980.html>.

²⁰ <http://www.netzeitung.de/spezial/irak/246980.html>.

²¹ Coalition Provisional Authority Regulation number 6: Governing Council Of Iraq; available at: http://www.iraqcoalition.org/regulations/20030713_CPAREG_6_Governing_Council_of_Iraq_.pdf; compare also, EGMR NJW 2006, 2971.

²² Available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N03/467/78/PDF/N0346778.pdf?OpenElement> (English); http://www.un.org/Depts/german/sr/sr_03-04/sinf59final.pdf (German).

²³ Compare, UN Security Council Resolution 1500-Nos. 1 and 2; available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N03/467/78/PDF/N0346778.pdf?OpenElement> (English); http://www.un.org/Depts/german/sr/sr_03-04/sinf59final.pdf (German).

²⁴ UN Security Council Resolution 1511-Nr. 13; available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N03/563/91/PDF/N0356391.pdf?OpenElement> (English); http://www.un.org/Depts/german/sr/sr_03-04/sinf59final.pdf (German).

²⁵ See, also the report of the State Center for Political Education, Baden-Württemberg "Iraq after the war" at http://www.lpb.bwue.de/aktuell/nach_irak_krieg.php3.

²⁶ The November 15 Agreement: Timeline to a Sovereign, Democratic and Secure Iraq; available at: <http://www.iraqcoalition.org/government/AgreementNov15.pdf>.

²⁷ Law Of Administration For The State Of Iraq For The Transitional Period (TAL); available at: <http://www.cpa-iraq.org/government/TAL.html>.

lution 1546²⁸ addressed the anticipated transfer of power to the sovereign transitional government for Iraq and expressed its readiness to support it.²⁹ Beyond that, it determined that occupation would end with the transfer of power, and the new interim government would have the right to order the withdrawal of international troops at any time.³⁰ With that, at least for all formal purposes, the occupation of Iraq ended. Iraq assumed full sovereignty, and a second phase of the transformation of Iraq into a democratically elected government began.

2. Phase Two: The Transitional Government and Transitional Constitution

In phase two there was an initial power transfer from the Coalition Provisional Authority to a government appointed by the Governing Council of Iraq. This appointed government had the primary task of providing necessary calm in Iraq and of taking all necessary measures to assure that the Iraqi people would be able to elect a Transitional National Assembly (TNA) by no later than January 31, 2005. It would then be up to the Transitional National Assembly to form a transitional government and to fashion a permanent constitution for Iraq on the basis of which a constitutionally elected (permanent) government would be organized.³¹ Approximately 60% of eligible voters took part peacefully and without incident in the transitional National Assembly elections on January 30, 2005. The Shiite coalition won an absolute majority³² with 140 of 275 seats. On February 22, 2005, the Shiite coalition nominated Ibrahim Jafari for the office of Prime Minister.³³ After approximately four months, the transitional National Assembly worked out a draft constitution which was voted on and accepted in a countrywide general referendum on October 14, 2005.³⁴ In this circumstance the

²⁸ Available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N04/381/16/PDF/N0438116.pdf?OpenElement> (English); http://www.un.org/Depts/german/sr/sr_03-04/sinf59final.pdf (German).

²⁹ UN Security Council Resolution 1546-No. 1; available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N04/381/16/PDF/N0438116.pdf?OpenElement> (English); http://www.un.org/Depts/german/sr/sr_03-04/sinf59final.pdf (German).

³⁰ UN Security Council Resolution 1546-No. 1; Nos. 1 and 9; <http://daccessdds.un.org/doc/UNDOC/GEN/N04/381/16/PDF/N0438116.pdf?OpenElement> (English); http://www.un.org/Depts/german/sr/sr_04-04/sinf59final.pdf (German).

³¹ Compare, Art. 2 para. 2 of the Transitional Constitution (TAL); available at <http://www.cpa-iraq.org/government/TAL.html>.

³² Compare, Report of the Independent Electoral Commission of Iraq; available at: <http://www.ieciraq.org/Arabic/FrameSetArabic.php> (Arabic).

³³ Compare, Report of the State Center for Political Education in Bavaria at <http://www.km.bayepartde/blz/web/irak/index.html>.

³⁴ 63 per cent of eligible voters took part in this referendum. 78 per cent voted for the Constitution; Compare, Final Report of the Independent Electoral Commission of Iraq of October

transitional constitution (Art. 61 Sec. 3) provided for the election of a new National Assembly by December 15, 2005.

3. Phase Three: Since December 2005

Phase three of the political regime change is the political completion phase. On December 15, 2005, 70% of eligible voters took part in the National Assembly elections.³⁵ On March 16, 2006, the Iraqi parliament convened for its constituent session. Some three years after the fall of Saddam Hussein, this is the first time Iraq's government functions are carried out by a government elected by the people and controlled by an elected parliament for a full four-year legislative period. Iraq's political regime change is terminated at this point, at least in any formal sense.

II. The Iraqi High Tribunal (IHT)

1. The Origin of the IHT

The idea of creating a court to adjudicate the crimes of Saddam Hussein and the heads of his regime was part of the political process in Iraq throughout the so-called development phases. This idea was already mentioned, at least in passing, in UN Security Council Resolution 1483, the first resolution passed after the official end of the Iraqi war. In this resolution, the UN Security Council called on all United Nations members to deny safe haven to all members of the former Iraqi regime who were allegedly responsible for crimes and atrocities and to support all measures to bring these persons to justice.³⁶ The establishment of a court to adjudicate these atrocities was among the central tasks of the Governing Council of Iraq. Shortly after its inception in July 2003, it formed a commission to work out the statute of a court.³⁷ The commission solicited input from internationally recognized criminal justice experts,³⁸ created a draft court statute, and presented it before the Governing Council of Iraq for their vote of approval. On December 10, 2003, the Coalition Provisional Authority empowered the Governing Council of Iraq to pass the court statute.³⁹ In the resulting statute, the criminal court had the original name "Iraqi Special Tribunal (IST)"⁴⁰.

