



## Lessons Learned from the Iraqi Special Tribunal: A Case for Syria

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The story of the Iraqi Special Tribunal is one of frustration, confusion, and loss, but also one of hope. With the present security situation this is clearer than ever. ISIS militants have taken large portions of North Western Iraq, and Eastern Syria. Iraqi and Syrian civil society is deteriorating even at the most basic levels. Still, there is a hope for a better future. Indeed, the long history of civil strife in these countries can serve as lessons to mitigate these conflicts, and better promote transitional justice in a post-conflict environment.

The Iraqi Special Tribunal (IST) is such an example. Over the course of this essay I analyze the struggles of transitional justice in post-Saddam Iraq. In particular, I look at the Iraqi Special Tribunal's shortcomings and their effects on promoting reconciliation in Iraq. I then analyze the IST's applicability to the Syrian Civil War, and engage in a brief discussion of what a similar tribunal might look like in a post-conflict Syria.

## **Introduction**

In March 2003 a US-led coalition of 400,000 troops entered Iraq. By Late April, the invasion phase of the Iraq War was over. For the US, it was an overwhelming victory. In less than two months, coalition forces had decimated the Ba'ath government and taken Baghdad and Tikrit (Saddam's hometown and

stronghold) with less than 550 wounded and 350 total casualties, compared to around 10,000 Iraqi casualties.<sup>1</sup>

Despite its success, the majority of fighting was still to come. A multinational coalition created the Coalition Provisional Authority (CPA), served as a weak interim government until the establishment of an Iraqi democracy. Because of the rising Iraqi insurgency, lack of clear authority, and negligence on behalf of the CPA and Bush Administration, it would not be until 2006 that an Iraqi democracy was formed and (now former) Prime Minister Maliki instated.<sup>2</sup>

The original aim of the US invasion was to remove a regime that developed and used weapons of mass destruction, harbored and supported terrorists, and committed outrageous human rights abuses.<sup>3</sup> However, this goal quickly became secondary to ensuring security in the chaos after the fall of Saddam. Iraq is divided between Shia Arab (55%), Sunni Arab (25%), and Kurd (25%).<sup>4</sup> The US invasion ignited this sectarianism. Iraqi Kurds and Shia Arabs used the US invasion to continue their rebellion started in 1990 during the first Gulf War. Sunnis, however, felt personally targeted by the fall of the Ba'ath regime and marginalized by the coalition-

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<sup>1</sup> Icasualties.org, "Iraqi coalition Casualties: Fatalities by Year and Month." 2009. Retrieved April 22, 2015. <http://www.icasualties.org/Iraq/ByMonth.aspx>, Conetta, Carl. "The Wages of War: Iraqi Combatant and Noncombatant Fatalities in the 2003 Conflict" Project on Defense Alternatives *Research Monograph* #8, October 20, 2003.

<sup>2</sup> Papagianni, Katia. 2007. "State Building and Transitional Politics in Iraq: The Perils of a Top-down Transition". *International Studies Perspectives*. 8 (3): 261-266.

<sup>3</sup> *The Guardian*, "Transcript of George Bush's Speech on Iraq" October 7, 2002. Retrieved April 22, 2015. <http://www.theguardian.com/world/2002/oct/07/usa.iraq>

<sup>4</sup>CEIP, "Political Reconstructions in Iraq: A Reality Check," Mar. 2003. Retrieved April 22, 2015. <http://usiraq.procon.org/view.source.php?sourceID=3952>

politics of the CPA.<sup>5</sup> As a result, what was first a straightforward invasion quickly became a protracted civil conflict, drawn on sectarian lines.<sup>6</sup>

In the Insurgency Phase of the Iraq War (2003-2006), Iraqi communities turned inward towards their local, city and ethnic affiliation, and refused to take part in national politics.<sup>7</sup> Few Iraqis trusted the ability of CPA to ensure civil security, creating a power vacuum with a fractionalized population, erupting in widespread civil strife. During the insurgency's height, Iraq suffered over 3000 civilian deaths per month.<sup>8</sup> By the end of the insurgency, Coalition forces had already suffered 3256 casualties of the total 4809 throughout the entire occupation period (2003-2011).

