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THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL

by

Louis-Philippe F. Rouillard*

The current travails of the American and Coalition forces in Afghanistan and Iraq have been much debated recently as to their legitimacy. In the same manner, the capture and detention of persons dubbed "enemy combatant", a term applying only to American citizens as determined by the American Supreme Court[1], has been decried for their illegality. As time takes us away from the trauma of September 11, 2001 and gives us time for pause, the questions relating to the causes and processes of two international conflicts waged simultaneously by American and Coalition forces will be further explored and deemed for their worth in light of new elements. Whether good or bad, conclusions will be drawn and history will judge. Nonetheless, even through bad causes and bad processes some good may result. With regards to the Iraq war, and regardless of the current morass in which the occupation forces are bugged down, the capture of Saddam Hussein has had the effect of liberating a nation of peoples. As for the legal world, it has provided yet another case for an international tribunal.

The *Coalition Provisional Authority* has issued on December 10, 2003, its *Statute of the Iraqi Special Tribunal*. An analysis of its content is therefore necessary to insure that while punishment is hopefully afforded to the guilty, the preservation of the fundamental guarantees of human rights are preserved in their clearest and purest form. Such an analysis is necessary to insure that the basic judicial guarantees are granted to even such a man as Saddam Hussein, but also to determine the evolution of *ad hoc* tribunals, to denote whether the international community has yet learn from its past mistakes.

Therefore, this essay will analyse the Statute in the light of those of three preceding tribunals: the International Criminal Tribunal for the former Yugoslavia (ICTY), that of the Rwanda (ICTR), and the Special Court for Sierra Leone.

LEGITIMACY OF THE *AD HOC* TRIBUNALS

Before attempting to denote the progress or regression made by the *Statute of the Iraqi Special Tribunal*, one needs to address a very pointed question about the legitimacy of international and national *ad hoc* tribunals to preside over crimes against humanity, war crimes, the crime of genocide, the crime of aggression, as well as gross and severe human rights violations.

One of the charges brought against such tribunals is that they are illegitimate and ought not to be recognised. Charges of illegitimacy against such tribunals are not new. The *Peace Treaty of*

***Editor, Eastern European Law Journals.**

[1] *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1867) and *Ex Parte Quirin*, 317 U.S. (1942). The 'illegal combatant' status is an American juridical term designating a particular category of U.S. citizens. It dates from the American Civil War and was further taken again during the early days of the Second World War. Both reflect a highly politicize categorisation of what constitute an American national captured and indicted for treasonous activities. This does not apply to other nationals.

Versailles established a special tribunal to indict Kaiser William II through its Article 227. Immediately, it was denounced by many international jurists as victor's justice. Yet, these charges are difficult to substantiate in view of Article 228 of the *Peace Treaty*, in which the German Government recognised the authority of such tribunal and in view of Article 229 which statutes upon the legitimacy of multinational tribunal for multinational crimes[2]. Of course, since the former Emperor was never extradited from the Netherlands, the question remained academic for lack of a trial. Nonetheless, recognition of the principles of international morality and the sanctity of treaties inferred a notion that such breaches of international peace and security could be prosecuted. And even the fact that Germany signed the *Versailles Treaty* somewhat under the gun does not take away the fact that recognition was willed by the victors and acquiesced to by the vanquished.

The same charges of a victors' justice were made against the *International Military Tribunal* of Nuremberg at the end of the Second World War. The legitimacy of the *Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*[3], was decried as *ex-post facto* law. Yet, warnings of such measures had been clearly, publicly and officially been given to the German authorities in a minimum of four instances since 1942, when word of atrocities began to filter out of the European continent and into the British and American press.

The first of such instance was the *Resolution on German War Crimes by Representatives of Nine Occupied Countries*[4] signed on January 12, 1942 in London. In this resolution, reference to the accepted principles of international law contained in the 1907 *Hague Conventions* are stated as the legal basis of indictment being sought, judgement being passed and sentence being carried out.

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[2] *Peace Treaty of Versailles*, 28 June 1919, [hereafter *Versailles Treaty*] at Article 227 : "The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence (…)"; at Article 228: "The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies."; and Article 229: "Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power. Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the Powers concerned. In every case the accused will be entitled to name his own counsel."

[3] *Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, December 20, 1945, 3 *Official Gazette Control Council for Germany* 50-55 (1946), http://www1.umn.edu/humanrts/instree/ccno10.htm, [hereafter *Control Council Law No. 10*] at Article II: "1. Each of the following acts is recognized as a crime: a) Crimes against Peace. Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

b) War Crimes. Atrocities or offences against persons or property, constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labour or for any other purpose of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

c) Crimes against Humanity. Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated (…)"

[4] *Resolution on German War Crimes by Representatives of Nine Occupied Countries*, London, January 12, 1942, at http://www.ibiblio.org/pha/policy/1942/420112a.html.

President Roosevelt released a statement on August 21, 1942 in which he restated these notions that acts of violence against civilian populations are "at variance with the accepted ideas concerning acts of war and political offences as these are understood by civilised nations"[5]. This further restated the President's own public declaration, pre-dating the United States entrance in the war on October 25, 1941 in which he warns of fearful retribution[6]. It is again once more taken publicly with the President's declaration that it is "the intention of this Government that the successful close of the war shall include provision for the surrender to the United Nations of war criminals"[7].

This is finally confirmed as a joint understanding of the major Allies in the *Statement on Atrocities* contained in the *Joint Four-Nation Declaration* of the *Moscow Conference* held in October 1943[8].

