

BOOK REVIEW

ENEMY OF THE STATE: THE TRIAL AND EXECUTION OF SADDAM HUSSEIN,
by Michael A. Newton and Michael P. Scharf

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INTRODUCTION

Enemy of the State: The Trial and Execution of Saddam Hussein,¹ written by Michael A. Newton² and Michael P. Scharf,³ is a fascinating, insider's account of the establishment of the Iraqi High Tribunal (IHT) in Baghdad and its first trial against former Iraqi President Saddam Hussein. The book does a fine job exploring the background of the Tribunal's creation, detailing Saddam's capture by American forces, describing some of the critical documents used at trial against Saddam and other defendants, and providing a flavor of the antics and chaotic tactics employed. The book also makes clear the personal courage possessed by the judges and lawyers involved in the trial, which was televised in Iraq, thereby exposing various individuals and their families to serious security risks, including death. The authors also provide their expert reflections on the difficulties of trying former leaders who insist on attempting to use trials as political platforms for grandstanding rather than addressing the charges against them (as was also seen in the trial of Slobodan Milošević). However, the book falls somewhat short in failing to adequately distinguish some of the antics and chaotic tactics (which may have colored public perceptions) from legitimate fair trial problems—about which numerous questions have been raised by other

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trial observers. The authors, who are largely supportive of the Tribunal's work and participated in training the judges and prosecutors, do not fully evaluate these serious flaws. Thus, if one were to ask: "Was the 'Dujail' trial—the trial against Saddam Hussein—fair?," the book may not fully convince or inform the reader; more will need to be written on the subject.

In terms of writing style, the book is an easy read that will appeal to experts and non-experts alike. No legal training is needed to comprehend the issues raised, yet the book is nonetheless extremely interesting to those with such training. Occasionally, there are awkward transitions, such as "[f]irst-person references in this chapter are to [Michael Newton]"⁴ and "[f]irst-person references in this section are to Michael Scharf,"⁵ that could have been handled more skillfully.⁶ On the other hand, the use of first-person narrative lends a sense of immediacy that contributes to the gripping nature of the book. The authors, both lawyers and legal scholars themselves, should also be commended for escaping the formalism of legal writing and producing an entirely intelligible and thought-provoking book. Furthermore, between the two of them, the authors were either themselves present at key moments or interviewed key participants, and conducted training sessions with the judges. The information they have compiled is welcome regarding a trial that was reported in the American media only on a superficial level, and about which in-depth information is less readily available.

I. BACKGROUND AND CREATION OF THE TRIBUNAL

After a brief overview, the book commences with a description of the capture of Saddam Hussein (based on an interview of one of the American soldiers present), and details the creation of the Tribunal and the United States' role. The book highlights both the optimism of ordinary Iraqis shortly after the U.S.'s capture of Baghdad, as well as their initial fear that Saddam Hussein could return to power (which helps explain the perceived urgency of trying him). Other reasons given for his

⁴ MICHAEL A. NEWTON & MICHAEL P. SCHARF, *ENEMY OF THE STATE: THE TRIAL AND EXECUTION OF SADDAM HUSSEIN* 10 (St. Martin's Press 2008).

⁵ *Id.* at 71.

⁶ The book also skips around in terms of chronology, for example, referring to "Saddam remain[ing] at large," after the sub-chapter that detailed his capture. *Id.* at 16-19, 62. Some topics are discussed twice—such as the fact that the judges of the International Criminal Tribunal for the former Yugoslavia (ICTY) did not participate in training the IHT judges and prosecutors—perhaps because each author wrote about the topic independently. *Id.* at 75-76, 190. The book also contains at least one bizarre non-sequitur when the authors state "the judgment tackles one of the most difficult legal questions of our time: where is the line to be drawn in a country's fight against terrorists?" *Id.* at 223. The book otherwise has no discussion of terrorism; the Dujail trial concerned war crimes and crimes against humanity. *See id.* at 21.

prompt (and arguably rushed) trial include avoiding revenge killings by Iraqis who suffered under his regime, attempting to quell the insurgency,⁷ and simply satisfying the desire of some for revenge.⁸ The book also makes clear the strong views of Iraqis who very much wanted justice for past crimes,⁹ and were in agreement as to retaining the death penalty.¹⁰ Given this insistence on the death penalty, the book explains that any form of international or “hybrid” tribunal through the United Nations—which would not have permitted the death penalty—was basically ruled out (even if there had otherwise been interest in such an approach).¹¹ Thus, the trial was ultimately a “domestic trial, incorporating international law and aspects of international procedures,”¹² or, as the authors later call it, an “internationalized domestic court.”¹³ Having an Iraqi tribunal meant that rather than utilizing the existing, well-tested methods employed by the two *ad hoc* tribunals,¹⁴ the Iraqis would have to forge a different course.

It would have been interesting for the authors to delve more into explaining exactly who decided that the Tribunal would be an “Iraqi-led” one.¹⁵ The book in certain areas suggests that it was a U.S. decision, noting that “the final policy decision in Washington favored a decentralized approach that empowered Iraqis to create and maintain a tribunal under their own legal authority,” and explaining that after that decision,

⁷ The authors state: “Prime Minister Maliki had a strong, and eminently reasonable, belief that Saddam’s death would strike at the heart of the insurgency . . .” *Id.* at 202.

⁸ The authors explain: “[I]t was clear to close observers that prosecution of leading Baath Party officials could act as a pressure relief valve to help meet the needs of impatient groups of victims in Iraq who had long harbored dreams for personal revenge and score settling.” *Id.* at 47.

⁹ *See, e.g., id.* at 40.

¹⁰ *See, e.g., id.* at 190.

¹¹ Any international role in the trials (initially complicated by the U.N.’s marginalization as to the decision to commence Gulf War II), was further complicated by the death of the U.N.’s highest representative in Iraq, Sergio Vieira de Mello, as a result of a truck bomb that destroyed the U.N. compound in Baghdad on August 19, 2003. *See id.* at 49. The authors lament that “[h]is absence deprived the Iraqis of an international voice and credibility that might have been critical in advocating on their behalf and explaining the need for international support to the investigation and prosecution of Saddam and his regime.” *Id.* Another possible form of tribunal that was not chosen was a “hybrid” tribunal based on joint U.N. and Iraqi authority, using both Iraqi and Arab judges from the region, and incorporating international legal standards. *See id.* at 43.

