I. INTRODUCTION

U.S. forces arrested Saddam Hussein on December 13, 2003, less than a week after Iraq's transitional Governing Council voted to establish its own tribunal to try Iraqi nationals on charges of war crimes, crimes against humanity, genocide, and stipulated violations of Iraqi law.1 Saddam's arrest catapulted the Iraqi Special Tribunal for Crimes Against Humanity2 (Iraqi Special Tribunal) into the spotlight, and Iraqi officials quickly indicated their intent to try Saddam themselves.3 The decision to try Saddam before the Iraqi Special Tribunal has generated much criticism. Human rights organizations are skeptical about the ability of Iraqi judges to handle a complex trial without international assistance and, regardless of that ability, believe that broad international participation is necessary to ensure the legitimacy of the trial.4

This Note addresses the question of whether the Iraqi Special Tribunal is a suitable venue in which to try Saddam. During the last decade, hybrid domestic-international tribunals have emerged as an alternative to purely international or domestic tribunals. In theory, hybrid tribunals combat the limitations of purely domestic or international tribunals, most notably

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problems of capacity-building\(^5\) and of achieving both domestic and international legitimacy.\(^6\) International tribunals have been criticized for not doing more to rebuild the local judiciary, while analysts have questioned the ability of local institutions to issue fair verdicts when trying members of an ousted regime.\(^7\)

This Note examines the plan to try Saddam before the Iraqi Special Tribunal in light of the goals of capacity-building and legitimacy, and concludes that broader international participation is necessary to achieve those aims. Section II briefly addresses the nature of the allegations lodged against Saddam.\(^8\) Section III examines hybrid tribunals as vehicles for the trial of serious international crimes and also briefly considers the tribunals installed in East Timor and Sierra Leone. Section IV analyzes the Statute of the Iraqi Special Tribunal, paying particular attention to the need for capacity-building in Iraq and the goal of internationally-acknowledged legitimacy. This Note ultimately concludes that, while the Statute of the Iraqi Special Tribunal may adequately provide for capacity-building and legitimacy in the trials of lesser figures, broader international participation is required to ensure that Saddam’s trial is fair enough to withstand international and historical scrutiny. Moreover, capacity-building will probably be undermined by a purely domestic trial. Thus, given current international and political realities, some version of a hybrid tribunal is the most appropriate forum for Saddam’s trial.

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\(^6\) See, e.g., id. at 33 (“[H]ybrid domestic-international courts may have greater legitimacy in the adjudication of serious human rights crimes than either purely domestic trials . . . or purely international processes . . . .”).

\(^7\) Id. at 33-37.

II. SADDAM AND IRAQI CRIMES AGAINST HUMANITY

Saddam first became involved in politics at the age of nineteen when he joined the Ba'ath (meaning renaissance) Party. After participating in a botched assassination attempt against Iraqi Prime Minister General Abdel-Karim Qassem in 1959, Saddam was forced to flee the country for several years. Saddam’s true rise to power began when he returned to help engineer a successful coup in 1963, with help from Iraqi generals and the United States Central Intelligence Agency, which approved of the Ba’athists’ anticommunist stance. However, the Iraqi generals consolidated power for themselves and imprisoned many Ba’athists. Five years later, under the leadership of Ahmad Hassan Al Bakr, Saddam’s cousin, the Ba’athists staged a second successful coup. Saddam, as Vice Chairman of the Revolutionary Command Council (RCC), was in charge of the state security apparatus and used his position to form a vast network of secret police to crack down on dissidents and party-opponents.

Bakr’s health began deteriorating in the mid-1970s, and he “increasingly turned over power to Saddam. . . . By 1977 the party bureaus, the intelligence mechanisms, and even ministers who, according to the Provisional Constitution, should have reported to Bakr, reported to Saddam Husayn [sic].” When

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11 Id.
12 Marshall, supra note 9, at 124.
13 Id.
15 The RCC had exercised executive and legislative powers since it was first formed in July 1968. Country Studies, Iraq: Government: The Revolutionary Command Council, at http://countrystudies.us/iraq/71.htm (last visited Nov. 5, 2004). The chairman of the RCC was President of the Republic and Saddam, as vice chairman, was first in the line of succession. Id.
16 Frontline, supra note 14.
Bakr stepped down in 1979, Saddam assumed the presidency and quickly demonstrated his now legendary brutality.

There followed an infamous purge, in which the new president staged a confession of treason by the Baathist Party chairman during an official conference. As party members were denounced one by one from the podium, they were led from the hall before the eyes of terrified colleagues to be executed. Hussein recorded the entire proceedings . . . on videotape, which he then ordered circulated.

In addition to such evidence of politically-motivated killings, a great deal of evidence has come to light over the years indicating torture of civilians, generally directed at the Kurdish minority or anyone who did not show loyalty to Saddam. Much of this evidence comes from personal accounts of those who survived, or whose relatives disappeared in the night. The evidence of human rights violations is not limited, however, to anecdotal accounts. In May 1992 and August 1993, following uprisings by Kurdish fighters, eighteen tons of official Iraqi state documents were shipped by the Kurds to the United States for safekeeping and analysis. Analysis of the

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18 It is widely speculated that Bakr's retirement was involuntary. See, e.g., The Iraq Foundation, Biography of Saddam Hussein of Tikrit ("On July 16, 1979[, a]t the age of 42, Saddam forces AI-Bakr to retire and is sworn in as President of the Republic of Iraq. . . . In 1982, former President Bakr dies mysteriously. It is widely suspected that Saddam is involved."), at http://www.iraqfoundation.org/research/bio.html (last visited Nov. 5, 2004).

19 Marshall, supra note 9, at 125. Twenty-two people, most or all of whom Saddam considered rivals, were executed, including five of Saddam's fellow members of the RCC. Moore, supra note 10.


23 The documents were acquired from government buildings, including intelligence agencies
documents, conducted by Middle East Watch,\(^2\) led to a report published by Human Rights Watch,\(^3\) that sought to establish the genocidal intent of the Iraqi Government against the Kurds.\(^4\) According to the report, the documents provide "unequivocal evidence... of Iraq's repeated use of chemical weapons against the Kurds" in the late 1980s.\(^5\) "The documents are crystal clear... on the issue of culpability for the chemical attack on Halabja on March 16, 1988."\(^6\) The attack on Halabja is, perhaps, the best-known chemical attack launched during the Anfal campaign against the Kurds.\(^7\)

Between 40,000 and 50,000 people were living there at the time. . . . During three days, the town and surrounding district were attacked with conventional bombs, artillery fire, and chemicals—including mustard gas and nerve agents (Sarin, Tabun, and VX). At least 5,000 people died immediately as a result of the chemical attack and it is estimated that up to 12,000 people died during those three days.\(^8\)

The attack on Halabja was one in a series of chemical attacks. Other allegedly genocidal activities included mass executions, razing of villages, forced relocation of Kurds, and economic blockades to cut villages off from