25, 2005, available at: http://www.ieciraq.org/English/FrameSet_english.htm.

³⁵ http://www.ieciraq.org/English/FrameSet_english.htm.

³⁶ UN-SC-Res. 1483-Nr. 3; available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N03/368/53/PDF/N0336853.pdf?OpenElement> (English); http://www.un.org/Depts/german/sr/sr_02-03/srband02-03.pdf (German).

³⁷ Members of the Commission: Attorney *Salem Chalabi*; Judge *Wael Abd Al Latif*; Judges *Dara Nur al Din*; *Ahmed Shya'a*; *Naseir al Chadirchi*; Compare, International Center for Transitional Justice, "Briefing Paper: Creation and First Trials of the Supreme Iraqi Criminal Tribunal", Pg. 6, note 11.; available at: <http://www.ictj.org/images/content/1/2/123.pdf>.

³⁸ For an overview of the international support, see *Scharf/McNeal*, *Saddam On Trial*, 2006, Pg. 3 et seq.

³⁹ Compare, the addendum from Judge *Ra'ed Juhi* (Examining Magistrate on the Iraqi High Tribunal and its official press representative) „A comprehensive view of the IHT“,

After the Coalition Provisional Authority and the Governing Council of Iraq were dissolved through the power transfer to the (appointed) transitional government in June 2004, the Iraqi Special Tribunal statute (IST statute) was initially validated in the transitional constitution as the legal basis for a criminal court to adjudicate crimes of the Baath regime (Art. 48 Sec. 1). Despite the fact that UN Security Council Resolution 1500 had addressed the formation of the Governing Council of Iraq and its cooperation with the Coalition Provisional Authority, political legitimization and development of the IST statute according to democratic concepts by the Governing Council of Iraq did not remain uncontested. The Governing Council of Iraq, as originally created, was not directly elected by the people but rather by an administrative guideline established by the Coalition Provisional Authority, which was also not elected by the Iraqi people. Most likely because of this, the on January 5, 2005, popularly elected Transitional National Assembly revised the IST statute and passed a new court statute which became effective on October 18, 2005, and replaced the IST statute. Since then the court has been called the "Iraqi High Tribunal (IHT)".⁴¹ The Iraqi High Tribunal was embedded in the (permanent) constitution (Art. 130), adopted by popular referendum on October 15, 2005, as an independent judicial entity for the adjudication of atrocities by the former dictatorial regime.

2. The Legal Bases of a Trial before the IHT

The IHT statute⁴² consists of 10 parts comprising 36 articles (Part 1, Art. 1-10: Name, Jurisdiction, Court location as well as its structural composition; Part 2, Art. 11-14: Substantive jurisdiction and elements of crimes [genocide, crimes against humanity, war crimes, and specific crimes from Iraqi law]; Part 3, Art. 15: Personal criminal responsibility and attribution; Part 4, Art. 16: Procedural and evidentiary rules; Part 5, Art. 17: General principles of criminal law; Part 6, Art. 18-19: Preliminary proceedings, case prosecution and rights of the accused; Part 7, Art. 20-24: Conduct of the trial; Part 8, Art. 25-26: Appeal and re-trial; Part 9, Art. 27: Execution of sentencing; Part 10, Art. 28-36: General miscellaneous final provisions). The 70 procedural and evidentiary rules (IHT-Rules) are also incorporated into the statute by Art. 16 IHT-

Pg. 4; available at: http://www.iraq-ihf.org/en/about_thecourt.html; Regarding the authorization of the Governing Council of Iraq to pass the Statute of December, 2003, compare, CPA-Order No. 48; available at: http://www.cpa-iraq.org/regutions/20031210_CPAORD_48_IST_and_Appen_dix_A.pdf.

⁴⁰ The statute was implemented as Law No. 1/2003 and published under number 3980 of Al-Waqaa'e Al-Iraqiya, Official Gazette of the Republic of Iraq.

⁴¹ The law was enacted under Number 10/2005 and published under Number 4006 of Al-Waqaa'e Al-Iraqiya, Official Gazette of the Republic of Iraq.

⁴² Available in the original Arabic version at <http://www.iraq-ihf.org/ar/home.html> and in an English translation at http://www.law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf.

Statute. In addition, Art. 16 IHT-Statute contemplates the (supplemental) use of the Iraqi Code of Criminal Procedure 1971 (Iraqi CCP [1971]). Individual provisions of the IHT statute refer supplemental to the Iraqi Penal Code of 1969 (Iraqi PC [1969]). Art. 14 Sec. 2 and 3 IHT-Statute also refer to the law of treason, conspiracy, and corruption of August 7, 1958 (Law No. 7 of 1958). The collective basis for a criminal trial before the Iraqi High Tribunal is the IHT-Statute, the IHT-Rules, the Iraqi CCP (1971), the Iraqi PC (1969), and Law No. 7 of 1958.

3. Personal, Temporal, and Subject Matter Jurisdiction of the IHT

Art. 1 IHT-Statute governs the name and location of the court in Baghdad as well as its personal, temporal, and subject matter jurisdiction. Jurisdiction extends to every natural person, whether Iraqi national or permanent resident charged between July 17, 1968,⁴³ and May 1, 2003,⁴⁴ with genocide⁴⁵, crimes against humanity⁴⁶, war crimes⁴⁷, obstruction of justice or attempting to influence the work of the court⁴⁸, spoliation of natural resources⁴⁹, embezzlement of public assets, or misuse of position causing a risk of war, e.g., turning the Iraqi military forces against an Arabic state.⁵⁰ Thus, the elements of genocide, crimes against humanity, and war crimes correspond, but for inconsequential deviations⁵¹, with Art. 6, 7, and 8 of the Rome Statute of the International Criminal Court (ICC) in Den Haag. This justifies the conclusion that the Rome standards should be stipulated.⁵² In addition to the list of crimes, the IHT statute also has other international elements. For example, Art. 3 Sec. 5 IHT-Statute gives the Iraqi government authority to appoint international judges upon nomination by the president of the IHT. Art. 7 Sec. 2

⁴³ On July 17, 1968, the Baath Party took over power in Iraq; Compare, *Fürtig*, "A Short History of Iraq" ("Kleine Geschichte des Irak"), Vol. 1, 2004, Pg. 82.