As such, the resulting *Charter of the International Military Tribunal* can hardly be said not to have been settled upon the firm foundation of treaty law, as understood in the concepts of the *Hague Conventions* of 1907, themselves resting upon the *St-Petersburg Declaration* of 1868. Nor could the intentions of prosecution of these crimes deemed to be unknown to the German government. The authority of the court being further recognised in the *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* by the United Nations in whose name the four signatories act, there can little doubt of its legitimacy[9].

In the same manner, the *Charter of the International Military Tribunal for the Far East* was a direct result of the *Cairo Declaration*[10] of December 1, 1943 and of the *Postdam Proclamation* of July 26, 1943[11]. This was recognised fully by the Japanese acceptance of the *Postdam Proclamation* in their

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[5] *President Franklin D. Roosevelt's Statement on Punishment of War Crimes*, Washington, White House News Releases, August 21, 1942, at http://www.ibiblio.org/pha/policy/1942/420821a.html.

[6] *Franklin D. Roosevelt on the Execution of Hostages by the Nazis*, *Department of State Bulletin*, October 25, 1941 at http://www.ibiblio.org/pha/policy/1941/411025a.html.

[7] *President Franklin D. Roosevelt's Statement on Punishment of War Crimes*, Washington, White House News Release, October 7, 1942, at http://www.ibiblio.org/pha/policy/1942/421007a.html.

[8] *Statement on Atrocities of the Joint Four-Nation Declaration*, Moscow Conference, October 1943, at http://www.ibiblio.org/pha/policy/1943/431000a.html, which states: "speaking in the interest of the thirty-two United Nations, hereby solemnly declare and give full warning of their declaration as follows: At the time of granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein. Lists will be compiled in all possible detail from all these countries having regard especially to invaded parts of the Soviet Union, to Poland and Czechoslovakia, to Yugoslavia and Greece including Crete and other islands, to Norway, Denmark, Netherlands, Belgium, Luxembourg, France and Italy. Thus, Germans who take part in wholesale shooting of Polish officers or in the execution of French, Dutch, Belgian or Norwegian hostages or Cretan peasants, or who have shared in slaughters inflicted on the people of Poland or in territories of the Soviet Union which are now being swept clear of the enemy, will know they will be brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged. Let those who have hitherto not imbued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied powers will pursue them to the uttermost ends of the earth and will deliver them to their accusors in order that justice may be done."

[9] *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* [hereafter the *London Agreement*], August 8, 1945, 58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280,

[10] *Cairo Conference*, November 1943 at http://www.ibiblio.org/pha/policy/1943/431201a.html.

[11] *The Postdam Proclamation, A Statement of Terms of Unconditional Surrender of Japan*, July 26, 1945, at paragraph 10: "We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners. The Japanese government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion and of thought as well as respect for the fundamental human rights shall be established."

surrender of August 10, 1945[12]. Again, the legitimacy of the Allies to establish tribunals and to pass judgement upon war criminals cannot be denied on account of a lack of recognition.

In the interval between the end of the Second World War and the 1990's, there have been no real examples of *ad hoc* tribunals being formed in this manner under international jurisdiction. While many trials of former war criminals have taken place, all were done under national jurisdiction, even if deemed in accordance with international law. Cynics might say that this is because it took Europe another 45 years to get on with yet another war in which mass persecutions and the new terminology of ethnic cleansing needed to be created. Neither the Asian situations in Vietnam and Cambodia nor the juntas of South America could create the kind of support for international tribunals that the Balkan conflicts of Slovenia, Croatia and Bosnia created.

To prosecute persons indicted of war crimes, including grave breaches of the *Geneva Conventions of 1949* as well as violations of the laws and customs of war, crimes against humanity and genocide, the *International Criminal Tribunal for the Former Yougoslavia* (ICTY) was created by the Security Council through its *Resolution 827* adopted May 25, 1993[13]. Despite the claims of some nationalists and of some of the accused, such as the former President of the Serbian Republic and of the Yugoslav Federation, Slobodan Milosevic, the tribunal not only has recognition through the Security Council, but also has wide recognition amongst nations. Furthermore, it is based upon the two precedents of the *International Military Tribunals* of Nuremberg and Tokyo. Even if the relevance of the IMTs could still be opposed, the simple fact is that the international order created by the *Charter of the United Nations* recognises only its Security Council has the body with the authority vested to determine any threat to international peace and security and to maintain and restore international peace and security. It has the sole authority of deciding what measures shall be taken to maintain or restore them[14]. As such, the application of today's international body of law in undeniable and therefore the establishment and prosecution through an international tribunal is perfectly legitimate. The same can be said of the *International Criminal Tribunal for Rwanda* (ICTR)[15], and of the *Special Court for Sierra Leone* (SCSL)[16].

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[12] *Offer of Surrender of the Japanese Government*, (1945) XIII (320) *Department of State Bulletin*, August 12, 1945 reproduced at http://www.ibiblio.org/pha/policy/1945/450729a.html#2 : "The Japanese Government is ready to accept the terms enumerated in the joint declaration which was issued at Potsdam on July 26th, 1945, by the heads of the Governments of the United States, Great Britain, and China, and later subscribed to by the Soviet Government, with the understanding that the said declaration does not comprise any demand which prejudices the prerogatives of His Majesty as a Sovereign Ruler." Furthermore, the principles of the IMTs have been recognised in *Affirmation of the Principles of International Law recognised by the Charter of the Nüremberg Tribunal*, Resolution 95 (I) of the United Nations General Assembly, 11 December 1946.