¹² *Id.* at 1.

¹³ *Id.* at 209.

¹⁴ These are the ICTY and the International Criminal Tribunal for Rwanda (ICTR), which sit in The Hague, Netherlands, and Arusha, Tanzania, respectively, and were created by the U.N. Security Council. *See* Security Council Res. 808, U.N. Doc. S/Res/808 (Feb. 22, 1993) (creating the ICTY); Security Council Res. 955, U.N. Doc. S/Res/955 (Nov. 8, 1994) (creating the ICTR). Both tribunals guarantee defendants before them a broad variety of fair trial protections.

¹⁵ Former U.S. Ambassador for War Crimes, Pierre-Richard Prosper, announced on April 9, 2003, that the process would be “Iraqi-led.” NEWTON & SCHARF, *supra* note 4, at 46.

“the United States and its lawyers on the ground were relegated to the role of assisting, advising, and supporting the Iraqis.”¹⁶ Yet, elsewhere, the book suggests it was an Iraqi decision to have “Iraqi-led trials”—for example, when the authors state “the Iraqis felt that a[n international tribunal] relying on [Security Council] power would be popularly rejected” and that there was little support for trusting the “U.N. bureaucracy.”¹⁷ In fact, there appear to have been multiple reasons why the U.S. might not have wanted an international or “hybrid” tribunal at the time: a fully independent court could have embarrassed the U.S. by examining its support of the Iraqi regime during the Iran-Iraq war, and might even have attempted to insist on jurisdiction over American soldiers (regarding, for example, conduct at Abu Ghraib Prison).¹⁸ The authors appropriately note that “[o]ne of the main arguments in favor of holding trials in Iraq . . . had been to permit the attendance of ordinary Iraqis and ordinary victims.” However, “[t]his goal quickly proved to be a fantasy” because the trials were held in the International Zone, or so-called “Green Zone,” in Baghdad, for security purposes.¹⁹

While some initially took the view that the Tribunal would never be able “to rid itself of the perception . . . that it is an instrument of American power”²⁰ and that the Tribunal would be no more than “U.S. proxies,”²¹ the book does a fair job of dispelling that impression.²² As to the original draft of the statute establishing the Tribunal (when it was known as the “Iraqi Special Tribunal”),²³ the book states that it was prepared by Salem Chalabi, an Iraqi expatriate living in London.²⁴ Although the tri-

¹⁶ *Id.* at 43.

¹⁷ *Id.* at 55.

¹⁸ Of course, at the time, the U.S. was also engaged in a campaign against the International Criminal Court. *See generally* Jennifer Trahan & Andrew Egan, *U.S. Opposition to the International Criminal Court*, 30 A.B.A. HUM. RTS. MAG., No. 1 (Winter 2003), available at <http://www.abanet.org/irr/hr/winter03/usopposition.html>.

¹⁹ NEWTON & SCHARF, *supra* note 4, at 87.

²⁰ *Id.* at 99 (quoting Niko Price, *Iraqi Genocide Tribunal Forming: Among Those Who May Be Tried: Hussein and Allies*, ASSOCIATED PRESS, Dec. 6, 2003).

²¹ *Id.* at 102 (quoting noted academic Cherif Bassiouni).

²² For example, the authors quote the second Presiding Judge, Judge Ra’ouf, as stating to Saddam: “If you are urging [Iraqis] to kill Americans, let your friends of the mujahideen attack the American camps and not blow themselves up in the street and public places and cafés and markets [thereby killing Iraqis]. Let them blow up Americans.” *Id.* at 169.

²³ The draft (and eventual statute) incorporated international definitions of the crimes of genocide, war crimes, and crimes against humanity, as well as forms of individual criminal responsibility. *See id.* at 56; *Law of the Supreme Iraqi Criminal Tribunal* (Law Number 10 of 2005), Official Gazette of the Republic of Iraq (Oct. 18, 2005) [hereinafter IHT Statute], arts. 11-13, 15. An English translation of the statute is available at <http://www.ictj.org/static/MENA/Iraq/iraq.statute.engtrans.pdf>. The Tribunal was renamed the “Iraqi High Criminal Court” in October 2005. NEWTON & SCHARF, *supra* note 4, at 62.

²⁴ NEWTON & SCHARF, *supra* note 4, at 52. The book omits mention of the role Mike Newton played in drafting the Statute. His webpage at Vanderbilt University School of Law states that he “assisted in drafting the Statute of the Iraqi High Tribunal, and served as Interna-

als were supported and assisted by the U.S.'s Regime Crimes Liaison Office (RCLO) in Baghdad, the book clearly draws a portrait of Iraqi ownership. The authors also point out that various non-U.S. nationals assisted in the trials as well,²⁵ but assistance was largely limited to the U.S., as the Iraqi decision to retain the death penalty in turn "prevented European countries from assisting with the work of the tribunal."²⁶ Ultimately, it does not appear from this book (or other accounts) that the U.S. controlled these trials;²⁷ to the contrary, if there was undue interference, as discussed below, it appears to have come from the Iraqi government.²⁸

The book progresses chronologically through Saddam's capture, his arraignment before the IHT, the authors' work training the judges and prosecutors, highlights of various days of trial, some of the evidence presented at trial, the trial chamber judgment, the rushed (and short) appellate chamber judgment, and Saddam's hurried execution. In doing so, it captures the historical significance of Saddam's trial and of holding this type of trial, for the first time, in the Middle East. As recounted by one individual who lost twenty-five members of his extended family under Saddam's regime, he "never really thought that Saddam would face trial for his crimes."²⁹ Moreover, the IHT Statute incorporated internationally accepted definitions of genocide, war crimes, and crimes against humanity,³⁰ and required proceedings to satisfy international fair

tional Law Advisor to the Judicial Chambers in 2006 and 2007." Michael Newton, Vanderbilt University School of Law Faculty Webpage, http://law.vanderbilt.edu/faculty/faculty-detail/index.aspx?faculty_id=212 (last visited Nov. 4, 2008).

²⁵ NEWTON & SCHARF, *supra* note 4, at 76–77 (noting the assistance of Canadian, British, and Dutch nationals).

²⁶ *Id.* at 190.