\(^{24}\) Middle East Watch is a division of Human Rights Watch.
\(^{26}\) Human Rights Watch, supra note 23.
\(^{27}\) Id.
\(^{28}\) Id.
\(^{29}\) Saddam Hussein's cousin, Ali Hasan al-Majid, directed the Anfal campaign, earning the nickname "Chemical Ali" because of his use of chemical and biological weapons on Kurdish towns and villages. Carole A. O'Leary, The Kurds of Iraq: Recent History, Future Prospects, MIDDLE E. REV. INT'L AFF., Dec. 2002, at 17-18 (reporting that "AI-Anfal (The Spoils) was the codename given to an aggressive, planned, military operation against Iraqi Kurds. It was part of an ongoing, larger campaign against Kurds because of their struggle to gain autonomy within the Republic of Iraq."), http://meria.idc.ac.il/journal/2002/issue4/jv6n4a5.html (last visited Sept. 26, 2004).
\(^{30}\) Id.
"In all phases of the ethnic cleansing program, which began when the Baath Party first seized power in 1963 and culminated in the Anfal operation, it is estimated that more than 4000 villages in rural Kurdistan were destroyed and perhaps 300,000 people perished." The alleged crimes of Saddam’s forces are not limited to those committed against Iraqi citizens. The regime is also accused of committing human rights violations during the war with Iran and the invasion of Kuwait. Iraq allegedly used chemical weapons extensively during the Iran-Iraq war, killing an estimated 20,000 Iranians with mustard gas and the nerve agents tabun and sarin. Both countries repeatedly accused the other of using chemical weapons, while denying their own use of such weapons. However, the reported Iraqi chemical attack at Hoor-ul-Huzwaizeh on March 13, 1984, was quickly and “conclusively verified by an international team of specialists dispatched... by the United Nations Secretary General.”

During the first three months of Iraq’s annexation and occupation of the state of Kuwait in 1991, an estimated 5000 Kuwaiti citizens were arrested and 600 were killed. Detainees reported widespread and systematic torture, such as threats of execution and use of electric shock. A report, declassified by the Pentagon and submitted to the UN Security Council, revealed, among other things, the discovery by the U.S. military of “at least two dozen [Iraqi] torture sites in Kuwait City, most of which were [in] police stations or sports

31 Id.
32 Id.
33 Malinowski, supra note 8 (noting that “Both Iran (1929) and Iraq (1931) are parties to the Geneva Protocol that prohibits the use of asphyxiating, poisonous, or other gases, and of all analogous liquids, materials, or devices, as well as the use of bacteriological methods of warfare. The use of... prohibited gases is a war crime.”).
37 Id.
facilities." Similar facilities have been discovered inside Iraq. Aside from the discovery of torture facilities, the report presents, in sometimes shocking detail, evidence of atrocities committed against Kuwaiti citizens gathered through "written and videotaped accounts from rape and torture victims, photographs of murdered Kuwaitis, and videotapes of burial sites and torture implements."

With the discovery of similar torture facilities in Iraq came similar stories of brutalities carried out against Iraqi civilians who, prior to the fall of Saddam, were understandably afraid to speak out against the regime. Evidence of these atrocities continues to be discovered in Iraq and presented to the world. Perhaps to drive home the point made by print articles, the Pentagon declassified a video taken by an Iraqi man, who claimed to have been involved in the taping of many similar videos, that shows acts of torture—such as tossing bound men off rooftops—and executions carried out by what appear to be Saddam Fedayeen fighters. Reportedly, "similar tapes have been found in Iraqi prisons, military facilities and even the private video collections of Uday and Qusay, Saddam's sons, who were killed by U.S. forces in a dramatic July shootout."

U.S. forces captured Saddam on December 13, 2003, in a small village near Tikrit. Iraqis quickly promised that Saddam would receive a fair trial before the Iraqi Special Tribunal. On December 10, 2003, the Iraqi Governing

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39 See, e.g., CNN, supra note 21.
41 In the three months following the end of the 2003 war, over sixty mass graves were found in Iraq. Associated Press, Another Mass Grave Found in Iraq, July 18, 2003, http://www. foxnews.com/story/0,2933,92237,00.html. Some of the graves contained hundreds of bodies, including women and children, and one grave held over 3000 bodies. Id.; Scheherazade Faramarzi, 3,000 Bodies Exhumed at Iraq Mass Grave, ASSOCIATED PRESS, May 14, 2003, 2003 WL 55371393.
42 The Saddam Fedayeen (Saddam's "Men of Sacrifice") were a politically reliable and intensely loyal paramilitary force outside the chain of military command. GlobalSecurity.org, Saddam's Martyrs ["Men of Sacrifice"] Fedayeen Saddam, at http://www.globalsecurity.org/intell/world/iraq/fedayeen.htm (last visited Sept. 26, 2004).
44 Id.
Council issued a law establishing the Iraqi Special Tribunal to try Iraqis on charges of genocide, crimes against humanity, war crimes, and violations of stipulated Iraqi laws.\textsuperscript{47} However, in the interests of justice and legitimacy, the Iraqi Special Tribunal is not the most appropriate forum for Saddam's trial. As argued below,\textsuperscript{48} the Iraqi judiciary simply does not have the expertise to carry out so complex a trial in a manner that will withstand international scrutiny. Instead Saddam should be tried before a hybrid tribunal, while the Iraqi Special Tribunal should focus on lower-level Ba'ath Party members.

\section*{III. HYBRID TRIBUNALS: BACKGROUND}

The hybrid tribunal is a recently-developed vehicle for accountability and reconciliation for human rights violations.\textsuperscript{49} Accountability and reconciliation through criminal prosecution is important for a number of reasons. Many argue that criminal punishment is the most effective insurance against future repression and that revealing the truth about past human rights violations, and condemning them, "can deter potential lawbreakers and inoculate the public against future temptation to be complicit in state-sponsored violence. Trials may, as well, inspire societies that are reexamining their basic values to affirm the fundamental principles of respect for the rule of law and for the inherent dignity of individuals."\textsuperscript{50} There is disagreement, however, as to who should dole out such punishment. Some argue that governments should prosecute their predecessors because the trials can assist the transition to democracy by demonstrating that no one is above the law.\textsuperscript{51} Similarly, the Rome Statute of the International Criminal Court states that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."\textsuperscript{52} The counterargument is that new democracies emerging from

\textsuperscript{47} THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL, supra note 2.
\textsuperscript{48} See discussion infra Part IV.A-B.
\textsuperscript{50} Diane F. Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, 100 YALE L.J. 2537, 2542 (1991) (citation omitted).
\textsuperscript{51} Id. at 2543, 2544-45 (discussing the arguments for and against this position).
\textsuperscript{52} Rome Statute of the International Criminal Court, July 17, 1998, pmbl., U.N. Doc. A/CONF.183/9, 37 I.L.M. 999. "[T]he Court's jurisdiction is complementary to national criminal jurisdiction and was never intended to be applicable in all situations. It is a court of last resort that can only operate when a state with jurisdiction cannot or will not act." Anne K. Heindel, The Counterproductive Bush Administration Policy Toward the International Criminal
dictatorship are polarized and fragile and may not be able to withstand the effects of a high profile, politically-charged trial.\textsuperscript{53}