[13] *Statute of the International Criminal Tribuna for the Former Yugoslavial*, adopted by S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 6, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1203 (1993), as amended by S.C. Res. 1166, U.N. SCOR, 53rd Sess., 3878th Meeting, U.N. Doc. S/RES/1166, 13 May 1998; S.C. Res. 1329, U.N. SCOR, 55th Sess., 4240th mtg, U.N. Doc. S/RES/1329 (2000)of 30 November 2000,; S.C. Res. 1411, U.N. SCOR, 57th Sess., 4535th mtg., U.N. Doc. S/RES/1411 (2002), of 17 May 2002; S.C. Res. 1431,57th Sess., 4601st mtg, U.N.Doc. S/RES/1431 of 14 August 2002; and S.C. Res. 1481, 58th Sess., 4759th mtg, U.N. Doc. S/RES/1481 of 19 May 2003. All these resolutions deal with the recognition of the tribunal as it stands and establishes criteria for the election of permanent judges and the composition of the Chamber as well as officers of the court.

[14] *Charter of the United Nations*, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force Oct. 24, 1945, at Article 39.

[15] *International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994* , [hereafter the *Statute of the International Tribunal for Rwanda*], adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994).

[16] S.C. Res. 1315, U.N. SCOR, 55th Sess., 4186th mtg., U.N. Doc. S/RES/1315 of 14 August 2000 which rests upon the terms of the Truth and Reconciliation Commission in relation to human rights violations as contained in article XXVI of the *Lomé Peace Agreement*, Lomé, U.N. Doc. S/1999/777 of 7 July 1999, as well as upon a statement of the Special

The interesting differences are that Yugoslavia's and Rwanda's tribunals have been created as the results of armed conflicts through the sole mechanism of the United Nations' Security Council while the Special Court for Sierra Leone was made through the means of the Security Council, but upon the instigations of Sierra Leone's government. This not only gives international legitimacy to the court, but it provides it with the national legitimacy it needs to face its own population and help the process of reconciliation.

This creates a precedent well supported by the international community, as requested in the *Lomé Peace Agreement* in its Articles XXXIII and XXXIV[17]. As a result the *Iraqi Special Tribunal* can be deemed as having solid grounds to claim its legitimacy since it is also rooted in both national and international law like the Sierra Leone Special Court.

Indeed, the *Coalition Provisional Authority* established through the Security Council's Resolution 1511 (2003) clearly recognises the sovereignty of Iraq as belonging to the State of Iraq and this provisional authority is constituted of the *Governing Council of Iraq* as the legitimate interim administrators of Iraq and therefore responsible for the exercise of all responsibilities, authorities and obligations under applicable international law[18]. This was in line with the mandate the Security Council provided the United Nations with in resolution 1483[19].

The *Coalition Provisional Authority*, or at the very least its *Governing Council*, did not waste time. On December 10, 2003, it issued the *Statute of the Iraqi Special Tribunal*[20]. It must be stated that the speed by which this document came about clearly indicates the insistence of the Iraqi members of the *Coalition Provisional Authority* to try former members of the Ba'ath regime in Iraq. Indeed, at the time prior to the capture of Saddam Hussein on December 13, 2003, there existed a definite question about who would have the privilege of trying former regime perpetrators and where such a trial would take place. While the United States have appeared non-committal, if somewhat bent upon doing this in America, the Iraqis have been very vocal in wanting to try those accused in Iraq. By producing a document permitting the trial to take place with the guarantees of justice, the *Governing Council* was in fact seizing the ground first to have the moral claim of trying under its terms. As the political manoeuvre of an occupied country's political body, this was brilliantly done. However, it does raise two questions as to its legitimacy: its roots in international law and the avoidance of the *International Criminal Court*[21].

Representative of the Secretary-General next to his signature of the treaty that amnesties given to former belligerents did not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian laws.

[17] *Lomé Peace Agreement*, *ibid*., whereas Article XXXIII request international involvement and Article XXXIV names the UN as the AOU (now the African Union), ECOWAS, the Commonwealth of Nations and the Government of the Togolese Republic as guarantors of the implementation of this agreement.

[18] *Coalition Provisional Authority*, S.C. Res. 1511, 57th Sess., 4844 mtg., U.N. Doc S/RES/1511 of 16 October 2003.

[19] S.C. Res. 1483, 57th Sess., 4761st mtg., U.N. Doc. S/RES/1483 of 22 May 2003, at par. 9 recognising the legitimacy of an interim administration until a representative government can be established. S.C. 1483 affirms in its preamble the need for accountability for crimes and atrocities committed by the previous Iraqi regime and request the denial of safe haven to those members of the previous regime who are alleged to be responsible for crimes and atrocities and requests support actions to bring them to justice. It also points to promoting human rights at par. 8(g), while encouraging legal reforms at par. 8(i). This is further recognised by S.C. Res. 1500, 57th Sess., 4808th mtg., U.N. Doc. S/RES/1500 of 14 August 2003 which grants recognition of the *Governing Council*.

[20] *Coalition Provisional Authority*, *The Statute of the Iraqi Special Tribunal*, December 10, 2003, at http://www.cpa-iraq.org/human_rights/Statute.htm.

[21] *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 (1998), *entered into force* July 1, 2002, [hereafter *Rome Statute*].