²⁷ That said, the U.S. was clearly in a position where it could have exerted some influence. The IHT was dependent on U.S. funding and personnel for most of its first three years of operation. E-mail interview with Nehal Bhuta, Faculty of Law, University of Toronto (Oct. 31, 2008). One instance where this might have had an impact is that although Iran asked the IHT to investigate Iraqi war crimes during the Iran-Iraq war (including the use of chemical weapons against Iranian soldiers on Iraqi territory), the IHT took no action on this request. *Id.* The Iraqis had received the assistance of U.S. battlefield advisors during some of these events. *Id.*

²⁸ One can also speculate that had the U.S. been controlling these trials, the fair trial problems and problems with appellate review (discussed below) could have been cured.

²⁹ NEWTON & SCHARF, *supra* note 4, at 89.

³⁰ See IHT Statute, *supra* note 23, arts. 11–13.

trial standards.³¹ Not only was Saddam to be tried, but the trial was also *intended* to adhere to internationally accepted fair trial standards.³²

The authors also provide a strong sense of the horrific crimes of the Ba'ath Party regime. The book cites an instance during the Iran-Iraq War, where “young Iraqis were sent without weapons en masse ahead of advancing military units to serve as human mine clearers”; as to deserters, “Saddam decreed that [they] would have their ears cut off.”³³ A health minister in the government who supported Saddam’s resignation in order to bring about a cease-fire in the war was shot in short order.³⁴ “Iraqis were murdered, raped, imprisoned, mutilated, and traumatized as a routine feature of life under Saddam”³⁵ As part of the “eight coordinated campaigns that came to be known as the Anfal [the subject of the Tribunal’s second trial], thousands of villages were literally bulldozed to the ground as their inhabitants fled, or were imprisoned or transported to distant locations where they eventually filled the mass graves prepared to receive their bodies.”³⁶

Indeed, as the authors acknowledge, the crimes that were the subject of the first trial of the Iraqi High Tribunal (the so-called “Dujail trial”), were “minor indeed” compared to other crimes committed during Saddam’s reign.³⁷ The authors touch upon the interesting debate of whether trying crimes through such discrete cases makes sense, as opposed to

³¹ Those fair trial standards, found in Article 19 of the IHT Statute, mirror the fair trial protections found in Article 14 of the International Covenant on Civil and Political Rights (ICCPR). Dec. 16, 1966, 999 U.N.T.S. 171. See NEWTON & SCHARF, *supra* note 4, at 56–58 (quoting the ICCPR); see also IHT Statute, *supra* note 23, art. 19 (mirroring the ICCPR with minor changes).

³² The IHT Statute also provided for the use of Iraqi procedural law, but, given that the IHT Statute also incorporated international fair trial standards, use of Iraqi law would also have to satisfy those standards. See IHT Statute, *supra* note 23, arts. 19, 22.

³³ NEWTON & SCHARF, *supra* note 4, at 24.

³⁴ The health minister suggested that Saddam’s resignation would speed negotiations for a cease fire in the Iran-Iraq war. After Saddam ordered the minister into another room to discuss the proposal, he was shot. *Id.* at 24–25.

³⁵ *Id.* at 25.

³⁶ *Id.* at 26. For analysis of the Anfal trial, see Jennifer Trahan, *A Critical Guide To The Iraqi High Tribunal’s Anfal Judgment: Genocide Against The Kurds*, 30 MICH. J. INT’L L. 305 (2009).

³⁷ See NEWTON & SCHARF, *supra* note 4, at 27. Given the authors’ clear understanding of the scope of criminality of the Ba’ath Party regime, it is strange that they frequently refer to the “thousands” of victims when they should refer to “hundreds of thousands of victims.” See, e.g., *id.* at 18 (“[H]e had terrified millions and buried thousands of his own citizens in mass graves”); *id.* at 23 (“Thousands of Iraqis died with the cry for justice on their lips.”); *id.* at 25 (“Thousands of Iraqi mothers saw their children dragged off to mass graves. Thousands of Iraqis were taken in the dead of night, often with no explanation or trial, never to be seen again.”); *id.* (“[U]nlucky thousands were killed or imprisoned”). Later, the authors acknowledge that there were up to two hundred thousand Anfal victims and up to an estimated five hundred thousand victims of the 1991 killings. *Id.* at 161.

more comprehensive charging.³⁸ For example, the trial of Slobodan Milošević before the International Criminal Tribunal for the former Yugoslavia (ICTY) included vast numbers of crimes committed in Kosovo, Croatia, and Bosnia-Herzegovina.³⁹ Given that Milošević died during his lengthy trial, thereby depriving his victims of justice and preventing that tribunal from finally adjudicating his role in the crimes at issue, the Iraqi High Tribunal's approach of holding more discrete trials is certainly defensible.⁴⁰ However, by trying Saddam, and ultimately sentencing him to death, for the relatively "discrete and comparatively minor series of events that took place in an Iraqi village named Dujail,"⁴¹ the authors appropriately observe that Saddam's "victims would be robbed of seeing him face justice for much greater atrocities."⁴² Thus, for example, as to the much more significant crimes that were the subject of the IHT's second and third trials (regarding the "Anfal" and 1991 "Intifada," respectively),⁴³ there are no official Tribunal findings as to the role of Saddam Hussein.

II. THE EVENTS IN DUJAIL AND THE EVIDENCE PRESENTED AT TRIAL

Of course, the crimes at the heart of the Dujail trial, as gleaned by the authors from evidence presented at trial, were not insignificant. A presidential motorcade on July 8, 1982, visited the town, which is located fifty miles north of Baghdad, and was a "place of palm groves, citrus trees, and grapevines."⁴⁴ Not coincidentally, Dujail was also "a center of [the] Dawa political [party], and many Dujailis opposed the unpopular war with Iran."⁴⁵ As Saddam's presidential convoy rolled through town, rifle shots were heard, although no one was hit.⁴⁶ Saddam's forces, in response, killed two children in an attempt to hit the attackers.⁴⁷ The

³⁸ See, e.g., *id.* at 20-21, 80-81.

³⁹ See Prosecutor v. Milošević, Case No. IT-02-54, Initial Indictment "Kosovo," May 22, 1999 (4 counts), available at <http://www.icty.org/x/cases/slobodanmilosevic/ind/en/mil-ii990524e.htm>; Second Amended Indictment "Croatia," July 28, 2004 (32 counts), available at http://www.icty.org/x/cases/slobodan_milosevic/ind/en/040727.pdf; Amended Indictment "Bosnia and Herzegovina," Nov. 22, 2002 (29 counts), available at http://www.icty.org/x/cases/slobodan_milosevic/ind/en/mil-ai040421-e.htm.