Hybrid tribunals essentially split the difference by employing local actors to the extent possible—so as to assist the transition to democracy and the healing process—and involving international figures to help achieve justice. Hybrid tribunals are courts where both the institution and the law it applies are mixtures of the domestic and the international.\textsuperscript{54} Panels of international and local judges try cases prosecuted and defended by international and local lawyers.\textsuperscript{55} The applicable law is domestic law modified to conform to international standards.\textsuperscript{56} The United Nations has recently installed hybrid tribunals in East Timor, Kosovo,\textsuperscript{57} and Sierra Leone, and plans are underway to establish a hybrid court in Cambodia.\textsuperscript{58} The hybrid tribunal has been advanced, in part, as a reaction to criticisms of purely international tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The essential purpose of a hybrid tribunal is to prosecute those responsible for crimes against humanity, war crimes, and other serious violations of international humanitarian law while addressing some of the problems and criticisms faced by purely international tribunals.\textsuperscript{59} Such criticisms include cost,\textsuperscript{60} a failure to

\begin{footnotesize}
\textsuperscript{53} Orentlicher, supra note 50, at 2544.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} This section does not discuss the Kosovo tribunal because, unlike East Timor and Sierra Leone, a hybrid tribunal was not implemented from the outset. Instead, the United Nations employed international judges and prosecutors in Kosovo’s domestic courts to help tackle the substantial caseload of the International Criminal Tribunal for the former Yugoslavia. See Hansjorg Strohmeyer, Making Multilateral Interventions Work: The U.N. and the Creation of Transitional Justice Systems in Kosovo and East Timor, 25 FLETCHER F. WORLD AFF. 107, 119 (2001).
\textsuperscript{58} Dickinson, supra note 54, at 295.
\textsuperscript{59} See Dickinson, supra note 54, at 305-08 (discussing the characteristics, benefits, and problems of hybrid tribunals).
\end{footnotesize}
help rebuild the local judiciary, and a legitimacy deficit from the perspective of the civilians who are supposed to be made whole by the proceedings.  

While hybrid courts have received little analysis, they have been challenged by supporters and critics of international courts alike. Advocates of formal international judicial mechanisms—such as the International Criminal Court (ICC)—fear that hybrid tribunals will be used, not only as an alternative to, but also as a means to undermine purely international tribunals. Such suspicions have been expressed by Human Rights Watch; David Scheffer, former U.S. Ambassador-at-Large for War Crimes Issues; and Hansjorg Strohmeyer, Director of the Office of Humanitarian Affairs at the United Nations. Conversely, those who are wary of international judicial mechanisms, such as members of President Bush's administration who oppose the ICC, may see hybrid tribunals as carrying too many of the characteristics of international courts. Proponents cite perceived advantages such as decreased costs, legitimacy problems faced by purely international or domestic tribunals, and the goal of capacity-building as evidence of the superiority of hybrid courts over purely international or domestic tribunals. These advantages, coupled with the problems associated with having Iraqis conduct these trials, suggest that Saddam should be tried before a hybrid tribunal instead of the Iraqi Special Tribunal.

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61 See, e.g., Susan W. Tiefenbrun, The Paradox of International Adjudication: Developments in the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the World Court, and the International Criminal Court, 25 N.C. J. INT'L L. & COM. REG. 551, 589 (2000) ("[T]he ICTR has failed to communicate its accomplishments effectively to the people of Rwanda. These failures, coupled with terrible pre-trial detention delays, have undermined the perceived efficacy of the tribunal.").

62 See Dickinson, supra note 54, at 295-96.

63 Id. at 296.


65 Both Scheffer and Strohmeyer rejected the idea that hybrid courts should serve as models for the future despite the fact that Strohmeyer contributed to the establishment of hybrid tribunals in Kosovo and East Timor and Scheffer helped create the Special Court for Sierra Leone and was "deeply involved" with the effort to create a hybrid court in Cambodia. See Dickinson, supra note 54, at 310 n.4.

66 Id. at 296.
A. Hybrid Tribunals: East Timor

East Timor, home to the first hybrid tribunal, occupies approximately half of an island between Australia and Indonesia. From 1976 to 1999, Indonesia occupied East Timor, claiming it as a province. Following a change in Indonesian leadership, the East Timorese were given the opportunity to vote on whether they preferred to become independent or to become an autonomous region within the Republic of Indonesia. The announcement of the results of the referendum, in which 78.5% chose independence, incited widespread violence and destruction, as the Indonesian military and pro-Indonesian East Timorese militias conducted a scorched-earth campaign as they withdrew.

Between March and June 2000, the United Nations Transitional Administration in East Timor (UNTAET) passed regulations establishing the structure of East Timor’s court system. Three Special Panels, each composed of two international judges and one East Timorese judge, were granted exclusive jurisdiction over allegations of genocide, war crimes, crimes against humanity, torture, murder, and sexual offenses committed between January 1 and October 25, 1999.

Three years later, the tribunal’s proceedings have generated much criticism, including allegations of due process violations, inadequate and underfunded defenders, and inexperienced judges. The causes of these serious problems

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68 Id.
70 Approximately 600,000 East Timorese, 75% of the population, were uprooted from their homes, and over 1000 civilians were killed. Suzanne Katzenstein, Note, Hybrid Tribunals: Searching for Justice in East Timor, 16 HARV. HUM. RTS. J. 242, 249 (2003).
72 Katzenstein, supra note 70, at 251.
75 Katzenstein, supra note 70, at 253 (stating that “[I]n the cases that have been prosecuted
include the inexperience of East Timorese lawyers and judges and a lack of funding so severe that those prosecuted arguably were denied effective counsel. Lack of funding also resulted in a strict deadline for ending investigations that will prevent the tribunal from fully investigating and prosecuting every case. In conjunction with the lack of experienced lawyers and judges, the decision to quickly involve local actors in the judicial process, coupled with an inadequate training and mentoring program, has been heavily criticized.

Despite these problems, the East Timor tribunal should not be written off as a failure. As an arguably flawed first attempt, it offers lessons and experience useable to improve on the hybrid model. The United Nations can improve upon the East Timor model by ensuring adequate funding, by giving primacy to capacity-building programs, and by reevaluating policy decisions. "The decision to quickly transfer control of the [East Timorese] judiciary, for instance, has been criticized only in retrospect. Its underlying motivation, to encourage local autonomy and participation, is difficult to fault."

B. Hybrid Tribunals: Sierra Leone

The West African nation of Sierra Leone was ravaged by a nearly decade-long civil war that began in 1991 when the Revolutionary United Front (RUF) attempted to overthrow the government. The war was characterized by widespread executions, amputations, rape, slavery, forced prostitution, and the extensive use of child soldiers.


and especially in the earlier ones, the judges neglected to apply international law or applied it incorrectly, and handed down harsh sentences for low-level perpetrators") 

76 Id. at 254-55.
77 Id. at 264.
79 See, e.g., Katzenstein, supra note 70, at 265-68.
80 Id. at 277.
81 Id.
Sierra Leone is unique in that it will have both a national Truth and Reconciliation Commission (TRC) and an international, UN-sanctioned, Special Court. Both the TRC and the Special Court are composed of domestic and international figures.