The *Iraqi Special Tribunal* has been created by the Iraqi's own *Governing Council*, through the approval of the Coalition Provisional Authority Administrator's *Order 48 – Delegation of Authority Regarding an Iraqi Special Tribunal*[22]. This order bases the legitimacy of its delegation upon Security Council Resolutions 1483 (2003), 1500 (2003) and 1511 (2003). As such, it therefore recognises its authority under the mandate of the United Nations and under Iraqi law. Indeed, Section 2(1) of *Order 48* takes pains to hold the *Governing Council* accountable for describing the elements that will apply to the crimes listed in the *Statute* and does promulgate in Section 2(2) the need for the tribunal to meet at least the international standards of justice.

Nonetheless, final authority for the Statute firmly rests in the *Coalition Provisional Authority* as the Administrator reserves himself the right to alter the statute or any elements of crimes or rules of procedure developed for the tribunal in Section 1(6), while the prevalence of the promulgations of the *CPA* is affirmed in Section 2(3) over any conflict of promulgations by the *Governing Council* and the *CPA* or judgements by the Tribunal. It is clear that the Coalition desires to firmly keep the situation within the confines of its authority. Hence the political manoeuvre in producing a *Statute* so fast and with clear indications of where the *Governing Council* wants to hold trials. Regardless of this intra-Coalition tug for jurisdiction, the legitimacy of the Tribunal is not in doubt.

Still, some will wonder about the choice of venue for such a trial, since the *International Criminal Court* was created in 2002, and therefore is available to conduct such trials. Indeed, the jurisdiction of the court extends well into all the crimes aimed in the *Statute of the Iraqi Special Tribunal*. However, it has two problems against it being applied. The first is the geopolitical nature of the *International Criminal Court*, as the United States continues to refuse to see it as having jurisdiction over its nationals. Using the ICC while leading the *Coalition Provisional Authority* would be most impolitic.

But, in legal terms it is Article 11 of the *Rome Statute* that bars it from being utilised. That is because Article 11 edicts a jurisdiction *rationae temporis* that limits it to crimes occurring solely after its coming into force. As the entry in force of the *Rome Statute* is July 1, 2002, and the crimes falling under the *Statute of the Iraqi Special Tribunal* have been giving a temporal jurisdiction applicable from July 17, 1968, there can be no question of using the *International Criminal Court*[23].

A final limitation is of course that while the United States has signed, but not ratified, the *Rome Statute*, Iraq has done neither, rendering it inapplicable to its citizens and thereby forcing the creation of an *ad hoc* venue for the trials[24].

All this speaks not only of the legitimacy of the *Iraqi Special Tribunal* as an *ad hoc* court of justice, but also of the reason why it has been enacted as it currently stands. While modifications may be foreseen, the *personae*, *temporis* and *loci rationae* are certain to remain. The determination that remains to be done is therefore the content of the *Statute of the Iraqi Special Tribunal*.

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[22] *Coalition Provisional Authority Order Number 48 - Delegation of Authority Regarding an Iraqi Special Tribunal*, CPA/ORD/ 9 Dec 2003/48, [hereafter *Order 48*] at http://www.cpa-iraq.org/regulations/#Orders, signed by the Administrator appointed by the Coalition, L. Paul Bremmer III.

[23] *Rome Statute*, *supra*, note 20 at Article 11 as opposed to the *Statute of the Iraqi Special Tribunal*, *supra*, note 21, at Article 1(b), which limits the crimes to "Iraqi nationals or residents accused of the crimes listed in articles 11 to 14 below, committed since July 17, 1968 and up until and including May 1, 2003 in the territory of the Republic of Iraq or elsewhere, including crimes committed in connection with Iraq<s war against the Islamic Republic of Iran and the State of Kuwait."

[24] This can be ascertained at http://www.iccnow.org/countryinfo/worldsigsandratifications.html.

JURISDICTION AND CRIMES

Since 1991, the *Iraqi Special Tribunal* is the fifth of the kind to be created. And there seem indeed to be lessons that have been drawn from the experiences of the preceding ones. Indeed, the progression in clarity and reach of the Statute seems to improve, although not everything has progressed toward securing the full measure of justice due to the victims in accordance with International Humanitarian Law and the International Bill of Human Rights[25].

The first attempt at creating such a court with the 1993 *Statute of the International Criminal Tribunal for the Former Yugoslavia* had fallen somewhat short of all the crimes that had been put to the feet of the accused. Indeed, this *Tribunal* was solely concerned with Serious Violations of International Humanitarian Law[26].

As such, it divided its competence over the notions of grave breaches of the *Geneva Conventions of 1949*[27], violations of the laws or customs of war, genocide and crimes against humanity. But even the formulation of these divisions seemed somewhat out of place. Instead of addressing the violations of humanitarian international law as a holistic legal regime, this *Statute* divided and compartmentalised what is inter-related. For example, its Article 2 joined as a cross-section the grave violations referred to in Articles 50 of the *First Geneva Convention*, 51 of the *Second Geneva Convention*, 130 of the *Third Geneva Convention* and 147 of the *Fourth Geneva Convention*. However, instead of speaking to the terms of the Geneva Conventions, it merged these documents to read "a prisoner of war or a civilian" when referring to grave breaches. As a result, it excluded some of the protected persons referred to in Article 4 of the *Fourth Geneva Convention*[28]. This oversight may seem benign, but it clearly excludes medical and religious personnel from the application of the *Statute* when Article 4(A) and (C) of the *Third Geneva Convention* is interpreted in the light of its Article 33[29], since it does not associate the status of prisoners of war to these persons. Nor are they considered civilians, although they are protected persons in the sense of the *Fourth Geneva Convention*. In wars like those of the Balkans, resting on cultural and religious

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[25] Recognized as being the *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948) , *International Covenant on Economic, Social and Cultural Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976, *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, *Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, *entered into force* March 23, 1976. , *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, G.A. res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989), *entered into force* July 11, 1991, United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, UN Doc E/CN.4/1984/4 (1984).