### **Creation of the IST**

The Iraqi Special Tribunal (IST) was born out of this chaotic environment. The unveiling of the IST by coalition forces in December 2003 was necessitated by the crimes by the Ba'ath party over the last thirty-five years of dictatorship (1968-2003). The tribunal was created for bringing personal accountability within the Ba'ath regime for their deprivation and violations of human rights within this period.<sup>9</sup> The IST was given wide-ranging jurisdiction over war crimes, crimes against humanity, and genocide committed against any Iraqi citizen, broadly defined, during Ba'ath rule.<sup>10</sup>

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<sup>5</sup> Haddad, Fanar. *Sectarianism in Iraq: Antagonistic Visions of Unity*. P. 147.

<sup>6</sup> "Iraq's divisions: Sectarian animosity". 2010. *The Economist* (8687): 54-55.

<sup>7</sup> Ibid. p. 152.

<sup>8</sup> Iraq Body Count, "Documented Civilian Deaths from Violence," 2015. Retrieved April 22, 2015. <https://www.iraqbodycount.org/database/>

<sup>9</sup> Newton, Michael, "The Iraqi Special Tribunal: A Human Rights Perspective" P. 2

<sup>10</sup> CPA, *The Statute of the Iraqi Special Tribunal*, see articles 1, 11, 12, 13.

The IST was also motivated by broader, political goals. The CPA sought to reaffirm the swift success of the invasion phase in 2003 in emphasizing the progress made in building a new Iraq. To demonstrate an Iraqi-led effort, IST staff was required to be Iraqi citizens.<sup>11</sup> While international law was integrated into the making of the IST, the tribunal was generated from Iraqi domestic law, with US oversight.<sup>12</sup> US policy makers argued that encouraging Iraqis to prosecute the former regime would establish the legitimacy of the new government. For the Bush administration, a domestic tribunal represented the power and ability of a CPA-lead Iraq to regional leaders and the international community.<sup>13</sup>

In total, the IST has conducted eight trials and has administered death sentences to twelve defendants.<sup>14</sup> Most famous of these trials were the Dujail trial which ended in the execution of Saddam Hussein and the Anfal trial, which investigated crimes against Kurds in the end of the Iran-Iraq War, ending in the indictment of several former Ba'ath officials including Majid 'Chemical and Tariq Aziz.<sup>15</sup> While the IST is still a functioning court under Iraqi law, it has not heard a

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<sup>11</sup> Nedelsky, Nadia and Stan, Lavinia, *Encyclopedia of Transitional Justice* p. 265.; HRW, "Dujail: Trial and Error" p 3.

<sup>12</sup> Newton, Michael A. 2005. "The Iraqi Special Tribunal: a human rights perspective". *Cornell International Law Journal*. 38 (3): 877.

<sup>13</sup> Bassouni, "Events leading to the Creation of the IHT": p. 13-14.

<sup>14</sup> Nedelsky, Stan *Encyclopedia of Transitional Justice*, p. 270.

<sup>15</sup> Trahan, Jennifer "A Critical Guide to the Iraqi High Tribunal's Anfal Judgment: Genocide Against the Kurds," *Michigan Journal of International Law*, 30(2): 305: p. 28.

case since 2010 and is currently inactive. The IST remains the only court to examine crimes committed under the Ba'ath regime.<sup>16</sup>

## Failures

The IST played a necessary role in pursuing justice for the Ba'ath party after the fall of Saddam.<sup>17</sup> Certainly, the egregious crimes perpetrated by the Ba'ath regime remained a visible, open wound in a post-Saddam Iraq. However, the IST is largely seen as a failure in ensuring an independent, impartial, and fair judicial process, and as a result, its overall success is questioned.<sup>18</sup> In this section I explore these failures. I identify three main criticisms of the IST—an over-aggressive policy of de-Ba'athification, prosecution of crimes beyond its capacity, and a lack of personal security—and relate these criticisms to the tribunal's overall success and failure.

Lustration is common in most post-conflict contexts. After the failure of an oppressive or defunct regime, lustration serves as a tool for political change to prevent defunct members of former regimes from participation in the building of a new government.<sup>19</sup> The IST lustrated staff by aggressively limiting the inclusion of former Ba'ath members. Those with direct links to the previous Ba'ath regime were barred from participating in the tribunal.<sup>20</sup> Lustration was implemented directly by the CPA. As a result, the degree of exclusion was left largely to the discretion of the CPA and

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<sup>16</sup> "Iraq's 'Chemical Ali' gets New Death Sentence" *Associated Press*, January 2010. Retrieved April 22, 2015, [http://www.nbcnews.com/id/34904200/ns/world\\_news-mideastn\\_africa#.VT6B86afYd0](http://www.nbcnews.com/id/34904200/ns/world_news-mideastn_africa#.VT6B86afYd0).