The Lome Accord, a peace agreement brokered in July 1999, helped lead "to the cessation of hostilities in January 2002." The Lome Accord was particularly controversial because it granted complete amnesty to all combatants. Many Sierra Leoneans supported the amnesty, believing it was the only way to avoid further war, while human rights groups criticized the agreement for giving concessions to war criminals. The Lome Accord also established the TRC, a fact-finding body whose principal objective is "to create an impartial . . . record of violations and abuses of human rights and international humanitarian law." From the outset, the RUF refused to fully comply with the Lome Accord. Their soldiers did not enter the disarmament, demobilization, and reintegration camps, and human rights abuses continued, including the taking of several hundred UN peacekeepers hostage in May 2000. In response, the United Nations Security Council authorized Secretary-General Kofi Annan to negotiate with Sierra Leone's government to create the Special Court.

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84 Id. at 143.
85 Id. at 145-46.
88 Article IX, Paragraph 3 of the Lome Accord provides:

[T]he Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organisations, since March 1991, up to the time of the signing of the present Agreement.

Lome Accord, supra note 86, art. IX, para. 3.
89 Schocken, supra note 87, at 441.
92 Id. at 397-98.
The Special Court,\textsuperscript{94} which is the first international criminal tribunal to sit in the country where the war crimes occurred,\textsuperscript{95} is charged with prosecuting the “persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law.”\textsuperscript{96} Because of the amnesty provision in the Lome Accord, temporal jurisdiction for international crimes extends back to November 30, 1996, and temporal jurisdiction for crimes under Sierra Leonean law extends back to July 1999.\textsuperscript{97} Some believed that the Special Court will eventually try approximately twenty-four people.\textsuperscript{98} Because the Special Court was created by contractual agreement—the ICTY and ICTR were products of the UN’s Chapter VII powers—the Sierra Leonean government and the UN were able to deal and compromise for provisions they believed appropriate.\textsuperscript{99} Thus, the Sierra Leonean government has the power to select one of every three trial chamber judges and two of every five appellate chamber judges, as well as administrators and other staff members.\textsuperscript{100}

The Special Court improved some problems faced by the East Timor tribunal. The Special Court is better funded than the East Timor tribunal, although it does face some constraints, and is comparatively well-staffed and well-equipped.\textsuperscript{101} The Special Court also improved on capacity-building by focusing more on side-by-side working arrangements and less on abstract classroom discussions and workshops.\textsuperscript{102} Nevertheless, the Special Court has also been the subject of debate and criticism. Groups of amputees are boycotting the Special Court because they allege that victims of the atrocities have been largely overlooked and also that the Lome Accord provisions for amputee victims are being ignored by the Sierra Leonean government and the


\textsuperscript{95} Schocken, \textit{supra} note 87, at 437.

\textsuperscript{96} Statute of the Special Court for Sierra Leone, \textit{supra} note 94, art. 1.

\textsuperscript{97} Schocken, \textit{supra} note 87, at 443.

\textsuperscript{98} E.g., Tejan-Cole, \textit{supra} note 83, at 148 n.46 (While neither the UN, the Sierra Leonean Government, nor “Court officials have confirmed or denied this figure. . . . Deputy Registrar of the Court, Robert Kirkwood, was quoted on the Sierra Leone Web as stating that the new court building will have [twenty-six] cells and that all of the accused will be held in individual cells.”).


\textsuperscript{100} Tejana-Cole, \textit{supra} note 83, at 145-46.

\textsuperscript{101} Katzenstein, \textit{supra} note 70, at 278.

\textsuperscript{102} See Dickinson, \textit{supra} note 54, at 307.
Special Court. Moreover, reaching some of the accused may be problematic as the Special Court, unlike the ICTR, ICTY, or ICC, does not have the power to demand extradition from a third country. Additionally, questions arise as to the relationship between the Special Court and the TRC. Nothing in the TRC prevents testimony given there from being used in a prosecution by the Special Court.

Because the earliest indictments by the Special Court were in March 2003, the trials before the Special Court have only just begun. Thus, the international community will have to wait and watch as the trials unfold before commenting on the Special Court’s success as a fair and legitimate body.

Regardless of whether one considers previous hybrid tribunals successes or failures, they are significant to the current situation in Iraq in that they have provided the international community with experience in conducting complex trials and in designing the tribunals themselves.

IV. THE IRAQI SPECIAL TRIBUNAL

On December 9, 2003, the Iraqi Governing Council voted to establish the Iraqi Special Tribunal to try Iraqis for genocide, war crimes, crimes against humanity, and stipulated violations of Iraqi laws. This tribunal will have jurisdiction over crimes committed from July 17, 1968 (the day the Ba’ath Party seized power) through May 1, 2003 (the day President Bush declared major hostilities over). Thus, the Iraqi Special Tribunal will try cases stemming from several distinct operations including the initial purge of Bakr’s regime, the Anfal Campaign, the Iran-Iraq war and the invasion of Kuwait. At this point, it is difficult to guess how many Iraqis will be tried by this body; however, given the breadth of jurisdiction, the number may be well into the thousands. Many Iraqis who did not appear in the deck of fifty-five cards

103 Miraldi, supra note 82, at 857.
104 Statute of the Special Court for Sierra Leone, supra note 94.
105 Schocken, supra note 87, at 456.
107 Zagaris, supra note 1, at 76; see also THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL, supra note 2, arts. 11-14.
108 THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL, supra note 2, art. 1(b).
110 As of December 2003, the Coalition Authority held over 5000 “people in detention centers, but it [is unknown] how many of those are war crimes suspects.” Id.
will be subject to prosecution before the court, and thousands of complaints against members of the former regime have already been filed. Iraqi Governing Council member Mahmoud Othman said that "anybody against whom a complaint is filed with evidence against them could be tried." However, more recently, Salem Chalabi, General Director of the Iraqi Special Tribunal, indicated that only 100 people, including Saddam, would be put on trial.

In addition to the scores of low-level Ba'ath Party members who may be tried before the Iraqi Special Tribunal, the Iraqi Governing Council has announced its intent to prosecute Saddam. Iraqi officials seem committed to prosecuting Saddam without the assistance of international judges. The original Statute of the Iraqi Special Tribunal did not even include a provision for involvement of international judges in the trials until "the Governing Council yield[ed] at the last minute to the urging of U.S. authorities." Many human rights organizations have questioned whether the Iraqi Special Tribunal can handle such a complicated trial without the assistance of the international community.

A number of experts, such as professor Diane Orentlicher, director of the War Crimes Research Office at American University's Washington College of Law, argue for the use of a judicial hybrid more closely modeled on the Special Court for Sierra Leone. Indeed, there are some significant

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113 Id.