[26] *Statute of the International Criminal Tribunal for the Former Yugoslavia*, *supra*, note 6, at Article 1.

[27] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* , 75 U.N.T.S. 31, entered into force Oct. 21, 1950 [hereafter the *First Geneva Convention*], *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 75 U.N.T.S. 85, entered into force Oct. 21, 1950 [hereafter the *Second Geneva Convention*], *Geneva Convention relative to the Treatment of Prisoners of War*, 75 U.N.T.S. 135, entered into force Oct. 21, 1950 [hereafter the *Third Geneva Convention*], and the *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 75 U.N.T.S. 287, entered into force Oct. 21, 1950 [hereafter the *Fourth Geneva Convention*].

[28] *Fourth Geneva Convention*, *ibid*., Article 2: "Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, shall not be considered as protected persons within the meaning of the present Convention."

[29] *Third Geneva Convention*, *supra*, note 27 at Article 4(A) and (C) and at Article 33.

differences, this oversight allows for many victims to fall out of the scope of obtaining justice. But this is even more telling when referring to irregulars.

Indeed, Article 4(2) of the *Third Geneva Convention* addresses the issue of militias and volunteer corps on the basis of the four conditions to be recognised for having combatant status. In ethnic conflicts such as those of the Balkan wars, a very high proportion of belligerents were in that category. But recognition as belonging to this category has always been very difficult and is left to the discretion of the Occupying Power. As a result, if they were not part of regularly constituted forces, many of the former belligerents who were victim of grave violations can not see justice done on their behalf since they did not acquire the status of prisoner of war, nor were they civilian since they were captured engaging in hostile actions, making them illegal combatants. They do remain protected persons in the sense of Article 4 of the *Fourth Geneva Convention*, but they are not civilians. As it has been noted by reputed author, the problem is that under the *Geneva Conventions'* regime, International Humanitarian Law does not recognise a category for quasi-combatants. Nor does it recognise the right of civilians to participate in hostilities. But direct participation does make one lose his civilian status and therefore results in him being a combatant, albeit an illegal one, and lawfully a target during the length of its engagement in hostile actions[30]. However, he does not re-acquire his civilian status after taking part in such hostilities if captured. He becomes an illegal combatant, subject to the protections of the *Fourth Geneva Convention*, but not entitled to the privileges of a prisoner of war. As a result, Article 2 of the *Statute of the International Criminal Tribunal for the Former Yugoslavia* had and still possesses a deep flaw whereby only grave breaches against prisoners of war and civilians can be prosecuted.

Article 3 of the *International Criminal Tribunal for the Former Yugoslavia* further had a problem in separating the violations of the laws and customs of war into a unique article. As a result, it repeated the wanton destruction of property not justified by military necessity and limited itself to stating five principles of the laws and customs of war.

Article 4 goes on with the crime of genocide, which repeats *verbatim* the wording of the *Convention on the Prevention and Punishment of the Crime of Genocide*[31].
The last crimes punishable under this *Statute* are crimes against humanity. These are listed as they first appeared when stipulated the first time in the *Control Council Law No. 10* for the promulgation of the *Charter of the International Military Tribunal* of Nuremberg[32]. The only difference concerns the fact that the persecutions on political, racial and religious grounds of the *International Military Tribunal* referred to persecution whether or not in violation of the domestic laws of the country where perpetrated, whilst no such statement is made in the *Statute of the International Criminal Tribunal for the Former Yugoslavia*.

The *Statute of the International Tribunal for Rwanda* followed suit in many respects. Its Article 2 concerning the crimes of genocide takes also the integral version of the *Convention on the Prevention and Punishment of the Crime of Genocide*. So does its Article 3 in relation with the *Control Council Law No. 10*.

Where it differs is in the violations of the laws and customs of war. This is because the Rwanda situation happened in the midst of a non-international armed conflict. But, not only did Article 3

[30] Sassóli, Marco and Bouvier, Antoine A., *How does Law Protect in War?*, Geneva, International Committee of the Red Cross, 1999 at 208.
[31] *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 U.N.T.S. 277, *entered into force* Jan. 12, 1951, [hereafter *Convention on Genocide*] at Articles 2 and 3.
[32] *Control Council Law No. 10*, supra, note 3 and *London Agreement*, *supra*, note 9.

common to the *Geneva Conventions*' regime apply to Rwanda, but also the *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, which it had ratified on 19 November 1984[33].

The drafters therefore choose to combine the fundamental guarantees of Article 3 of the *Geneva Conventions* with the notions of *Protocol II*. As a result, Article 4 of the *Statute of the International Criminal Tribunal for Rwanda* combined the four prohibitions of violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture, the taking of hostages, outrages upon personal dignity, in particular, humiliating and degrading treatment, and the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples contained in Article 3 common to the four *Geneva Conventions*[34], with the additional prohibitions of collective punishments, acts of terrorism, enforced prostitution and any form of indecent assault, pillage, and the threats to commit any of the foregoing acts contained in Article 4(2) of *Protocol II*[35]. Interestingly, it did not concern itself with including slavery and the slave trade in all forms as violations, despite it being in Article 4(2) and the situation in some cases might be associated to this. Still, the wording of the Statutes allows for violations which "…shall include, but shall not be limited to…" these violations. Therefore, one can assume that such violations can also be prosecuted.