⁴⁴ On May 1, 2003, the U.S. President declared the military action in Iraq ended, see, *Fürtig* (note 43).

⁴⁵ Art. 11 IHT-Statute.

⁴⁶ Art. 12 IHT-Statute.

⁴⁷ Art. 13 IHT-Statute.

⁴⁸ Art. 14 para. 1 IHT-Statute.

⁴⁹ Art. 14 para. 2 IHT-Statute.

⁵⁰ Art. 14 IHT-Statute in conjunction with Art. 1 and Art. 2g, Law No. 7 of 1958.

⁵¹ The „Crime of Apartheid“ is not included in the acts characterized as „Crimes against humanity“ in the IHT-Statute according to Art. 7 para. 1j Rome-Statute. In contrast to Art. 6 (Genocide) of the Rome-Statute, the crime of „Genocide“ in the IHT-Statute, second paragraph, participation in genocide or attempted genocide is criminally punishable. This rule is superfluous, however, for systematic reasons, because in Art. 15 para. 1, 2 IHT-Statute questions of participation in and attempt are covered for all crimes.

⁵² *Heinsch*, Saddam Hussein Before the Iraqi Special Tribunal („Saddam Hussein vor dem Iraqi Special Tribunal“), available at <http://www.uni-muenster.de/Politikwissenschaft/Doppeldiplom/docs/Irak1.pdf>.

IHT-Statute creates the possibility of appointing international advisors to support examining magistrates and prosecutors. Moreover, judges are authorized by Art. 17 Sec. 2 IHT-Statute (interpreting Art. 11, 12, 13, and 14 IHT-Statute) to resort to the decisions of international criminal courts as precedent. Art. 15 IHT-Statute also borrows from the statutes of Rome, Yugoslavia, and Rwanda⁵³ with respect to its treatment of criminal accountability. All of these examples illustrate the “hybrid”⁵⁴ character of the IHT. In contrast to the statutes of many modern tribunals for the adjudication of regime crimes, in the broadest sense⁵⁵, or the International Criminal Court in Den Haag⁵⁶, Art. 1 IHT-Statute recognizes no territorial jurisdictional limits. As long as the personal, temporal, and subject matter requirements are met, the IHT has jurisdiction without consideration of the particular location. Through this wide ranging territorial jurisdiction, the crimes perpetrated by the Saddam Hussein regime in connection with the war against Iran (September 1980 to August 1988) and the invasion of Kuwait (August 2, 1990 to February 1991) come under the cognizance of the IHT.⁵⁷

4. Trial Process Before the IHT

a) Investigative Proceedings/Pre-Trial

A pre-trial process precedes the actual trial as with German criminal proceedings. Here, however, in contrast to German criminal procedure law in which the prosecuting attorney is the “Lord of preliminary proceedings”⁵⁸, the responsibility for drawing up charges and initiating the indictment lies with

an examining magistrate. The prosecutor is entitled only to unrestricted access to the files (IHT-Rule 23 Sec. 2). The examining magistrate may get involved on his own initiative (Art. 18 Sec. 1 IHT-Statute), or on the basis of information from any other source, in particular, however, on notice from Iraqi ministers, government officials, examining commissioners, domestic or international organizations (Art. 18 Sec. 1 IHT-Statute in conjunction with IHT-Rule 22 Sec. 2). The examining magistrate must determine whether there is a sufficient basis to institute preliminary proceedings, which corresponds essentially to the so-called initial suspicion (probable cause) in German criminal procedure law (§ 152 Sec. 2 German Code of Criminal Procedure).⁵⁹ Working within the framework of the preliminary findings, he is authorized to take the depositions of witnesses and victims, or their respective relatives, as well as accused parties, to order the accused to be held in investigative custody (IHT-Rule 24 Sec. 2), and to take other protective and security measures. Beyond that, he can seek, in consultation with the presiding examining magistrate, the cooperation of state bodies or international organizations, including Interpol (Art. 18 Sec. 2 in conjunction with IHT-Rule 23 Sec. 1 c). As part of this process, he must convey the inculcating as well as exculcating evidence (IHT-Rule 23 Sec. 2). If the examining magistrate determines that the collective evidence supports the requisite level of suspicion of the commission of a crime falling within the jurisdiction of the IHT, he must file charges with the IHT. This corresponds essentially with probable cause as found in § 170 Sec. 1 of the German Code of Criminal Procedure.⁶⁰

b) Main Trial Proceedings

The IHT trial panel consists of a presiding judge and four associate judges. It is responsible for initiating the main trial. There is no authority to dismiss the main proceeding analogous to § 204 of the German Code of Criminal Procedure. The trial panel must see to it that the trial is conducted in such a manner as to protect the interests and rights of the defendant (Art. 20 Sec. 2 IHT-Statute), and that necessary measures are taken to protect witnesses and victims. After the trial proceeding is opened, the trial panel must read the indictment charges to the defendant and ask him to enter a plea of “guilty” or “not guilty” (Art. 20 Sec. 3 IHT-Statute in conjunction with IHT-Rule 54). Only from this point on does the prosecution perform the task of prosecuting the charges in the typical manner known from the German Code of Criminal Procedure.

After the evidentiary phase of the trial is completed, the trial panel must publicly announce its verdict. A simple majority of the judges’ votes is sufficient to support the verdict. Dissenting opinions can be added to the verdict (Art. 23 Sec. 2 IHT-Statute).