⁴⁰ See NEWTON & SCHARF, *supra* note 4, at 118. It was also apparently legally mandated under Iraqi law. The authors refer to the "Iraqi procedural code approach, by which a defendant is tried in a series of mini-trials, each focusing on a particular incident." *Id.* at 21.

⁴¹ *Id.* at 2.

⁴² *Id.* at 82.

⁴³ See *id.* at 161 (estimating up to two hundred thousand Anfal victims and up to five hundred thousand victims of the 1991 killings).

⁴⁴ *Id.* at 28.

⁴⁵ *Id.* at 29. The Dawa party was, at the time, committing acts against the regime and was allied with Iran. *Id.*

⁴⁶ *Id.* at 30-31.

⁴⁷ *Id.* at 31.

crowd then “frantically screamed their allegiance, knowing the likely fate of those thought to be involved in any plot.”⁴⁸ “Saddam immediately sent for his half-brother, Barzan al-Tikriti, head of the secret police known as the Mukhabarat.”⁴⁹ As tanks and helicopters arrived, Iraqi army units sealed off the town, and civilians who could not flee were taken into custody.⁵⁰ Families were arrested, with men separated from the women.⁵¹ Three hundred townspeople (including children) were sent to the Hakimiya detention facility in Baghdad run by the Mukhabarat, and later to Abu Ghraib.⁵² Many died during interrogation. Others “were transported to a compound known as Liya, in the Samawah Desert, where they were held for years.”⁵³ One hundred forty-eight villagers were executed, by request of then-chief judge of the Revolutionary Court, Awad Hamad al-Bandar (although the Dujail judges concluded no trials were actually held).⁵⁴ Under the direction of the head of the Popular Army, Taha Yassin Ramadan, more than 5,000 acres of “the fields and orchards surrounding Dujail were razed and all of the fruit trees carted off and destroyed.”⁵⁵ (Al-Tikriti, al-Bandar, and Ramadan were all defendants in the Dujail trial, and, like Saddam, ultimately faced the death penalty.)

The book also does a particularly good job of detailing some of the incriminating documentary and other evidence used against the defendants at trial.⁵⁶ Such evidence partly undermines the criticisms that the trial was weak in linking the defendants to the crimes. Some of the documents included a death warrant signed by Saddam Hussein covering 148 citizens from Dujail, based on the request from al-Bandar.⁵⁷ Video was also shown at trial of Saddam interrogating citizens from Dujail.⁵⁸ An additional document from al-Tikriti indicates that the “final results” of the investigation showed that ten individuals were implicated in the attack;⁵⁹ Saddam nonetheless approved of the execution of 148 individuals (including twenty-eight minors, some as young as eleven).⁶⁰ Saddam also openly testified that he “had ordered the destruction of the orchards

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 32.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 33, 182.

⁵⁵ *Id.* at 33.

⁵⁶ The documentary evidence was apparently authenticated by two separate reports of handwriting experts who found only one document not authentic. *Id.* at 151-52.

⁵⁷ *See id.* at 182; *see also id.* at 285 n.28.

⁵⁸ *Id.* at 117.

⁵⁹ *Id.* at 137.

⁶⁰ *See id.* at 138. However, the book later states that the judgment found that thirty-nine minors were sentenced to death. *Id.* at 182.

and homes, and that he had ordered the arrest, interrogation, trial, and execution of the townspeople.”⁶¹

The documentary evidence was also strong regarding al-Bandar—the judge who sentenced the 148 individuals to death, absent trials.⁶² As to al-Tikriti, written testimony of Waddah Ismai’il Khalil, the director of the investigations department of the Mukhabarat Intelligence Service (who had died by the time of trial), implicated him in ordering the arrest of over 400 individuals who were initially interrogated and later moved to Abu Ghraib prison.⁶³ Testimony by the same individual suggested that the sole criterion for selecting the 148 who were sentenced to death was whether they were capable of bearing arms.⁶⁴ At trial, other testimony personally linked al-Tikriti to committing torture.⁶⁵ Taha Yassin Ramadan was linked to the decision to raze the groves surrounding Dujail not only by Waddah,⁶⁶ but also by another witness and resident of

⁶¹ *Id.* at 141. Some of the strongest evidence against Saddam is that when he later learned of some of the crimes (such as the imprisonment of villagers at the Lea desert complex), he did nothing to punish subordinates who committed the crimes. Case no. 1/9 First/2005, Al-Dujail Lawsuit (Case) [hereinafter Dujail Trial Chamber Judgment], part III, at 32-34, available at <http://law.case.edu/saddamtrial/dujail/opinion.asp>. Similarly, when Saddam later learned that detainees had died during interrogations (something al-Tikriti also knew of), he did nothing to investigate or punish subordinates who were involved. *Id.* at part III, at 41 (re: Saddam). Such derelictions of duty became the foundation for command responsibility convictions.

⁶² NEWTON & SCHARF, *supra* note 4, at 138. Al-Bandar approved the death penalty even though forty-six of the individuals sentenced had already died in custody. *Id.* at 92, 140. The IHT judges concluded from this and other evidence that no trials were in fact held. Dujail Trial Chamber Judgment, *supra* note 61, part II, at 21. While al-Bandar was convicted of murder as a crime against humanity, he was the only one of the defendants sentenced to death who was convicted on only one count. More troublingly, it is unclear whether all the elements of murder as a crime against humanity were actually shown. The basis from which the court inferred that he knew about the attack on the residents of Dujail, and knew that his acts were part of the attack, appears extremely weak. *See id.*, part II, at 30.

⁶³ NEWTON & SCHARF, *supra* note 4, at 117. A letter sent by former Iraqi minister of the interior, Sad’un Shakir, to the National Security Council suggested that 687 were detained, including 294 women and children. *Id.* at 138.

⁶⁴ Dujail Trial Chamber Judgment, *supra* note 61, part IV, at 6. This became one of the bases for al-Tikriti’s conviction for murder as a crime against humanity. *Id.*, part IV, at 32. The same individual linked Saddam as the original source of this directive, although the testimony was based on hearsay. *Id.*, part IV, at 6. That the evidence is a product of hearsay is something that would preclude its consideration in American courts, although not necessarily in an Iraqi one.