In both cases, the *International Criminal Tribunals* tried to create statutes tailored to the conditions of the conflicts for which they were created. The fact that they were created and that they did indeed prosecute and convict is an accomplishment worth celebrating. The lessons of the Yugoslav tribunal certainly did show in the drafting of the Rwanda statute, but as the legal regime applicable differs, it is difficult to see true progress.

The *Statute of the Special Court for Sierra Leone*[36] brought a new perspective to *ad hoc* tribunals. As in the case of Rwanda, the Sierra Leone conflict was essentially non-international, despite obvious meddling by other nations. As such, it was again Article 3 common to the *Geneva Conventions* and *Protocol II* which applied.

Its Article 2 takes once more the notion of the crimes against humanity in full, but adds to the crime of rape by declaring sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence as such crimes. As such, it incorporates the enlargement made in Article 7(1)(g) of the *Rome Statute*, although omitting the last part of the sentence, where it stipulates "…of comparable gravity…"[37]

Further adapting to the times and moving toward simplicity Article 3 of the *Statute* deals with the violations to the laws and customs of war applicable to non-international armed conflicts by simply restating verbatim the notions of Article 4(2) of *Protocol II*.

However, the *Sierra Leone Special Court* does not limit itself. Article 4 includes other serious violations of international humanitarian law, namely: intentional attacks upon civilians, intentional

[33] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [*hereafter *Protocol II]*, 1125 U.N.T.S. 609, *entered into force* Dec. 7, 1978. For ratification information, see http://www.icrc.org/ihl.nsf/WebNORM?OpenView&Start=53.1.92&Count=30&Expand=53.1#53.1

[34] *Geneva Conventions*, *supra*, note 27 at Article 3.

[35] *Protocol II*, *supra*, note 35 at Article 4(2).

[36] *Statute of the Special Court for Sierra Leone*, at http://www.sc-sl.org.scsl-statute.html

[37] *Rome Statute*, *supra*, note 23, at Article 7(1)(g).

attacks upon UN personnel, materiel, installations, units or vehicles involved in humanitarian assistance or peacekeeping missions as long as they are entitled to the protection given to civilians and civilian objects under international law, and the conscription or enlisting of children under the age of 15 or using them to participate in hostilities.

This article is truly interesting as while the principle of the respect of civilians has been part of the laws of armed conflicts since the *Declaration of St-Petersburg* of 1868, the notion of the crimes against the United Nations and its associated personnel have been set very shortly prior to the establishment of the Special Court in the *Convention on the Safety of United Nations and Associated Personnel*[38]. The fact that it is made a serious violation due to its grave nature, as expressed in its text makes for an interesting, and yet to be seen effective, addition to the corpus of the laws of armed conflicts. The last notion is that of combatant children and is a direct incorporation of Article 4(3)(c) of *Protocol II*, but was used here for the first time while it was of definite interest in the Rwanda cases.

But where the *Special Court for Sierra Leone* truly innovates is in its joint approach from international to national legislation. While resting on all previous International Humanitarian Laws as well as on the *Convention on Genocide* for indictments and prosecution, it also incorporates within its statute two categories of crimes under national law. Its Article 5 thereby incorporates as crimes under Sierra Leonean laws offences against the abuses of girls and offices regarding wanton destruction of property. The most interesting aspect of this incorporation is that no one can ever accuse the current government of trying to prosecute under *ex-post facto* law as the first category of offences comes from the *Prevention of Cruelty to Children Act* of 1926 (Cap.31), while the second comes from the *Malicious Damage Act* of 1861[39].

These laws still being in force at the time of the commission of the offences, they fully apply to perpetrators. Furthermore, this incorporation of national laws within the structure of an essentially international law-based instrument demonstrate the juridical sense and the seriousness of the Government of Sierra Leone in trying and convicting those guilty of such crimes.

Parallel to the crisis in Sierra Leone, another type of violence took place in East Timor in 1999. From August 1999, the UN Commission on Human Rights was seized with the on-going violence and informed of alleged systematic and gross abuses. Following the intervention of an Australian-led Coalition to re-establish a secure environment, steps were taken to make accountable Indonesian military and paramilitary perpetrators of crimes against humanity.

[38] G.A. res. 49/59, 49 U.N. GAOR Supp. (No. 49) at 299, U.N. Doc. A/49/49, entered into force January 15, 1999, these are enumerated at Article 9: "Crimes against United Nations and associated personnel: 1. The intentional commission of:
(a) A murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel; (b) A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty;
(c) A threat to commit any such attack with the objective of compelling a physical or juridical person to do or to refrain from doing any act; (d) An attempt to commit any such attack; and (e) An act constituting participation as an accomplice in any such attack, or in an attempt to commit such attack, or in organizing or ordering others to commit such attack, shall be made by each State Party a crime under its national law.
2. Each State Party shall make the crimes set out in paragraph 1 punishable by appropriate penalties which shall take into account their grave nature."

[39] *Statute for the Special Court for Sierra Leone*, *supra*, note 36 at Article 5.