In determining the penalty, the trial panel is essentially limited to selecting among four types of penalty set out in the Iraqi PC (1969) (Art. 24 Sec. 1 IHT-Statute), namely death,

⁵³ More detail below, III. 1. (The Indictment).

⁵⁴ See, *Ambos*, International Criminal Law („Internationales Strafrecht“), 2006, § 6 Parts 58, 63.

⁵⁵ Compare this with the ad hoc Criminal Tribunals for Yugoslavia and Rwanda, Compare, Art. 1 ICTY-Statute, Art. 1 ICTR-Statute.

⁵⁶ According to Art. 4 para. 2 and Art. 12 para. 2a of the Rome-Statute, the jurisdiction of the International Criminal Court (ICC) in Den Haag only extends to the sovereign territory of the treaty signatories, where the subject criminal act occurred. For this very reason, the ICC in Den Haag would not have had jurisdiction to adjudicate most of *Saddam Hussein’s* alleged crimes since Iraq is not a treaty state and most of the crimes took place in the sovereign territory of Iraq. Moreover, the ICC in Den Haag only has jurisdiction over crimes committed after the effective date of the Rome-Statute, July 1, 2002. As a result, many crimes did not fall under the jurisdiction of the ICC in Den Haag. For this reason, it would not have been feasible to use a so-called ad hoc inclusion along the lines of Ivory Coast, February 15, 2005; see, *Ambos* (Fn. 54), § 6 Part. 45.

⁵⁷ Compare, *Ambos* (Fn. 54), § 6 Part 63; Art. 1 para. 2 of the IST-Statute of December 2003 expressly includes this crime: “territory of the Republic of Iraq or elsewhere, including crimes committed in connection with Iraq’s wars against the Islamic Republic of Iran and the State of Kuwait”.

⁵⁸ *Meyer-Göfner*, Code of Criminal Procedure (“Strafprozessordnung, Kommentar“), 48. Aufl. 2005, § 163 Part 3.

⁵⁹ E.g., *Meyer-Göfner* (note 58), § 152 Part 4.

⁶⁰ E.g., in place of many: *Meyer-Göfner* (note 58), § 170 Part 1 et seq.

life imprisonment, imprisonment for a term of up to 15 years, and a monetary fine (Art. 25 and 26 Iraqi PC [1969]). If homicide or rape is among the crimes the defendant is convicted of, the trial panel must impose the penalty set out in the Iraqi PC (1969) for these crimes. In the case of a conviction of multiple crimes, the penalty for the most serious crime is imposed (Art. 142 Iraqi PC [1969]).

c) Appellate Procedure

Within 30 days (Art. 25 Sec.1 IHT-Statute in conjunction with Art. 252 Iraqi CCP [1971]) after the verdict is announced, both the convicted person and the prosecution have the right to appeal the trial panel's verdict to the appellate panel of the IHT, which consists of nine judges and is directed by the president of the IHT⁶¹ (Art. 3 Sec. 4 a IHT-Statute). If the trial panel has imposed the death penalty or life imprisonment in its verdict, it is then obligated to deliver to the appellate branch the record of the case and the verdict within ten days (Art. 16 IHT-Statute, IHT-Rule 68 in conjunction with Art. 254, 255 Iraqi CCP [1971]). In these cases, there is an automatic appeal, even without a formal filing (Art. 254 Sec. 1 Iraqi CCP [1971]). Grounds for an appeal are limited to the following: the verdict is contrary to the law; the law was interpreted in error; there was a procedural error in the proceeding; or there was a substantial error in the presentation of the evidence which amounts to an abuse of justice (Art. 25 Sec. 1 IHT-Statute). The appellate panel may affirm, reverse or revise the decisions taken by the trial panel or the decisions of the examining magistrate (Art. 25 Sec. 2 IHT-Statute). If the appellate body suspends a decision, which would mean the convicted person must be released by the trial panel, the appellate body must return the case to the trial panel for a new trial. If it suspends the decision of an examining magistrate which would implicate preliminary proceedings by the examining magistrate, it refers the case to the examining magistrate to set the decision aside (Art. 25 Sec. 3 IHT-Statute).

It is disputed whether there is a right to further appeal beyond the decision of the appellate panel of the IHT.⁶² The IHT statute does not contemplate any further legal recourse, i.e., right to further remedy. According to Art. 16 IHT-Statute however, the entire Code of Criminal Procedure (1971) is deemed incorporated. Art. 266 Iraqi CCP (1971) provides for a petition to the appellate court within 30 days to confirm the decision of the appellate panel. However, this petition might not apply to decisions of the IHT appellate panel. The IHT statute could be considered to be the last recourse with regard to remedies, thereby cutting off any further options. In that case, Art. 25 IHT-Statute would have to be seen as an ultimate special rule. However, this is questionable for various reasons including the fact that the appellate court not only recognizes the convicted person's and the prosecution's right to petition, as contemplated by Art. 25 Sec. 1 IHT-Statute,

⁶¹ At that time Judge *Arf Schahin*.