⁶⁵ NEWTON & SCHARF, *supra* note 4, at 131. Al-Tikriti also recommended in a letter to the Revolutionary Command Council that certain intelligence officers receive awards for their efforts in the interrogations, a recommendation Saddam endorsed. *Id.* at 137. The authors point out that “the letter suggested that rather than discipline subordinates for criminal acts, Saddam rewarded them,” a fact relevant to the finding of command responsibility. *See id.*

⁶⁶ *See id.* at 118. As to the razing of the groves, which was the basis for convictions of “other inhumane acts” as a crime against humanity, this author has some doubt as to whether the crimes were “of comparable gravity and seriousness” as other crimes against humanity, as the law requires. *See* Kayishema & Ruzindana, (ICTR Trial Chamber), May 21, 1999, para. 148 (“[O]ther inhumane acts include those crimes against humanity that are not otherwise

Dujail who had been taken to Baghdad for interrogation with his townspeople, and several of whose friends had died during interrogation.⁶⁷ Ramadan was also implicated in the deportation and imprisonment of villagers by the same source—Ramadan had ordered villagers to be detained at Nuqrat al-Salman prison camp.⁶⁸ Other witnesses also provided evidence of mass arrests, torture, and the retaliatory destruction of Dujail.⁶⁹ Additionally, testimony was presented from someone who had been a young mother in 1982 and who was imprisoned for several years with her children at Abu Ghraib following the Dujail incident.⁷⁰

III. CHALLENGES FACED AND FAIR TRIAL PROBLEMS

The book also details the challenges the judges faced in conducting the trial. Due to being cut off from developments in the field of international law and the work of the ICTY and ICTR, the judges had to be quickly brought up to speed on the elements of the crimes and forms of individual criminal responsibility.⁷¹ The judges also had to master application of the international fair trial standards incorporated into the Statute.⁷² Their challenges were compounded by the existence of ongoing conflict in Iraq, and—due in part to the decision to televise the trial—serious personal security risks faced by the judges and lawyers involved, and their families. Indeed, three defense lawyers, along with others associated with the Tribunal, were killed during the trial.⁷³

Above all, the book chronicles the difficulties of trying Saddam Hussein—a former leader who “competed for domination” with the

specified . . . but are of comparable seriousness” and “comparable gravity” to the other enumerated acts.). The destruction no doubt wreaked awful havoc on the livelihood of the townspeople, but whether it reached the legal threshold required is doubtful. Yet, if the legal threshold were not met, acquittal on that charge would have been warranted. Indeed, presumably, the Trial Chamber, which sentenced Ramadan to life in prison, found his crimes not as grave as the crimes of others. This makes the Appeals Chamber’s conversion of his life sentence to a death sentence (discussed below) all the more troubling.

⁶⁷ NEWTON & SCHARF, *supra* note 4, at 119. Saddam also apparently approved the confiscation of the orchards and agricultural land pursuant to a Revolutionary Command Council decision. *See id.* at 138.

⁶⁸ Dujail Trial Chamber Judgment, *supra* note 61, part IV, at 6.

⁶⁹ *See* NEWTON & SCHARF, *supra* note 4, at 121.

⁷⁰ *Id.* at 126. As to the remaining defendants, their involvement in the Dujail incident appears to have been limited. *See id.* at 140.

⁷¹ *See id.* at 75. As the authors explained: “While judges selected to preside over international war crimes trials usually have some experience with trying complex cases, applying international criminal law, and adhering to the equivalent of international standards of due process, none of this was true for the Iraqis.” *Id.* at 74.

⁷² *See* IHT Statute, *supra* note 23, art. 19.

⁷³ *See* NEWTON & SCHARF, *supra* note 4, at 114. The morning after the trial opened, defense counsel Saddoun al-Janabi was killed. *Id.* A few days later, Abdel Muhammed al-Zubaidi was murdered. *Id.* Near the end of trial, a third member of the defense team, Khamees al-Obeydi, was killed. *Id.* at 162.

judges.⁷⁴ When the court referred to him as the former president of Iraq, Saddam responded, “I didn’t say ‘former president,’ I said ‘president’”⁷⁵ The book demonstrates how “Saddam, his seven co-defendants, and their dozen lawyers regularly disparaged the judges, interrupted witness testimony with outbursts, turned cross-examination into political theater, and staged frequent walkouts, boycotts, and hunger strikes.”⁷⁶ When the verdict was announced, Saddam “entered [the court] with an arrogant strut” and “refused to stand until the guards made him do so.”⁷⁷ One day, al-Tikriti entered the courtroom in his long underwear as a sign of disrespect to the judges.⁷⁸ The authors make clear that the “defense strategy was . . . to delegitimize the process by creating the impression that the trial was not about the events and evidence from Dujail, but was instead a showcase for political interests.”⁷⁹ The authors discuss the problems of trying political leaders who insist on either representing themselves (as Slobodan Milošević did), or using the trial as a political platform:

Former leaders on trial such as Saddam Hussein are more likely than ordinary defendants to perceive that they do not stand a chance of obtaining an acquittal by playing by the rules They will try to hijack the trial, hoping to transform themselves through their political diatribes into heroic martyrs in the eyes of their followers. And at the same time, they will seek to discredit the tribunal⁸⁰

Such tactics, of course, complicated the judges’ tasks. With the trials televised, to have constantly cut off Saddam’s long-winded speeches would have appeared to deprive him of his day in court.⁸¹

Yet, as frustrating and annoying as these tactics may have been for the judges,⁸² the authors do not fully explain that while the tactics created the appearance of the trial being at times out of control, they were not necessarily problematic in terms of actual fairness. That Saddam made political speeches rather than addressing the charges at hand created the perception of a power struggle, but ultimately it meant that he had his day in court and chose to squander it rather than mount a de-

⁷⁴ *Id.* at 3.

⁷⁵ *Id.*

⁷⁶ *Id.* at 106.

⁷⁷ *Id.* at 5.

⁷⁸ *Id.* at 131.

⁷⁹ *Id.* at 100.

⁸⁰ *Id.* at 107.

⁸¹ *See, e.g., id.* at 98.