As such, Indonesia established a *Special Panel on Serious Crimes*[40] on the basis of national law number 26 of year 2000[41]. This law is supposed to permit the *Ad Hoc Human Rights Court* to try broad and systematic attacks against the civilian population as crimes against humanity[42]. Still its very form, including genocide within the concept of crimes against humanity and speaking of such deeds as "explosions and invasions" confuses the usual categorisation of crimes. Indeed, explosion as such is not a crime under international law. Even explosions are not crimes *prima facie*; their obvious intent to attack systematically the civilian population must be demonstrated. But, even more damaging, is the inclusion of invasion within that concept of crimes against humanity. This confuses crimes against humanity with the notion of crimes of aggression, as understood in the *Rome Statute*. As such, this *Ad Hoc Human Rights Court* has been deemed an instrument for paying lip service to international pressures on Indonesia while assuring the perpetrators to be sent home free. But, this may not be the case as of yet. The UN Press Release of May 10, 2004 announced that the United Nations Mission in Timor-Leste (UNMITE) communicated that General Wiranto and seven other senior officers of the Indonesian military (TNI) and officials of the former government have been indicted by the Special Panel for Serious Crimes[43]. General Wiranto was charged with command responsibility for murder, deportation and persecution[44]. As the warrant is issued and prosecution demanded, the efficiency of the Indonesian tribunal will be offered as a test case. And its efficiency will be compared to that of the legislations given to the *Iraqi Special Tribunal*.

THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL

The cumulative lessons from the previous tribunals instituted to indict and prosecute the crime of genocide, crimes against humanity, war crimes and violation of national Iraqi law have not been lost on the drafters of the *Statute of the Iraqi Special Tribunal*. Indeed, the structure of its *Statute* once more demonstrate the juridical ability of its drafters and the search for clarity and expediency, while adapting to the new applicable models of international law.

First of all, the temporality of the statute addresses from the start the notion that the crimes aimed at are all those that are alleged to have taken place since the illegal *putsch* of the Ba'ath party against the ruling government of July 17, 1968 up to and including the official end of the latest Iraq War on May 1, 2003. As a result, there is a wide variety of conflicts and crimes that need to be addressed in particular geographic locations and at precise time. In order to avoid limiting the powers of the *Tribunal*, the Statute states clearly that its jurisdiction applies to any Iraqi national or resident accused of the crimes listed, whether it occurred in the territory of Iraq or elsewhere. As such, it does not limit the persons or the geographic area of its jurisdiction.

The drafters of this *Statute* have also decided to change its structure compared to the prior tribunals. Instead of plunging itself immediately into the crimes to be under its jurisdiction, it instead presents the composition and organisation of the tribunal. This seems obviously to be done in order to

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[40] Information on the court is sketchy, but glimpsed of its schedule can be seen at http://www.jsmp.minihub.org/trials.htm.

[41] Katjasungkana, Nug, "The Justice Process in Indonesia Regarding the Prosecution of the Serious Crimes Cases of Human Rights Violation in East Timor in 1999", in Justice and Accountability in East Timor: Internationals and Other Options, Dili, 16 October 2001 at page 9, available at http://www.etan.org/lh/misc/justconf3.html.

[42] *Ibid*., these adapted Article 7 of the *Rome Statute* to encompass: "a) genocide, b)

[43] *Daily Press Breifing by the Office of the Spokesman for the Secretary-General*, 10 May 2004 at http://www.un.org/News/breifing/docs/2004/db051004.doc.htm.

[44] Special Panel for Serious Crimes, Motion to Request a Warrant Application Hearing Pursuant to Sections 27.2 and 19(A) of UNTAET Regulation 2000/30, as Amended by Regulation 2001/25, District Court of Dili, 28 January 2004 at http://www.etan.org/et2004/january/25-31/28deputy.htm

alleviate critics of a 'kangaroo court' by showing from the start and in plain view who and what the tribunal shall be composed of. This is of paramount importance as many of the persons representing the current *Governing Council* of Iraq are expatriates who returned to Iraq after the Coalition's invasion. As such, they are deemed to have a strong bias against the former regime and therefore need to avoid any sort of accusation that would attack its legitimacy.
It is in this aim that Article 5(e) of the *Statute of the Iraqi Special Tribunal* incorporates not only the notion of national law for the selection of judges, but also the possibility for disqualifying a judge at Article 5(f)(1). This is also applicable to investigative judges under Article 7(m)(1).

There is also a Presidency of the Tribunal, established at Article 6, which further tries to increase the legitimacy by the appointment of non-Iraqi advisors to the Tribunals whose function will be to advise the Tribunal on international law and to monitor the due process of law standards.

It is only after the credentials of the *Tribunal* are established that the *Statute* moves to the crimes submitted to its jurisdiction. And again, this is an exercise in simplicity and clarity. As such, Article 10 states them clearly: the crime of genocide, crimes against humanity, war crimes or violations of certain Iraqi laws listed in Article 14.

It is interesting that this article does not keep in full with the *Statute of Rome*. Its Article 5(1) refers to four serious crimes, the first three being the same as in the *Iraqi Statute*, but the fourth is the crime of aggression.

Where Article 1 of the *Iraqi Statute* refers to the conflicts with the Islamic Republic of Iran and the State of Kuwait, one would expect in Article 10 that this is indeed a serious crime and that it should hold the Iraqi leadership accountable for this. Quite to the contrary, there is no mention of this being a crime at all. This is certainly the major failing of this statute, and one cannot discard the very real possibility that the avoidance of this inclusion is not unrelated to political consideration and historical facts. No mention of this crime means that no testimonies on the matter are to be accepted by the tribunal and therefore the avoidance of the subject of some countries' support for Iraq's wars.