115 See Slevin, supra note 3.


117 THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL, supra note 2, art. 4(d).


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differences between the Iraqi Special Tribunal and the Special Court. Most notably, the Iraqi Special Tribunal does not mandate the involvement of international judges and prosecutors.\(^\text{121}\) Instead, the law assumes all trial, appellate, and investigative judges, as well as all prosecutors, will be Iraqi nationals.\(^\text{122}\) "The Governing Council . . ., if it deems necessary, can appoint [experienced] non-Iraqi [trial and appellate] judges," but is under no obligation to do so.\(^\text{123}\) There are, however, requirements that non-Iraqis be appointed "to act in advisory capacities or as observers to the Trial Chambers and to the Appeals Chamber."\(^\text{124}\) Similar provisions mandate the appointment of non-Iraqi advisors or observers of investigative judges and prosecutors.\(^\text{125}\)

Human rights organizations point out that the Iraqi Special Tribunal's requirement of international advisors and observers, with only the possibility of international judges, is not comparable to the Special Court's mandatory appointment of international judges and prosecutors with relevant experience to work alongside Sierra Leoneans.\(^\text{126}\) Such organizations argue that the Iraqi Special Tribunal should be designed to more closely resemble the Special Court.\(^\text{127}\) Although the Iraqi Special Tribunal arguably can, without modification, effectively prosecute most Iraqis, international figures must be utilized for the prosecution of Saddam. The complexity and importance of Saddam's trial demands the participation of international judges with experience and expertise in the field of crimes against humanity.

A. The Iraqi Special Tribunal: Capacity-Building

The trial of Iraqis on allegations of human rights violations by an Iraqi court will do much to help restore the system and can serve as the foundation for what becomes, in the future, an independent and credible judicial system.


\(^{122}\) \textit{THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL}, \textit{supra} note 2, arts. 4(d), 7(h), and 8(j).

\(^{123}\) \textit{Id.} art. 4(d).

\(^{124}\) \textit{Id.} art. 6(b).

\(^{125}\) \textit{Id.} arts. 7(n), 8(j).

\(^{126}\) \textit{See, e.g.,} Human Rights Watch, \textit{supra} note 121.

reminiscent of pre-Saddam Iraq. However, the trial of Saddam will unduly burden the Iraqi Special Tribunal while contributing little, if anything, to capacity-building. Trying Saddam will not benefit the capacity of the Iraqi judiciary because the trial will be much longer and more complex than any trial they will encounter in the future. Moreover, participating in Saddam's trial will severely narrow the experience a judge receives over the course of the Iraqi Special Tribunal's operation.

Hybrid tribunals offer at least a partial response to the problem of inadequate capacity-building by purely domestic or international institutions. An international court that excludes local participation does little to train local actors in necessary skills and does not help improve the ability of the local population to staff and run its own judicial system. Conversely, transferring complete control over to an inexperienced judiciary without training yields questionable justice. Logically, the condition of the local judiciary dictates the necessity of capacity-building. If a strong judiciary was largely unaffected by the human rights violations at issue, then capacity-building may be viewed as a lesser concern. In post-conflict situations, the local judiciary is often left in shambles.

In Kosovo, for example, politically and ethnically motivated appointments, removals, and training begat a judiciary in which only thirty of the 756 judges and prosecutors were Kosovar Albanian. The previous regime had attempted to exterminate the Kosovar Albanian population and, when it fell, many non-Albanians, including the Serb and Montenegrin lawyers who had administered Kosovo's justice system for the previous decade, quickly fled the country. The few judges and prosecutors who stayed soon received death threats, as they were considered allied with the previous regime.

The capacity deficit in East Timor was even more severe than that faced by Kosovo. The conflict between the Indonesians and the East Timorese virtually eliminated the entire physical infrastructure of court buildings, prisons, and

128 See Faramarzi, supra note 116 ("Iraqis refer to the period between 1930 to 1960 as a golden age for their judiciary, when it functioned independently under a system derived from French, Turkish and Islamic law.").
129 Dickinson, supra note 5, at 36-39.
130 Id. at 37.
131 Id. at 36-37.
133 Id.
134 Id.
equipment, including furniture, case files, and legal texts. Moreover, judges, prosecutors, lawyers, and support staff sympathetic to the Indonesian regime, as well as many who were merely perceived de facto members of the privileged classes, fled East Timor following the referendum, leaving fewer than ten lawyers. These remaining lawyers were considered so inexperienced as to be unfit to serve in the new East Timorese justice system.

Although the Iraqi judiciary suffered greatly during Saddam’s reign, the capacity deficit in Iraq, though serious, is not as severe as that faced by East Timor and Kosovo, both of which saw the vast majority of their trained personnel flee the country.

After the Ba’athists seized power, the courts gradually came under government control as Saddam took the power to appoint judges. Many of Saddam’s appointees were Ba’ath Party members; judges who issued sentences that displeased him were often fired or imprisoned. The chief judge in every province was expected to demonstrate unwavering obedience to Saddam’s commands. This policy yielded rampant bias and favoritism, “with verdicts being routinely influenced by payoffs and tribal affiliations.”

Although many experienced judges are available in Iraq, the breadth and scope of the corruption ingrained in the Iraqi judiciary poses a serious challenge to the establishment of a fair and credible justice system. Thus, the capacity-building process necessarily began with the purging of corrupt, self-serving judges. On June 17, 2003, Coalition Provisional Authority (CPA) Administrator L. Paul Bremer, America’s top civil administrator in Iraq, announced the planned formation of the Judicial Review Committee, which was charged with the task of cleaning up Iraq’s judiciary by evaluating the suitability of judges and prosecutors. Consisting of three Iraqis and three members of the occupying coalition, the Judicial Review Committee had the authority to dismiss prosecutors and judges for links to the Ba’ath Party,

135 Id. at 50-51.
136 Id. at 50.
137 Faramarzi, supra note 116.
138 Id.
139 Craig T. Trebilcock, Note from the Field: Legal Cultures Clash in Iraq, ARMY LAW., Nov. 2003, at 48, 48.
140 Id. at 49.
141 Id.
142 See id. at 49-50.
complicity in human rights violations, or corruption.\textsuperscript{144} Approximately 25% of Iraq’s judges and prosecutors were dismissed by the committee.\textsuperscript{145}

In addition to the Judicial Review Committee’s investigation, there are other roadblocks that will keep Iraqi judges from trying Saddam. Several judges thought to be working with the Americans have been assassinated,\textsuperscript{146} and many fear that Saddam loyalists will kill them if they preside over any case against the ousted dictator.\textsuperscript{147} This concern further narrows the pool of experienced and competent Iraqi judges who can try Saddam because some judges, such as Qasem Ayash, a judge of thirty-two years, have indicated they will not sit on a tribunal trying Saddam due to fear of retaliation.\textsuperscript{148}

Given its recent history, there is a definite need for capacity-building in Iraq. The question, then, is how to achieve it. The Iraqi Special Tribunal’s use of only Iraqi judges, with international judges available for observation and consultation, will provide on-the-job training necessary for young prosecutors and judges who currently know only Saddam’s system of justice. The presence of international authorities will help ensure that the new system grows in the right direction instead of resembling the justice system under Saddam. Because most of these cases will likely involve an isolated incident or short timeframe, Iraqi judges and prosecutors will gain relevant experience quickly by conducting a large number of relatively short, straightforward trials.

Trying Saddam, on the other hand, will do little to improve the capacity of the Iraqi judiciary. Saddam’s trial will revolve around complex allegations of genocide, war crimes, and human rights violations.\textsuperscript{149} These are issues that an

\textsuperscript{144} Id.