⁸² Among other names, Saddam apparently called the judge “a son of a whore,” “a traitor,” and “a homosexual.” *Id.* at 134.

fense.⁸³ (Sometimes Saddam chose *not* to have his day in court—storming out of the proceedings, or being so disruptive that he had to be removed.)⁸⁴ Similarly, the extremely poor handling of Saddam’s execution arguably did create a “lasting impression of illegitimacy,”⁸⁵ but in fact had little to do with the actual fairness and legitimacy of the trial.⁸⁶ The book may have been written for a general audience, but that suggests all the more so that readers should have been given more help distinguishing between what was a real fair trial problem and what was not.

As to actual fair trial issues, why should one care that a defendant such as Saddam Hussein received a fair trial when he afforded no such fair trial protections to victims of his own security courts? As was eloquently explained by Judge Pavel Dolenc in a case before the International Criminal Tribunal for Rwanda (ICTR):

[T]he ultimate interest of international justice, the universal application of the rule of law, may be achieved only by respecting the basic rights of an accused to a fair trial and due process. Even when trying cases involving the most serious crimes, the Tribunal is responsible for ensuring a fair trial

[T]he legitimacy and legacy of this Tribunal rests as much on the fairness of the proceedings as on the substance of the Judgements [*sic*] that we deliver. It is only

⁸³ Saddam was not the only one who made political speeches. One of his defense lawyers, Ramsey Clark, argued that it was the U.S. that should be on trial for its unlawful invasion, not Saddam Hussein. *Id.* at 116. In fact, work on the definition of the crime of aggression, and trigger mechanisms for the exercise of jurisdiction, is currently on-going. The crime of aggression cannot be prosecuted at the international level until a definition is agreed upon by States Parties to the Rome Statute of the International Criminal Court and there are enough ratifications for the required amendment to the Rome Statute to come into effect. *See* Rome Statute of the International Criminal Court, art. 5(2), July 17, 1998, U.N. Doc. A/CONF.183/9. Additionally, there would need to be jurisdiction. *See id.* at arts. 12, 13. Neither Iraq nor the U.S. is currently a party to the Rome Statute, and the ICC will not exercise jurisdiction retroactively. *See id.* at art. 11. Thus, regardless of one’s sentiments about the propriety or wisdom of the commencement of Gulf War II, statements that the U.S. should be prosecuted for the crime appear to be pure anti-U.S. showmanship without legal basis. For a current appraisal of where negotiations as to the definition of the crime stand, see Draft Report of the Special Working Group on the Crime of Aggression, ICC-ASP/7/SWGCA/CRP.2 (Feb. 12, 2009), International Criminal Court, Assembly of States Parties, Seventh Session (second resumption), New York, Feb. 9-13, 2009 [on file with author].

⁸⁴ *See, e.g., id.* at 106. Whether he was adequately represented in his absence is discussed below.

⁸⁵ *Id.* at 185. A cell phone video showed “the executioners mocking Saddam as they placed the noose around his neck and then jubilantly dancing around his body after it was cut down from the gallows.” *Id.* at 214; *see also id.* at 184-85, 203-06.

⁸⁶ Thus, the authors devote a great deal of attention to issues such as: “Was the Courtroom Chaos Preventable?” *See id.* at 227-31. Ultimately, however, a chaotic courtroom matters much less than other issues raised.

through fair and equitable proceedings that international justice is achieved

As Justice Murphy of the United States Supreme Court explained nearly sixty years ago:

If we are ever to develop an orderly international community based upon a recognition of human dignity it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness. Justice must be tempered by compassion rather than by vengeance We must insist, within the confines of our proper jurisdiction, that the highest standards of justice be applied in this trial of an enemy commander Otherwise stark retribution will be free to masquerade in a cloak of false legalism. And the hatred and cynicism engendered by that retribution will supplant the great ideals to which this nation is dedicated.⁸⁷

This reasoning is equally applicable to the trials of the Iraqi High Tribunal—they needed to be fair in order to demonstrate that the Iraqis were returning to a period where the rule of law would govern; to show through fair verdicts the true nature of the past regime’s crimes; and, by demonstrating that justice had been done, to prevent a cycle of revenge killings. Not coincidentally, the U.S. no doubt also had an interest in a fair trial for Saddam—having failed to show his regime possessed weapons of mass destruction, at least they could show they had rid the region of a brutal tyrant.

While the authors repeatedly state that the court needed to demonstrate to the world that it could correctly apply complex international laws and due process standards,⁸⁸ and explain that “[j]ustice” is necessarily “apolitical and impartial,”⁸⁹ the authors do less well in persuading the reader that the trial was indeed fair (if that was their goal). The authors inconsistently assert that the IHT functioned “as a neutral, indepen-

⁸⁷ Prosecutor v. Ntagerura, Bagambiki & Imanishimwe, Case No. ICTR-99-46-T, Separate Opinion of Judge Pavel Dolenc, ¶¶ 3, 5–6 (Feb. 25, 2004) (quoting *In re Yamashita*, 327 U.S. 1, 29-30 (1947) (Murphy, J., dissenting)). The authors also quote a victim of Saddam’s regime who made a similar plea: “I want the trial [of Saddam] to be just because he was not just for all his life, for a single moment, over Iraq. But I wish there is, God willing, a transparent and just tribunal over him as it would be over any person or any other dictator.” NEWTON & SCHARF, *supra* note 4, at 38.

⁸⁸ NEWTON & SCHARF, *supra* note 4, at 38.