⁶² See, e.g., the discussion between *Scharf* and *Heller*, „Dujail Issue # 46: Saddam's Execution“; available at: <http://www.law.case.edu/saddamtrial/index.asp>.

but also all other complainants'.⁶³ Only Art. 249 Iraqi CCP (1971) produces this result. The appellate court of the IHT itself reached beyond Art. 25 IHT-Statute to incorporate the Iraqi Code of Criminal Procedure (1971). Since there is a dearth of other authority to support the concept that the IHT statute should exclude the legal construct of appellate correction (review), it is impossible that the disallowance of a petition for appellate review can be based on the notion of the specialized nature of the IHT statute. Art. 267 No. 3 Iraqi CCP (1971) could support the argument that petition for appellate review should not be recognized. It provides that there is no basis for a petition for appellate review of decisions and verdicts of the so-called „General Board“ of the general Iraqi appellate court, to which the Iraqi Code of Criminal Procedure (1971) applies expressly, not just in an advisory capacity. However, this deliberative entity does not exist in the IHT; thus, Art. 267 No. 3 Iraqi CCP (1971) is not directly applicable. According to Art. 257 Sec. 2 Iraqi CCP (1971)⁶⁴, the General Board of the general Iraqi appellate court always has original appellate jurisdiction in cases involving imposition of the death penalty (Art. 257 Sec. 2 Iraqi CCP [1971]). There is, however, no good explanation why a petition for appellate review should be excluded for the death penalty, the most serious of all penalties. However, in cases where the verdict of the IHT could result in the death penalty, one could invoke the rationale of Art. 267 No. 3 Iraqi CCP (1971) and imply authority to refuse appellate review. However, this approach is, first, highly questionable because by this analogy the person sentenced to death is denied a last appeal. Second, there is no substantive justification why verdicts resulting in life imprisonment or lesser periods of incarceration compared to verdicts supporting a death penalty should be in any way singled out, because the deliberative body (Appellate Panel of the IHT) is the same in all cases. The result is that a petition for appellate review under Art. 266 Iraqi CCP (1971) would legally apply to all decisions of the appellate panel of the IHT.

d) Execution of the Sentence

By operation of law, all verdicts of the IHT must be carried out within 30 days (Art. 27 Sec. 2 IHT-Statute). When the appellate decision takes effect depends on whether the convicted person is allowed to petition for appellate review under Art. 266 Iraqi CCP (1971) (by operation of law, no sooner than expiration of the 30-day period) or not (by operation of law, upon announcement of the appellate decision).

A death sentence must not be carried out on a national holiday and not during particular religious holidays observed by the condemned's religion (Art. 290 Iraqi CCP [1971]).

⁶³ See, Pg. 1 of the appellate decision in the Dujail case; available at http://law.case.edu/saddamtrial/documents/20070103_dujail_appellate_chamber_opinion.pdf (English) und <http://www.iraq-ihf.org/ar/doc/ihfdf.pdf> (Arabic).

⁶⁴ In addition, jurisdiction is based on reference to cases by the President of the Appellate Court of another such body (so-called „Penal Boards“), Art. 257 para. 2 Var. 2 and 3 Iraqi CCP, 1971.

There is no clemency allowed the condemned, even on personal intervention by the national president (Art. 27 Sec. 2 IHT-Statute).

III. The Dujail Case Against Saddam Hussein

The case prosecuted before the IHT was the so-called Dujail case against Saddam Hussein and seven additional defendants.

1. The Indictment

The indictment against Saddam Hussein addressed him directly and contained the following:⁶⁵

“I, the Presiding Judge of the First Trial Panel of the Iraqi High Tribunal, accuse you, Saddam Hussein Al-Majid, of the following: While you occupied the office of National President, Supreme Commander of the Iraqi Armed Forces, and Chairman of the Revolutionary Command Council, and while visiting the village of Dujail on July 7, 1982, which was under the administration of the Salah-al-Din province, you issued orders to the military and security organizations, namely the military facilities, the Secret Service, the Peoples’ Army, and the Baath Party organization in Dujail, claiming that shots were fired at your convoy and accompanying vehicles, to conduct a wide-reaching and systematic attack on the population of the village of Dujail (men, women, and children), with all available weapons and helicopters, in order to kill, seize, imprison, and torture a large number of inhabitants. Thereafter you issued orders to destroy their crops and houses.

According to the evidence supporting the case, the forenamed organizations killed nine people⁶⁶ the next day, following this command. Entire families, totaling 399 persons, were detained and imprisoned in the Investigation and Interrogation Section (Al-Hakimiyyah) of the Central Headquarters of the since disbanded Secret Service, under the leadership of co-defendant Barzan Ibrahim Al-Hasan. The detainees were tortured by officers of the Secret Service. During the interrogations, five of the detainees⁶⁷ died as the result of torture by electrical shocks, blows to the head with metal objects, sleep deprivation, and other methods. The remaining detainees were taken to the Abu-Ghraib prison under custody of the since disbanded Secret Service. There the detainees were tortured further. Many of them were killed; six more⁶⁸ died under the forenamed torture methods.

Many of the detainees (men, women, and children) were taken to a fenced desert area (Liyah) in the vicinity of Al-Samawah, which was intended to provide protection to Bedouins and their animals. The imprisonment lasted four years. During this time in the desert, they were subjected to torture, intentionally harsh health and living conditions, as well as deprivation of food and medical care. One detainee⁶⁹ was killed there. Five more detainees died.⁷⁰

Acting on your direct orders, the „National Security“ Section of the since disbanded Presidium handed over the names of 148 persons to the since disbanded Revolutionary Tribunal, under the chairmanship of co-defendant Awwad Hanad Al-Bandar. Included were the names of the persons who died from torture during the imprisonment in the Central Headquarters Investigation and Interrogation Section (Al-Hakimiyyah) of the since disbanded Secret Service and in the Abu-Ghraib prison, and the names of 30 juveniles under the age of 18.⁷¹ Co-defendant Awwad Hamad Al-Bandar conducted a one-day summary trial against all 148 persons, resulting in an unappealable verdict (No. 744/[SATTS J]/1984 of June 14, 1984) by which all were sentenced to death by hanging. This sentence also applied to the people tortured to death before the trial by the Central Headquarters Investigation and Interrogation Section (Al-Hakimiyyah) of the since disbanded Secret Service, although they had received no trial process. Moreover, juveniles under 18 were sentenced to death and executed, although this was not legally allowed (Art. 79 Iraqi PC [1969], principles of the Iraqi Law for the Protection of Youth [1983], and Iraqi PC [1969]; Art. 6 Sec. 5 of the International Pact On Civil Liberties and Political Rights [1966], which had been ratified by the Republic of Iraq on February 18, 1969).