\textsuperscript{146} See Patrick Cockburn, \textit{Judge is Shot Dead as Iraqis’ Hatred of Occupiers Grows}, \textit{INDEPENDENT}, Nov. 5, 2003 (describing the assassinations of two prominent Iraqi judges in twenty-four hours), http://www.commondreams.org/headlines03/1105-02.htm.

\textsuperscript{147} Faramarzi, \textit{supra} note 116.

\textsuperscript{148} Id.

\textsuperscript{149} The complexity of these allegations stems not only from the need to prove systematic genocidal intent that can be positively linked to Saddam, but also stems from the volume of evidence that will be used to do so. In March 2004, the Justice Department sent fifty lawyers, investigators, and prosecutors to Iraq to help prepare a blueprint for Iraqi prosecutors. The case against Saddam will come from three caches of documents, including the eighteen tons seized during the Kurdish uprising discussed \textit{supra} text accompanying notes 23-28. The second cache is twenty-two cartons of documents and testimony of atrocities collected by the human rights group Indict. The third cache is drawn from hundreds of thousands of documents seized by American forces after Saddam’s ouster. Neil A. Lewis & David Johnston, \textit{U.S. Team Is Sent to Develop Case in Hussein Trial}, \textit{N.Y. TIMES}, Mar. 7, 2004.
Iraqi judge is unlikely to ever see again, unless he participates on an international tribunal. Moreover, the time required to conduct such a trial will necessarily keep those judges from hearing other cases, effectively limiting the knowledge and experience they gain from sitting on the tribunal.

In addition to presenting complex allegations of genocide, war crimes, and human rights violations to judges that have no experience in that area, Saddam's trial may be further complicated by defense tactics. Given its general lack of experience in international law, the Iraqi judiciary will likely have a difficult time managing the trial if Saddam challenges the legitimacy of the U.S.-installed Iraqi government. Many also believe that Saddam will attempt to bring "evidence of Western support for his regime before the first Gulf War, and may even try to call former heads of state like former-President George H.W. Bush to the witness stand." By employing such tactics, Saddam may undermine the legitimacy of his trial by taking advantage of the Iraqi judiciary's inexperience.

The Iraqi justice system has a much better foundation than many post-conflict countries, such as East Timor. There are experienced judges, and courts are being quickly repaired and restored to operation. The trials of hundreds of Iraqi citizens—observed by international figures to ensure fairness—on various charges of human rights violations will eventually restore the Iraqi justice system to a position of legitimacy and credibility, but such a restoration cannot be expected to occur overnight. Instead it will take time to build up the human resources and physical infrastructures needed for the weakened Iraqi justice system to recover from years of degradation and corruption.

Although the Iraqi judiciary needs time and experience to effectuate such a restoration, it simply does not require the expertise that would be gained through trying Saddam. It makes little sense to rely on judges from a system

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151 Id.; see also *French Lawyer Says He Will Defend Saddam*, CNN, May 6, 2004 ("Among witnesses he plans to call to testify, [Saddam's attorney Jacques] Verges said, are Western leaders who backed Saddam's government during the Iran-Iraq war in the 1980s."). at http://www.cnn.com/2004/WORLD/meast/03/28/saddam.attomey/.


of questionable capacity to essentially train themselves when international figures with experience in trying these cases are available.\textsuperscript{154} Shutting out those figures from Saddam’s trial will contribute little to capacity-building while raising questions as to the legitimacy of the trial.

B. The Iraqi Special Tribunal: Legitimacy

Legitimacy is an extremely important goal that the Iraqi Special Tribunal must meet. As President Bush himself has acknowledged, Saddam’s trial must be fair and just enough to withstand international scrutiny.\textsuperscript{155} However, the establishment of a domestic tribunal by American forces during an occupation raises significant questions as to whether the justice delivered by that court will be seen as fair by the international community of today and the history books of tomorrow.\textsuperscript{156} Without the participation of international judges in Saddam’s trial, there is a serious risk that the Iraqi courts—supported only by American forces—will be seen as dispensing victor’s justice.\textsuperscript{157} War crimes tribunals are often dismissed as exercises in victor’s justice, largely due to the difficulty of prosecuting those who remain in power,\textsuperscript{158} thus there is concern that the trials of deposed leaders are nothing more than show trials with predetermined outcomes. In failing to better protect against allegations of victor’s justice, the Iraqi Governing Council and the United States have greatly endangered the legitimacy of Saddam’s trial.

Legitimacy is an amorphous concept, the perception of which varies greatly because different communities have their own opinions about what constitutes legitimacy and what a justice system must do to achieve it.\textsuperscript{159} National and

\textsuperscript{154} Human Rights Watch, supra note 121 ("[T]ernational judges and prosecutors [have] a lot of experience in trying very serious human rights crimes. This experience should not be wasted.").


\textsuperscript{157} Slevin, supra note 3.

\textsuperscript{158} Eric Pape, Cleaning House: Sierra Leone’s War Crimes Tribunal Defied History by Going After the Victors, not just the Losers, in the Country’s Civil War. Rebuilders of Iraq are Taking Notice, LEGAL AFF., Sept-Oct. 2003, at 69, 69.

\textsuperscript{159} Dickinson, supra note 5, at 33.
international groups, in the case of Iraq, have incompatible views of what is necessary to ensure the Iraqi Special Tribunal’s legitimacy. Iraq’s justice minister, Hashim Abdul-Rahman al-Shalabi said that “[t]he presence of foreign judges will undermine [Iraqi] sovereignty and would undercut the value of the Iraqi judiciary.” Conversely, human rights organizations and activists believe that the legitimacy of the Iraqi Special Tribunal would be enhanced by broad international participation. Despite Iraqi assurances that they can handle a trial of this magnitude, human rights organizations are no doubt concerned by a UN team’s evaluation of Iraq’s justice system as “degraded” in August 2003. That team said the system was “not capable of rendering fair and effective justice for violations of international humanitarian law and other serious criminal offenses involving the prior regime.”

Questions about the legitimacy of criminal tribunals arise in many different forms. An empirical study of the perceptions of the ICTY within Bosnia and Herzegovina found that a wide cross-section of lawyers and judges from all ethnic groups was ill-informed about the ICTY, and were suspicious of its motives and results. In Kosovo, several convictions against Serbian defendants by domestic panels of Albanian judges were later thrown out by hybrid and international panels due to lack of sufficient evidence and due process concerns. Similarly, in East Timor, questions were raised whether individuals who supported only limited autonomy for East Timor under Indonesian authority—a very small segment of the population—could receive fair trials under the newly-created Timorese system. The demographics of these countries—in Kosovo Serbs were largely unrepresented in the judiciary and in East Timor the vast majority of the population remaining after the conflict was pro-independence—brought into doubt the ability of a local justice system to deliver verdicts that would be perceived as legitimate.