⁸⁹ *Id.* at 102.

dent, and apolitical [court],”⁹⁰ but also admit that the trial was “muddled in misconception,”⁹¹ “marked by missteps and miscalculations,”⁹² “rudimentary in its application,”⁹³ and “did not turn out to be the exemplar of justice its proponents had hoped for.”⁹⁴ These statements leave it unclear as to exactly which flaws the authors agree did exist and how serious those flaws were. It is difficult to evaluate, based on this book, whether the flaws undermined the fairness of the trial—a key focus of the book. The authors hoped the “book [would] convince the reader just how extraordinarily different the IHT was from both Hitler’s People’s Court and Saddam’s Revolutionary Court.”⁹⁵ The authors have undoubtedly shown that, but those are not the standards by which fair trials are judged today.⁹⁶

Newton and Scharf do, in fact, illustrate some of the key flaws of the trial, such as Iraqi government interference with the work of the IHT. The authors explain that in January 2006, the Presiding Judge, Amin Rizgar, was suddenly replaced with Judge Ra’ouf Abdul Rahman, noting that “[s]ome believe [Judge Amin] was pressured by Iraqi government officials” to step down.⁹⁷ Newton maintains that Rizgar voluntarily resigned, and that Rizgar has never offered a public explanation; indeed, Newton confirmed from several sources that the judge (who is Kurdish) was having difficulty with the pace of the proceedings, which were conducted in Arabic.⁹⁸ A more recent revelation by an international defense consultant to the Tribunal is that the Iraqi prime minister, Nuri Kamal al-Maliki, forced the resignation of Judge Munthur Hadi “less than a week before the court delivered its verdicts” and replaced him with “another judge, Ali al-Kahaji, who had heard none of the evidence in the nine-month trial.”⁹⁹ “The purpose, the consultant stated, was to avert the possibility that judges who were wavering would spare Mr. Hussein the death penalty and sentence him to life imprisonment instead.”¹⁰⁰ If true,

⁹⁰ *Id.* at 233.

⁹¹ *Id.* at 7.

⁹² *Id.*; *see also id.* at 63 (“The record of the Dujail trial is one of misstep, misconceptions, and misstatements.”).

⁹³ *Id.* at 8; *see also id.* at 95–96 (“The gap between the aspirations of the Dujail trial and its actuality would prove cavernous.”).

⁹⁴ *Id.* at 217.

⁹⁵ *Id.* at 183.

⁹⁶ *See* ICCPR, *supra* note 31; IHT Statute, *supra* note 23, art. 19, for contemporary fair trial standards.

⁹⁷ NEWTON & SCHARF, *supra* note 4, at 127.

⁹⁸ Interview with Michael Newton (Oct. 30, 2008); *see also* NEWTON & SCHARF, *supra* note 4, at 128.

⁹⁹ John F. Burns, *Western Lawyers Say Iraq Discarded Due Process in Hussein Trial*, N.Y. TIMES, Sept. 24, 2008, at A17.

¹⁰⁰ *Id.*; *see also id.* (“In the PBS documentary [“The Trial of Saddam Hussein”], one of the lawyers said that ‘other members of the chamber,’ apparently another judge, had told Mr.

such interference clearly suggests that the right to a fair trial was indeed undermined by the Iraqi government. The authors also cite various statements by government officials that suggest the officials knew that the death sentences would be affirmed before they in fact were.¹⁰¹ The authors also acknowledge that the lack of controls regarding how de-Ba'athification was conducted "created a black hole of politicized influence."¹⁰² They conclude that the IHT has been "tainted by the *perception* of insidious external politics,"¹⁰³ but the facts suggest more than the mere perception of taint.

The authors attempt to rebut certain fair trial criticisms that have been leveled against the Tribunal, but are not always persuasive. They defend the seventeen page appellate judgment which purports to review a thirty-nine-day trial, conducted over nine months, involving eight defendants, a 298-page trial chamber judgment, and the imposition of charges as serious as the death penalty.¹⁰⁴ While the authors argue that "the brevity itself does not provide conclusive evidence that the judges were driven by politics in their deliberations,"¹⁰⁵ the brevity does raise red flags. The authors also admit that the sentence of Taha Yassin Ram-

Maliki's office that Judge Hadi was 'relatively soft' during deliberations on the verdicts and sentences for the eight Dujail defendants and was leaning against a death sentence for Mr. Hussein."). Newton maintains that the lawyer was merely serving as the second or third hand conduit for information that he received from other sources, and that any assumed effects on particular findings or sentences are purely speculative. Interview with Michael Newton (Nov. 7, 2008).

¹⁰¹ Prime Minister Nouri al-Maliki told the BBC: "We are waiting for the decision of the appeals court, and if it confirms the sentence, it will be the government's responsibility to carry it out I expect the execution to happen before the end of this year." NEWTON & SCHARF, *supra* note 4, at 186-87. Jalal Talabani, who succeeded Saddam as President of Iraq, stated before the trial began: "Saddam Hussein is a war criminal and he deserves to be executed twenty times a day for his crimes against humanity." *Id.* at 188. Such statements by public officials go a long way to suggesting a lack of governmental interest in fair trials.

¹⁰² *Id.* at 101-02. The authors note there was no oversight mechanism to ensure "that political interests outside the tribunal did not use the de-Baathification requirement as a pretext for exercising undue control over the judges and prosecutors." *Id.* at 101. The authors also note that as to one judge, Judge Muneer Haddad, "[t]hree of his brothers had been jailed by Saddam's forces, and then executed." *Id.* at 104. They do not discuss whether or not that should have been grounds for recusal.

¹⁰³ *Id.* at 233 (emphasis added).

¹⁰⁴ Case no. 29/c/2006 ("Appellate Judgment") (Dec. 26, 2006), English translation *available at* <http://law.case.edu/saddamtrial/documents/20070103dujailappellatechamberopinion.pdf>. Some analysis is extremely critical of the quality of the Dujail Trial Chamber Judgment. See, e.g., Nehal Bhuta, *Fatal Errors: The Trial and Appeal Judgments in the Dujail Case*, 6 J. INT'L CRIM. JUST. 39 (2008). Newton and Scharf, however, seem to suggest (by detailing the evidence) that at least some of the convictions rest on solid evidence. Additionally, while Bhuta makes a strong argument that convictions based on some forms of responsibility are flawed, most of the convictions rested on multiple forms of responsibility. See Dujail Trial Chamber Judgment *supra* note 61, at 9 (reciting the charges against the defendants as under IHT Articles 15(1) and 15(2) (covering all forms of individual criminal responsibility)). Thus, errors as to one form of responsibility should not delegitimize all the convictions.

¹⁰⁵ NEWTON & SCHARF, *supra* note 4, at 192-93.

adan, who had been sentenced to life imprisonment by the trial chamber, was “summarily reversed with no explanation or legal reasoning by the appeals chamber.”¹⁰⁶ Yet, international fair trial standards require a “reasoned opinion in writing.”¹⁰⁷ The authors also note that when Ramadan’s life sentence was announced after the trial, one Iraqi official “with close connections to the prime minister” stated “something to the effect of ‘we will remedy that.’”¹⁰⁸ The authors acknowledge that capital punishment is permitted in nations that have not banned its practice, but only where “the trial and appeals process meet the highest standards of due process and fundamental fairness.”¹⁰⁹ Yet, their own analysis of the Dujail trial goes a fair way in demonstrating actual unfairness.