You signed the above mentioned mass execution verdict (Presidential Directive No. 778, June 16, 1986). Further, acting in your position as Chairman of the since disbanded Revolutionary Command Council, you issued an order (No. 1283, October 24, 1982) to seize and destroy the fields and crops of the Dujail inhabitants. The bodies of the killed were disappeared and not turned over to their families. The fate of one prisoner, as well as six juveniles⁷², is yet unknown.

Based on foregoing, you have committed the following crimes:

- a) Crime against humanity committed by deliberate killing (Art 12 Sec. 1 a IHT-Statute),
- b) Crime against humanity committed by the expulsion or forced displacement of a population (Art. 12 Sec. 1 d IHT-Statute),
- c) Crime against humanity committed by deprivation of liberty or other grievous deprivation of physical freedom while violating basic concepts of human rights (Art. 12 Sec. 1 e IHT-Statute),
- d) Crime against humanity committed by torture (Art. 12 Sec. 1 f IHT-Statute),

⁶⁵ Available in English at *Scharf/McNeal* (note 38), Pg. 63 et seq. and at http://law.case.edu/saddamtrial/documents/20060515_indictment_trans_saddam_hussein.pdf; in Arabic at <http://law.case.edu/saddamtrial/images/B4L0558.JPG>; <http://law.case.edu/saddamtrial/images/B4L0559.JPG> and <http://law.case.edu/saddamtrial/images/B4L0560.JPG>; a German translation of the indictment, including the standard for the law, through the authors is available in the German article, ZIS 2007, 1 (7 et seq).

⁶⁶ Named in the indictment.

⁶⁷ Named in the indictment.

⁶⁸ Named in the indictment.

⁶⁹ Named in the indictment.

⁷⁰ Named in the indictment.

⁷¹ Named in the indictment.

⁷² Named in the indictment.

e) Crime against humanity committed by forced disappearance of persons (Art. 12 Sec. 1 h IHT-Statute), and

f) Crime against humanity committed by other similar inhumane treatment causing the deliberate infliction of severe suffering, or substantial curtailment of physical integrity, or adversely affecting mental or physical health (Art. 12 Sec. 1 i IHT-Statute).

You are liable for these crimes in accordance with Art. 15 Sec. 1 through Sec. 4 IHT-Statute, which states:

Sec. 1: In accordance with this statute, whoever commits a crime subject to the jurisdiction of this court is individually responsible and culpable.⁷³

Sec. 2: In accordance with this statute and the rules of Iraqi criminal law, a person is criminally responsible, who

a) commits such a crime personally, in concert with another, or through another without regard to the criminal responsibility of the other,

b) orders, solicits or induces the commission of such a crime, which has been completed or has been attempted,

c) with the intent of facilitating such a crime, affords assistance or other support in the preparation of means for, commission of, or attempted commission of the crime,

d) in any other way contributes to the commission or attempted commission of such a crime through a group of people acting with common purpose. Such a contribution must be deliberate and done either with the purpose of advancing the criminal activity or culpable intent of the group, to the extent it relates to the commission of a crime coming under the jurisdiction of the court, or with knowledge of the intent of the group.

e) regarding the crime of genocide, directly incites others to commit genocide.

f) attempts to commit such a crime by taking an action constituting a material step towards its commission, which due to circumstances independent of the perpetrator's intent, does not result in the completion of the crime. Nonetheless, whoever abandons further action in furtherance of the crime or in some other manner interferes with completion of the crime, is not subject to punishment for the attempt under this statute, if he has completely and voluntarily abandoned the illegal purpose.⁷⁴

Sec. 3: The official status of the defendant, whether as National President, President or Member of the Revolutionary Command Council, Prime Minister, or Chairman or Member of the Baath Party Central Committee will not relieve the defendant of, nor reduce the severity of any penalty.⁷⁵ No person may claim immunity with respect to any of the crimes covered in Art. 11 through 14 of this statute.⁷⁶

⁷³ Art. 15 para. 1 IHT-Statute corresponds to Art. 25 para. 2 Rome-Statute.

⁷⁴ Art. 15 para. 2a to f IHT-Statute corresponds generally to Art. 25 para. 3 Rome-Statute.

⁷⁵ Art. 15 para. 3 Sub. 1 IHT corresponds generally to Art. 27 para. 1 Rome-Statute.

⁷⁶ Art. 15 para. 3 Sub. 2 IHT corresponds generally to Art. 27 para. 2 Rome-Statute.

Sec. 4: Crimes committed by a subordinate do not relieve the superiors of their legal responsibility where the superior knew or should have known the subordinate was in the process of committing or commencing such an act and the superior did not take the necessary and appropriate measures to prevent the action or turn the matter over to the appropriate authority for investigation and prosecution.⁷⁷

Based on the abovementioned, and in light of the facts revealed in the evidentiary material developed in the investigatory proceedings, by virtue of my office as Presiding Judge of the First Trial Panel of the Iraqi High Tribunal, and based on the stated allegations, and in consideration of the laws and regulations I have read to you, I have decided to commence the trial against you. What is your plea? Are you guilty or not guilty?"

Saddam Hussein, as well as the other defendants, answered, "Not guilty."