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160 Faramarzi, supra note 116.
161 See, e.g., Slevin, supra note 3.
162 Price, supra note 113.
163 Id.
166 Dickinson, supra note 5, at 34-35.
167 Id.
The Special Court, championed by many human rights activists as a model the Iraqi Special Tribunal should more closely resemble, is too new to be evaluated in a similar manner. Thirteen indictments were approved between March and June 2003, two of which were withdrawn in December 2003 following the deaths of the accused. Because these trials have only just begun, it is impossible to judge their future legitimacy. However, unlike the tribunals for Iraq, Kosovo, or East Timor, the Special Court may give indicia of its legitimacy through its sentencing because the eleven remaining indictments include representatives of all three of the country's former warring factions. Indeed, the Special Court is unlike any other tribunal in that it has indicted figures on all sides, including the victors. Trials before the Iraqi Special Tribunal will not have such indicia of legitimacy. Instead, the Statute of the Iraqi Special Tribunal includes a blanket provision prohibiting any former member of the Ba'ath Party from serving as "officer, prosecutor, investigative judge, judge or other personnel of the [Iraqi Special] Tribunal." This provision only serves to "undermine the legitimacy . . . of the [Iraqi] Special Tribunal." 

The exclusion of any former Ba'ath Party member from the positions of officer, prosecutor, judge, or personnel of the Iraqi Special Tribunal undermines the legitimacy of the tribunal by providing ammunition for those who allege the trial is an exercise of victor's justice. The Ba'ath Party was a vast bureaucracy that remained in power for decades. Saddam, as President Bush said, "showed no love for the Iraqi people, particularly those that dared express an opinion other than his." It is certainly conceivable that many Iraqis joined the Ba'ath Party out of fear, rather than devotion to Saddam. The Statute recognizes that an Iraqi citizen may be unfit to serve as part of the Iraqi Special Tribunal due to past corruption or criminal conduct even if they were not members of the Ba'ath Party. Conversely, an Iraqi may be perfectly fit

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168 Cases, supra note 106.
169 Id.
170 In March 2002, police arrested then Minister of State Security Sam Hinga Norman, a military hero who helped end the civil war as leader of the Kamajors, a government militia that defeated the RUF. Pape, supra note 158, at 69.
171 THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL, supra note 2, art. 33.
172 Human Rights Watch, supra note 156 (arguing that former Ba'ath Party members should be assessed on a case-by-case basis and that "blanket exclusion . . . undermine[s] the legitimacy and credibility of the [Iraqi] Special Tribunal").
173 Primetime, supra note 155.
174 THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL, supra note 2, arts. 5(f), 7(m), 8(f).
to serve despite his prior membership in the Ba’ath Party. If non-Party members are subject to individual review, former Party members should be treated equally by having their suitability “assessed on a case-by-case basis with regard to their past performance and seniority of their membership in the Ba’ath Party.”

Refusing to offer former Party members the opportunity to participate not only reduces the pool of qualified personnel by presumably barring dedicated individuals, it also casts doubt on the credibility of the proceedings by dividing the country along party lines: the victors on the Iraqi Governing Council try members of the ousted former regime who, regardless of their level of participation or seniority, are so corrupt and deceitful that their mere membership in the Ba’ath Party makes any other inquiry into their fitness unnecessary. The refusal to consider any former Ba’ath Party member is especially damaging to the credibility of the Iraqi Special Tribunal because of broad U.S. influence in the formation of the Tribunal. The exclusion, therefore, may be seen as proof that the United States is less concerned with justice than with assuring the outcome of the trial.

The legitimacy of the Iraqi Special Tribunal is being questioned by many due to the role played by the United States in forming the Iraqi Governing Council, which wrote the Statute of the Iraqi Special Tribunal and will pick its members. There are twenty-five members of the Iraqi Governing Council, two of whom are judges, and all of whom were appointed by L. Paul Bremer, the American CPA Administrator, on July 13, 2003. Judge Wael Abdulatif was “disbarred and imprisoned by Saddam” and Judge Dara Nor al Din, a former Court of Appeals judge, served eight months of a two-year sentence in prison after he “held one of Saddam’s edicts (confiscating land without proper compensation) unconstitutional.” Most of the members of the Iraqi Governing Council are noted long-time opponents of the regime, representatives of oppressed groups, and/or were imprisoned or exiled by the Ba’athists. If, like the members of the Iraqi Governing Council, the Iraqi

175 Human Rights Watch, supra note 156.
176 Malinowski, supra note 8 (“Trials conducted without U.N. authority by Iraqi jurists selected by the United States will widely be seen as American trials. Indeed, they will smack of victor’s justice.”).
177 Slevin, supra note 3.
179 Id.
180 See id.
Special Tribunal judges are selected exclusively from communities that have suffered harsh repression under the Ba'ath Party, the tribunal will lose the appearance of impartiality.\textsuperscript{181} There is no specific reason to question the integrity of these individuals, but it is important to avoid the appearance of impropriety as carefully as actual impropriety. "The gravity and scale of the [allegations against Saddam] underscore[s] the paramount importance that he be brought to justice in a manner that is unquestionably fair. . . . The countless victims of decades of grave violations of human rights by the previous Iraqi government deserve nothing less."\textsuperscript{182} If the judges conducting Saddam's trial have personally suffered imprisonment, disbarment, or exile at the hands of the former dictator, as judges Dara Nor al Din and Wael Abdulatif have, Saddam's trial will be forever tainted as one of revenge instead of justice.\textsuperscript{183} Further, many experts believe that justice dispensed by the Iraqi Special Tribunal will be of questionable legitimacy regardless of the absence of personal motive. Paul van Zyl of the International Center for Transitional Justice said, "[a]ny tribunal established on behalf of the Coalition Provisional Authority will not be able to rid itself of the perception and the fact that it is an instrument of American power."\textsuperscript{184}

Ultimately, it is impossible for any tribunal to achieve the perception of legitimacy from every concerned group because of the unique demands of each community. Although it is important that the concerns of Iraqis—who, after all, suffered the most—are addressed, it is more critical that Saddam's trial achieve the perception of legitimacy from the international community. That is not to suggest that Iraqi concerns are irrelevant. Ensuring that Iraqis feel ownership of and informed about the trial should be a priority. However, legitimacy should not be sacrificed in the name of Iraqi sovereignty. Instead these two goals must be balanced to the greatest extent possible. Moreover, a tribunal of Iraqis does not ensure a sense of ownership and perception of legitimacy from the Iraqi people.