Despite this failing, the adaptation of the statute to circumstances is interesting. One must take into consideration that the crimes mentioned have different time and space applicable to them. For example, crimes committed during the Iran-Iraq war of 1980-1988 fall under the international armed conflict regime of International Humanitarian Law. But crimes committed against Kurds during the interwar period do not. They either fall under non-international armed conflicts, if the existence of such a conflict is proven in court and which means that only Article 3 common to the *Geneva Conventions* applies with the applicable customs of the laws of war, or there is no international *juris corpus* applicable other than the crimes against humanity. As such, the Statute does an excellent of keeping with simplicity in order to obtain clarity.

On the crime of genocide, it takes in full by referring to it and mentioning Iraq's ratification, the notions of Articles 2 and 3 of the *Convention on Genocide* and incorporating it *verbatim* within Article 11.

As for crimes against humanity, the *Iraqi Statute* does keep to the very wording of the *Rome Statute* on the vast majority of its defined acts. However, it does differ with respect to imprisonment or other severe deprivation of liberty in violation of fundamental norms of international law, whereas the *Rome Statute* uses "…rules…" of international law. As it stands, this was a solid demonstration of the juridical thoughts of the drafters as norms are more likely to be applicable than rules, which should be define by reference to specific treaties and not solely by custom as norms can be.

The crimes against humanity also do differ in the fact that they do not encompass enforced sterilisation, as the *Rome Statute* does in reference to sexual crimes. This omission is particularly troubling as it is known that some branches of Islam do practice the ablation of the clitoris on women. It happens sometimes that the process is not successful or that it is not a precise surgical operation. As a result, death, serious debilitating injuries or sterilisation occur. This is evidently a very delicate issue. Nonetheless, the whole rationale to justify the invasion of Iraq has been based upon the principles of democracy and humanity. The very deliberate omission of those two words does not augur well for the future of Iraq, nor of the region. As with the avoidance of the crime of aggression, the religious and political implications leave a very sour taste in the whole work of the establishment of the tribunal, despite its very commendable juridical approach. To which approach one must applaud the inclusion of the crime of force disappearance, in keeping with both the *Rome Statute* and the *Declaration on the Protection of All Persons from Enforced Disappearances*[45].

Further in keeping with the Article 7(2) of the *Rome Statute*, Article 12(b) of the *Iraqi Statute* states almost identically the definitions of these crimes, if only with the omission of the crime of apartheid, which is clearly irrelevant and the vulgarisation of the term *inter alia*, where it concerns extermination. However, it does completely omit to define the crime of forced pregnancy. Again, one must see in this omission a clear statement of the keeping of religious and political gains by factions of the Iraqi *Governing Council* favouring some segment of the Iraqi society. This is regrettable as the definition provided for in the *Rome Statute* does not alter the meaning of national laws.

Another area of interest in the *Iraqi Statute* is where it concerns war crimes at Article 13. Indeed, as seen in the international tribunals before, there is a difference of applicability between international armed conflicts and non-international ones. But, in order to avoid having to divide and diminish the reach of war crimes dispositions, the *Iraqi Statute* follows the Article 8 of the *Rome Statute*, while rightly making unlawful confinement a separate offence from unlawful deportation or transfer.

But, more important than the enumeration of what constitutes war crimes, the *Iraqi Statute* takes the whole of the definitions contained at Article 8(2)(b) of the *Rome Statute* in its overall written form. However, there is one important omission in these which concerns international armed conflicts. This intentional omission is the employment of weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict. This can be construed as a clear desire to leave out the very delicate issue of the employment of some weapons, such as bomblets, napalm, gas bombs and nuclear bombs, which many officials of the Coalition would certainly not want to have to speak about in a trial.

And the question of sexual sterilisation is again left out, as it is also when reference to sexual crimes is made in relation to serious violations of the laws and customs of war.

As for the rest, the whole of Article 3 common to the *Geneva Conventions*, as written in the *Rome Statute*, is brought forward in the *Iraqi Statute*, while the serious violations of the laws and customs of war are *verbatim*, save for the sexual crimes definition shown above.

[45] *Declaration on the Protection of All Persons from Enforced Disappearances*, G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992).

CONCLUSION

As a result of the evolution of the LOAC, it is evident that the experiences of the tribunals for Yugoslavia and for Rwanda affected the kinds of conflict of the end of the 1990s and the more recent ones of the third millennium. The development of the *Rome Statute of the International Criminal Court* has also clearly influenced the development of national instruments, such as the *Statute of the Special Court for Sierra Leone* and that of the *Statute of the Iraqi Special Tribunal*. Therefore, a definitive progress has been made towards legitimizing the rule of international humanitarian law in both non-international and international armed conflicts, as well as the particular rules of that pertains to the *jus in bello*.

Nonetheless, and despite clear efforts of providing for transparency of procedures and meeting of the minimal humanitarian standards, there remains a very entrenched political influence that is pervasive throughout the redaction of such statutes. Not until the United States recognizes the *International Criminal Court* will we see a fully harmonized and applicable system of indictment and prosecution of crimes against humanity, war crimes, crimes of genocide and, as important, the crime of aggression. Until such time, there will be a selectivity applied to the prosecution of particular crimes while avoiding some of the more delicate issues, such as disappearance, sexual crimes and the crime of aggression.

A silver lining does exist in the fact that all crimes committed after July 1, 2002 can be submitted to the jurisdiction of the court. Furthermore, the joint use of this tribunal with the *Convention of the Safety of United Nations and Associated Personnel* renders the U.N. peacekeepers less prone to attacks – or least able to obtain justice for sustaining injuries during their missions. As such, the *Iraqi Statute* demonstrates that the work done to draft the *Rome Statute* made good juridical sense, since it has taken most of its provisions for its own work. It now remains to be seen how far this will permit justice being truly served.