2. The Trial

The evidentiary phase of the trial lasted from October 19, 2005, through July 24, 2006. During the 40 trial days, 130 witnesses gave testimony and numerous exhibits were considered. The following were notable events during the trial:

a) Recusal of the Presiding Judge

The Presiding Judge, Rizgar Mohammed Amin, recused himself for personal reasons, according to official reports, on January 14, 2006, after eight days of trial.⁷⁸ Judge Raouf Abdel-Rahman, who up to that point had been neither present nor involved in the trial, took his place and presided until the end of the trial. Witnesses who had testified to that point were not recalled. This would have not been permissible under German criminal procedure law as a violation of the concept of immediacy (i.e. all aspects of the case must be presented to the court with the responsibility to render a verdict⁷⁹), but it is permissible under Iraqi law according to Art. 16 IHT-Statute in conjunction with Art. 161 Iraqi CCP (1971). Repeating testimony is only advisory, not mandatory. The change of a (Presiding) judge during an ongoing trial does not constitute, according to Iraqi procedural law, a procedural error.

b) Trial Objections

The defense raised objections against the new Presiding Judge Raouf Abdel-Rahman. He comes from the Kurdish village Halabdscha, which in 1988 was the target of a poison

⁷⁷ Art. 15 para. 4 IHT corresponds generally to Art. 7 ICTY-Statute (Yugoslavia) and Art. 6 ICTR-Statute (Rwanda).

⁷⁸ Regarding reasons for recusal see, IHT-Rule 9.

⁷⁹ In place of many, *Meyer-Gofßner* (note 58), § 250 Part 1 et seq; regarding regulations governing substitute judges and jurors, compare § 192 Parts 2 and 3 German Code of Judicial Organization ("Gerichtsverfassungsgesetz"); such a procedure would not be permissible also before the International Criminal Court (ICC) in Den Haag (Art. 74 para. 1 Rome-Statute), compare, *Ambos*, ZStW 111 (1999), 175 (201).

gas attack by the Iraqi army, resulting in at least 3,000 dead and 7,000 at least to some extent seriously injured. This crime was supposed to be the subject of a later trial before the IHT. Moreover, Raouf Abdel-Rahman belongs to a human rights organization which cares for victims of the Baath regime in Kurdistan. The First Trial Panel denied all trial objections.

c) Defense Counsel

Three of defendants' defense counsels were shot during the trial with the result that from the end of June 2006 on, except for one volunteer defense attorney⁸⁰, all other defense counsel boycotted the trial due to security issues until the verdict was read.⁸¹ From the end of June 2006 on, the defendants were represented by appointed defense counsel from the "Defense Office" (compare IHT-Rule 30), who until that point had not participated in the trial. Again, according to Iraqi procedural law, there was no requirement that witnesses who had already testified be recalled.

d) Exclusion of the Defendants Due To Disruptive Behavior

Saddam Hussein and other defendants were removed from the court room on numerous occasions for disruptive behavior. The disruptive behavior included, in addition to insulting the judges and other outbursts, giving political speeches. This exclusion is allowed under Iraqi criminal procedure law (IHT-Rule 52 Sec. 1 and 2). After the defendant is returned to the court room, the court must inform him about the content of the trial during his absence (IHT-Rule 52 Sec. 2).

3. The Verdict

On November 5, 2006, the First Trial Panel of the IHT sentenced Saddam Hussein to death by hanging for crimes against humanity committed by deliberate killing (Art. 12 Sec. 1 a, Art. 15 Sec. 1, 2, 3, and 4, Art. 24 IHT-Statute in conjunction with Art. 406 Iraqi PC [1969]), crimes against humanity committed by the expulsion or forced displacement of a population (Art. 12 Sec. 1 d, Art. 15 Sec. 1, 2, 3, and 4, Art. 24 IHT-Statute in conjunction with Art. 421 Iraqi PC [1969]), crimes against humanity committed by deprivation of liberty or other grievous deprivation of physical freedom while violating basic concepts of human rights (Art. 12 Sec. 1 e, Art. 15 Sec. 1, 2, 3, and 4, Art. 24 IHT-Statute in conjunction with Art. 421 Iraqi PC [1969]), crimes against humanity committed by torture (Art. 12 Sec. 1 f, Art. 15 Sec. 1, 2, 3, and 4, Art. 24 IHT-Statute in conjunction with Art. 333 Iraqi PC [1969]), and crimes against humanity committed by other similar inhumane treatment causing the deliberate infliction of severe suffering, or substantial curtailment of physical integrity, or adversely affecting mental or physical health (Art. 12 Sec. 1 i, Art. 15 Sec. 1, 2, 3, and 4, Art. 24 IHT-Statute in conjunction with Art. 479 Sec. 2 Iraqi PC [1969]). The First Trial Panel of the IHT acquitted the defendants on

the count of forced disappearance of persons for lack of evidence (Art. 12 Sec. 1 h IHT-Statute).⁸² The death penalty was mandated against Saddam Hussein on the basis of the conviction of crimes against humanity committed by deliberate killing (Art. 12 Sec. 1 a IHT-Statute) pursuant to Art. 24 Sec. 1 IHT-Statute in conjunction with Art. 142, 406 Iraqi PC (1969) (Deliberate killing with special circumstances) as the most severe of all the justified penalties.

The First Trial Panel dealt first with the legitimacy of the IHT in its explanation of the verdict, since this issue was brought into question by the defense. Defense objections were denied⁸³ with reference to the UN Security Council resolutions previously discussed in the framework for the political regime change⁸⁴, which had addressed the establishment of the Governing Council and its cooperation with the Coalition Provisional Authority, and had legitimized the transitional government after the transfer of power, the subsequent general referendum, and free parliamentary elections⁸⁵.

Furthermore, the First Trial Panel of the IHT rejected the defense argument that, according to Art. 240 of the Iraqi Constitution of 1970, Saddam Hussein enjoyed unrestricted immunity as National President and Chairman of the Revolutionary Command Council which only the Revolutionary Command Council could withdraw. No one who had committed crimes of such magnitude could claim immunity. International recognition of this has developed over time, beginning with the Nuremberg and Yugoslavian trials. Moreover, with the fall of the regime and establishment of a new government, immunity was expressly suspended in any event by Art. 15 Sec. 3 IHT-Statute. Further, according to the express operation of Art. 15 Sec. 3 IHT-Statute, immunity is not available for criminal liability for crimes under Art. 11 through 14 IHT-Statute.⁸⁶

The First Trial Panel of the IHT concentrated exhaustively on the defense objection that the principle „No crime without a law, and no penalty without a law“⁸⁷ had been violated and that this constituted an ex post facto law.⁸⁸ The defense argued that the fact elicited at trial occurred in the period between 1982 and 1986, a time when these acts had

⁸⁰ Of co-defendants *Abdullah Kadhim Ruwayid* and *Mizhar Abdullah Ruwayid*.