The authors claim that criticism of stand-by defense counsel—who represented the defendants when they and/or their counsel stormed out of or were ejected from court—as not up to the task misses the mark because they were ably assisted behind the scenes by a distinguished international defense adviser.¹¹⁰ However, problems exist with this assertion. First, the international defense advisor did not commence his work until several months into the trial.¹¹¹ Second, able as that advisor in fact is, out-of-court assistance is not a substitute for effective in-court representation.¹¹² As to other possible fair trial violations observed by groups such as Human Rights Watch and the International Center for Transitional Justice,¹¹³ the book only refers to a rebuttal article by Eric Blinderman, former head of the RCLO.¹¹⁴ These issues are central to the question of whether the Dujail trial was fair, and they should have been addressed directly in the book.

¹⁰⁶ *Id.* at 91.

¹⁰⁷ *See, e.g.*, *Musema v. Prosecutor*, Case No. ICTR-96-13-A, Appeal Chamber Judgment, ¶ 18 (Nov. 16, 2001) (“[T]he Trial Chamber’s discretion in weighing and assessing evidence is always limited by its duty to provide a ‘reasoned opinion in writing.’”). This may not have been the standard traditionally required under Iraqi law, but given the IHT Statute’s incorporation of international fair trial standards, it arguably was supposed to be utilized.

¹⁰⁸ NEWTON & SCHARF, *supra* note 4, at 187.

¹⁰⁹ *Id.* at 189.

¹¹⁰ *See id.* at 230.

¹¹¹ E-mail interview with Nehal Bhuta, *supra* note 27.

¹¹² The authors do rebut (and render moot) the criticism that the Statute did not require proof beyond a reasonable doubt. *See* NEWTON & SCHARF, *supra* note 4, at 226. They note that the actual Dujail judgment uses the phrase “beyond reasonable doubt” several times, and, thus, that the judges appear to have used that standard. *See id.* at 151, 227.

¹¹³ *See, e.g.*, Human Rights Watch, *Judging Dujail: The First Trial Before the Iraqi High Tribunal* (2006), available at www.hrw.org/reports/2006/iraq1106/; International Center for Transitional Justice, *Dujail: Trial and Error?* (2006), available at www.ictj.org/static/MENA/Iraq/ICTJDujailBrief.eng.pdf.

¹¹⁴ *See* NEWTON & SCHARF, *supra* note 4, at 224; Eric H. Blinderman, *Judging Human Rights Watch: An Appraisal of Human Rights Watch’s Analysis of the Ad-Dujayl Trial*, 39 CASE W. RES. J. INT’L L. 99 (2006-2007).

When one starts to understand the magnitude and grotesque nature of the crimes committed under Saddam Hussein's regime, one can understand the authors' decision to assist with, and defend, the work of the Tribunal. The authors took the leap of faith that, despite the death penalty and the open issue of whether the judges would adjudicate the trials fairly, they should attempt to make the trials better than they otherwise would have been—a calculation that also swayed other individuals to assist the Tribunal. European governments, the United Nations, and certain NGOs, on the other hand, largely chose to ignore such pleas for assistance, due to these two concerns as well as perhaps opposition to the U.S.'s unilateral decision to commence the war. The authors point to one instance where judges from the ICTY were set to train IHT judges until they were instructed by the U.N. Secretary-General that they could not participate because "the United Nations was not satisfied that the IHT would be a fair tribunal."¹¹⁵ Were the authors right to provide assistance? At the end of the day, their work and the work of others probably *did* improve the trials. Yet, this book does not put to rest suspicions that the defendants—four of whom were executed as a result of the Dujail verdict—were not fully accorded fair trial protections.

CONCLUSION

United States Supreme Court Justice Robert Jackson, also chief prosecutor for the U.S. before the International Military Tribunal at Nuremberg (the Nuremberg Tribunal),¹¹⁶ eloquently stated: "We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well."¹¹⁷ Although Newton and Scharf have attempted to convince the reader that Saddam Hussein's trial was fair, by ultimately failing to clearly identify those difficulties in managing the trial that did not directly impact its fairness, and not giving due acknowledgement to those issues that did, the authors have not succeeded at their task.

The field of international justice is still striving for a perfect form of tribunal by which to adjudicate crimes such as genocide, crimes against humanity, and war crimes. While historical precedents such as the Nuremberg Tribunal and the International Criminal Tribunal for the Far East (Tokyo) were significant institutions for starting this field, they

¹¹⁵ NEWTON & SCHARF, *supra* note 4, at 75–76.

¹¹⁶ The authors' many references to the Nuremberg Tribunal are somewhat strange. It is unclear why Nuremberg should be the reference point for such trials when there is now so much other (and more accepted) precedent in the field of international justice.

¹¹⁷ Justice Robert H. Jackson, *Opening Statement Before the International Military Tribunal at Nuremberg* (Nov. 21, 1945), in *THE TRIAL OF GERMAN WAR CRIMINALS BY THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBURG, GERMANY* 5 (1946).

were deeply flawed. The ICTY and ICTR are fairer tribunals that accord defendants strong fair trial protections and have created a wealth of sound judicial precedent,¹¹⁸ but they have been criticized for their cost. The Special Court for Sierra Leone—a “hybrid” tribunal, initially lauded as the “new model” for international justice—has also been criticized for the duration of its trials, and has tried far fewer defendants than the *ad hoc* tribunals.¹¹⁹ Although Newton and Scharf appear to suggest the Iraqi High Tribunal as a new model for international justice, it is a model that ultimately needs to be studied further if its merits are to be adapted for future use, while avoiding its flaws.

¹¹⁸ See, e.g., Jennifer Trahan, *Genocide, War Crimes and Crimes Against Humanity: A Topical Digest of the Case Law of the International Criminal Tribunal for the Former Yugoslavia* (HRW 2006) available at <http://www.hrw.org/sites/default/files/reports/ICTYweb.pdf>.

¹¹⁹ Other “hybrid” tribunals include the Extraordinary Chambers of the Courts in Cambodia, the Special Panels for Serious Crimes established in Timor L’Este, and the Sarajevo War Crimes Chamber.