\textsuperscript{181} Malinowski, \textit{supra} note 8.
\textsuperscript{183} See id. ("It is not clear that the independence and impartiality of prosecutors and judges can be guaranteed in a highly politicized context.").
Both the Iraqi people and the international community are concerned about the CPA’s naming of Salem Chalabi as Director General of the Tribunal.\textsuperscript{185} Chalabi is the nephew of Ahmed Chalabi, head of the Iraqi National Congress and a member of the Iraqi Governing Council.\textsuperscript{186} Ahmed, who reputedly has close ties to the Pentagon,\textsuperscript{187} was exiled from Iraq for decades and was a prominent critic of Saddam’s, while Salem received his legal education in the United States.\textsuperscript{188} Because Salem, by virtue of his position, named the other judges on the tribunal,\textsuperscript{189} it is easy to see why this tribunal, composed entirely of Iraqis, does not have widespread support in Iraq and why some observers predicted a move to change the court’s personnel following the planned transfer of power to a new government on June 30, 2004.\textsuperscript{190}

The use of international figures who have extensive experience trying war crimes, sitting alongside Iraqi judges more closely connected to the Iraqi people, will provide an air of legitimacy that cannot be achieved with a panel entirely composed of Iraqi judges, who have no experience in this area. That lack of experience, coupled with the self-assuredness that comes from many years on the bench, will severely compromise the legitimacy of Saddam’s trial if international judges are not involved. Regardless of their tenure, few, if any, Iraqi judges have ever tried a case that even approaches the complexity of Saddam’s pending trial.\textsuperscript{191} Human Rights Watch reports that, “[T]raditionally,


\textsuperscript{186} Id.

\textsuperscript{187} See \textit{The World Today} (ABC Local Radio broadcast, Apr. 22, 2004), at http://www.abc.net.au/worldtoday/content/2004/s1092663.htm. More recently, Ahmed has fallen out of favor with the United States after it was discovered that his network provided the Bush administration with faulty pre-war intelligence reports on Saddam’s weapons of mass destruction programs. Ahmed was also recently accused of informing Iran that the United States had cracked its intelligence codes. Meanwhile, Salem, who still heads the tribunal, has been charged in the June murder of Haithem Fadhil, director general of the finance ministry. Both deny the charges against them. The United States has distanced itself from the criminal charges, saying they are sovereign matters for the Iraqi people to handle themselves. Associated Press, \textit{Chalabis Deny Charges}, Aug. 9, 2004, http://www.foxnews.com/story/0,2933,128383,00.html.


\textsuperscript{189} Id.

\textsuperscript{190} Id.

\textsuperscript{191} See Press Release, Human Rights Watch, Iraq: Justice Needs International Role (July 15, 2003) (“Few judges in Iraq, including those who fled into exile, have participated in trials of the complexity that they would face when prosecuting leadership figures for acts of genocide, crimes against humanity, or war crimes.”), at http://www.hrw.org/press/2003/07/iraq071503.htm.
Criminal trials in Iraq have been very brief proceedings, lasting only a few hours, or at most a few days.\textsuperscript{192} Considering that standard, Judge Ayash's observation that "[t]here's nothing to it. It's like trying any other criminal case,"\textsuperscript{193} is extremely worrisome. The trial of many lower level Ba'ath Party members may indeed be just like trying any other criminal case. The trial of Saddam will not. Instead, it will be an extremely lengthy and heavily scrutinized trial that covers decades of actions and will likely entail years of trial.\textsuperscript{194}

\section*{V. Conclusion}

The atrocities occurring in and around Iraq during Saddam's reign clearly justify his trial on charges of war crimes, genocide, and human rights violations. There is ample evidence that genocidal intent drove the Anfal Campaign and that citizens of Iraq, Kuwait, and Iran were tortured and executed.\textsuperscript{195} Yet no assumption or belief of guilt, no matter how strong, justifies the compromise of justice. Whether or not Saddam is, as President Bush alleges, "a torturer, a murderer ... [and] a disgusting tyrant who deserves justice, the ultimate justice,"\textsuperscript{196} he is still entitled to due process, including a presumption of innocence.\textsuperscript{197} Moreover, a fair trial, one that lives up to
international standards, is crucial to the demonstration that the new Iraq is different from Saddam's Iraq.  

Aside from the opportunity to adjudicate Saddam's conduct as ruler of Iraq, the Iraqi people stand to gain much through the operation of the Iraqi Special Tribunal. The Iraqis can show the world that Iraq's future justice system will not resemble Saddam's. However, such a demonstration is by no means assured. While the Iraqi Special Tribunal can contribute to a marked improvement in the quality of the Iraqi justice system, a widespread consensus that Saddam's trial was fair and legitimate will be extremely difficult to realize without broader international participation.

The capacity-building benefits of a hybrid tribunal can be achieved through the hundreds of prosecutions that can be held by the Iraqi Special Tribunal. These prosecutions, conducted by judges without fear of a dictator, will serve to rebuild the Iraqi judiciary while allowing the people to heal, to the extent possible, by seeing justice brought against their oppressors. However, adding Saddam to the list of those tried before the Iraqi Special Tribunal will be counter-productive. While judges struggle with their first and probably last dose of complex international human rights law, many trials will be delayed or possibly abandoned as a result of the years spent trying Saddam. Worse yet, the trial may be labeled a farce, a mere show put on by Americans who had decided the outcome long before the trial even began.

International human rights groups suggest that the Iraqi judiciary lacks the institutional competence and credibility to conduct such an important trial. However, many Iraqis believe that broad international participation will undercut the value of the Iraqi judiciary. In order to achieve the most widespread perception of legitimacy possible, both Iraqis and experienced international judges must sit on the tribunal that tries Saddam.

The Iraqi people must understand that collaboration with international judges need not involve surrendering Iraqi ownership of the trial, and that it is possible to "craft a solution that would give a central role to Iraqi jurists while

of his or her choice; adequate time and facilities to prepare a defense; free communication with a lawyer; trial without undue delay; and challenge the evidence against him or her. THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL, supra note 2, art. 20. Significantly, the Statute "does not ensure that guilt must be proven beyond a reasonable doubt." Human Rights Watch, supra note 127.

198 Slevin, supra note 3.  
199 Carter, supra note 150.  
200 Faramarzi, supra note 116.
at the same time securing meaningful international input.”

International figures, on the other hand, must respect the fact that the Iraqis are victims of Saddam’s regime and thus deserve a central role in his trial. Despite the experience gained by international figures while conducting similar trials in Yugoslavia, Rwanda, East Timor, and Sierra Leone, Iraqis must play a central role in the trial in order for it to contribute to Iraqi healing and reconciliation.

Holding the trial in Iraq and allowing Iraqis to retain this central role—and applying other lessons learned from the successes and failures of previous hybrid tribunals—will increase the Iraqi perception of legitimacy because the trials will be more accessible to the victims and their families. Involving international judges will increase the global perception of legitimacy by detracting from the perception of victor’s justice.

The desire of the Iraqi people to try Saddam themselves is understandable; they suffered greatly under his rule. However, it is precisely this suffering that demands the participation of international judges on the tribunal. The Iraqi judiciary can be rebuilt through the prosecution of low-level Ba’ath Party members. For the trial of those figures, the Iraqi Special Tribunal has adequate protections to provide for capacity-building and legitimacy. However, those protections are not sufficient for Saddam’s trial. For his alleged crimes against humanity, Saddam must sit before international as well as Iraqi judges. A trial conducted solely by Iraqis will never escape the allegation that it was a mere kangaroo court whose outcome was determined by Americans before Saddam was even arrested.

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201 Letter, supra note 4.

202 International judges and prosecutors on East Timor’s tribunal were criticized for wielding too much power over the process. Dickinson, supra note 5, at 38.

203 See id.

204 Human Rights Watch, supra note 121 (“National judges and prosecutors help create a feeling of ‘ownership’ of the important process of accountability.”).