⁸¹ *Scharf/McNeal* (note 38), Pg. 82.

⁸² The verdict is available in the original Arabic version at <http://www.iraq-iht.org/ar/home.html> and in an (unofficial) English translation at <http://law.case.edu/saddamtrial/dujail/opinion.asp>.

⁸³ Pg. 30 et seq. of the Arabic original, Pg. 26 et seq. of the (unofficial) English translation.

⁸⁴ See above, I. 1. (Phase One of the Political Regime Change).

⁸⁵ See above, I. 2. (Phase Two of the Political regime Change).

⁸⁶ Pg. 35 et seq. of the Arabic original, Pg. 31 et seq. of the (unofficial) English translation.

⁸⁷ Instead of many: *Ambos* (note 54), § 1 Part. 11.

⁸⁸ Instead of many: *Rudolphi*, in: Rudolphi et al. (Eds.), *Systematic Commentary on the Penal Code („Systematischer Kommentar zum Strafgesetzbuch“)*, 6th Ed., 26. Printing, Status as of: June 1997, § 1 Part 6 et seq.

not yet been codified as crimes against humanity and, moreover, the IHT was not yet established. The First Trial Panel of the IHT rejected these objections with the rationale, among others, that no written law need exist in the area of human rights law and that the unwritten international law of peoples is a sufficient basis on which to ground criminal culpability, giving effect to the principle “*nullum crimen sine lege*”. In 1982, peacetime crimes against humanity were recognized in customary law. On this point, the First Trial Panel of the IHT referred to the war crime trials in Nürnberg and Tokyo at the end of the Second World War. Further, under Iraqi national criminal law, the alleged acts (murder, torture, rape, forced dislocation, etc.) also carried potential penalties at the point in time these events took place, i.e. 1982 and thereafter. Moreover, the prohibition against *ex post facto* laws would not apply to the establishment of the Iraqi High Tribunal and the prosecution of the defendant’s crimes, because these are criminal procedural matters. The prohibition against *ex post facto* laws does not apply to procedural law issues.⁸⁹

It was also problematic whether Saddam Hussein could be sentenced to death.⁹⁰ The Coalition Provisional Authority had suspended the death penalty in § 3 Part 1 of Administrative Guideline No. 7 of June 9, 2003.⁹¹ According to Art. 24 IHT-Statute in conjunction with Art. 2 Sec. 2 Iraqi PC (1969) (which corresponds with § 2 Part 3 of the German Penal Code), the defendant must receive the benefit of a milder later law if the reduction of severity is the result of a law passed between the act and the verdict (principle of *lex mitior*).⁹² The transitional government appointed by the Governing Council of Iraq re-introduced the death penalty on August 8, 2004, for certain crimes. The law provided for *ex nunc* (prospective) application after its effective date only.⁹³ The First Trial Panel of the IHT argued that this had merely been a suspension rather than an abolition of the death penalty; Art. 24 IHT-Statute in conjunction with Art. 2 Sec. 2 Iraqi PC (1969) is, therefore, not applicable. The death penalty existed as a form of penalty in Iraq since the Iraqi Penal Code of 1911.

4. The Appeals Process and Execution of Sentence

On December 26, 2006, the Appeals Panel of the IHT denied the appeal of the sentence of death by hanging against Saddam Hussein. The Appellate Court followed essentially every point of the argument made by the First Trial Panel of the IHT. On Saturday, December 30, 2006, at 6:00 local time, the death sentence against Saddam Hussein was executed.⁹⁴ Re-

garding the execution, two comments can be made. In most Sunni Islamic states, the Muslim sacrifice festival (*Ied Al-A’adha*) began on December 30, 2006. In Iraq, this festival, as a state holiday, did not begin until December 31, 2006. It is questionable whether this was a violation of Art. 290 Iraqi CCP (1971), which states that death sentences may not be executed on state holidays and particularly not during religious festivals of the condemned person’s religion. If one focuses on the state holiday, then there is no violation because the legal holiday in Iraq did not begin until December 31, 2006. However, if one focuses on holidays special to the condemned person’s religion, one must conclude, since Saddam Hussein was Sunni, that a (temporary) ban against execution was already in place as of December 30, 2006.

Moreover, the death sentence against Saddam Hussein was executed before all legal remedies had been exhausted. According to the position taken here, there is still a legal right to an appeal (correction) of the decision of the Appellate Court of the IHT according to Art. 266 Iraqi CCP (1971). Saddam Hussein had 30 days after the announcement of the appellate decision to lodge an appeal (correction) with the Appellate Court of the IHT. Only after this period had run or the appeal had been rejected could the penalty be executed. Although no other outcome could have been expected from the substance of this case, it cannot be reason to change constitutional proceedings.

⁸⁹ Pg. 39 et seq. of the Arabic original version; Pg. 35 et seq. of the (unofficial) English translation; see also, *Ambos* (note 54), § 1 Part 12 et seq.

⁹⁰ Thorough treatment of this topic, *Bohlander*, ZStW 117 (2005), 677 et seq.

⁹¹ http://www.iraqcoalition.org/regulations/20030610_CPAORD_7_Penal_Code.pdf.

⁹² Instead of many: *Rudolphi* (note 88), § 2 Part 5 et seq.

⁹³ Complete *Bohlander*, ZStW 117 (2005), 677 (680).

⁹⁴ Regarding the context: <http://www.spiegel.de/politik/ausland/0,1518,457204,00.html>.