<sup>17</sup> Newton, "The Iraqi Special Tribunal: A Human Rights Perspective," pp. 866-867.

<sup>18</sup> Nedelsky, Stan, *The Encyclopedia of Transitional Justice*, P. 269.

<sup>19</sup> Roman, David, "From Prague to Baghdad: Lustration Systems and their Political Effects," *Government and Opposition* 41(3): 353-354.

<sup>20</sup> *The Statute of the Iraqi Special Tribunal*, see 'Part six, article 7(m)(1).

the aims of US policy in Iraq. To appease the Shi'a majority and steer Iraq away from any possible return the Ba'athist party, US officials implemented a policy of an aggressively exclusive lustration.<sup>21</sup>

This had major impacts on IST's effectiveness. Party membership was a strict prerequisite for any judicial training under Saddam's rule.<sup>22</sup> In the IST, however, no distinction was made between active party members or those making the best of living under the repressiveness of the Ba'ath regime.<sup>23</sup> Throughout proceedings, judges consistently showed bias against the defense.<sup>24</sup> As much as 80% of Ba'ath judges were turned over from the previous regime.<sup>25</sup> In the Dujail trial alone, 19 staff and four of five judges were dismissed after allegations of their alleged connections to the Ba'ath party.<sup>26</sup> As a result, experienced judges were refused or dismissed from the IST for their less experienced, biased counterparts.<sup>27</sup>

The selective limiting of former administrators' participation in the IST also hindered the court's overall impartiality. For one, those who refused Ba'ath membership, and who are more likely to rule in favor of others victimized by Ba'ath oppression, were also more likely to be selected for a position in the IST.<sup>28</sup> Moreover,

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<sup>21</sup> David, Roman. "From Prague to Baghdad: Lustration Systems and their Political Effects." *Government and Opposition*, Vol. 41, No. 3 pp. 367-8. 2006.

<sup>22</sup> Saddam Hussein's Trial in Iraq: Fairness, Legitimacy & Alternatives, A Legal Analysis. p. 23.

<sup>23</sup> "Justice Under Occupation: Rule of Law and the Ethics of Nation-Building in Iraq": p. 146.

<sup>24</sup> Chwalisz, "The Trial of Saddam" p. 42.

<sup>25</sup> Alston, Philip, "Tragic Mistakes Made in the Trial and Executions of Saddam Hussein Must Not Be Repeated" (2007), *UNHCHR Press*. Retrieved April 22, 2015, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=3983&LangID=E>

<sup>26</sup> ICTJ, "Dujail: Trial and Error": p 10.

<sup>27</sup> Dougherty, "Iraq's Failed Tribunal," p. 64.

<sup>28</sup> Chwalisz, "The Trial of Saddam Hussein" p. 22.

the high turnover rate of IST staff even after the lustration process by the CPA shows that the tribunal was not insulated from politics. IST personnel were under intense pressure to convict former Ba'athist administrators and fulfill the goals of their US advisors.<sup>29</sup> Those suspected of previously aiding or assisting former members of the Ba'ath party could be removed at any time, and "for any reason."<sup>30</sup> Sitting judges could be removed or transferred from trials in which they had participated or even helped adjudicate.<sup>31</sup> In all, the aggressive and continued IST policy of exclusive lustration largely limited its pick of experienced judges able to perform such complex trials, and also curtailed its impartiality by selecting staff more likely to convict former Ba'ath party members.

Beyond personnel, the IST was also limited in its capacity as a domestic tribunal. Ultimately, the IST was not competent to rule on such extremely contentious and complex periods of Ba'ath repression and fell short in doing so.<sup>32</sup> At the time of its formation in 2003 there was no precedent in Iraqi law in adjudicating crimes of war, crimes against humanity, or genocide. The integration of international law in the framework of the IST comes directly from the 1999 Rome Statute which was—and remains—absent from Iraqi jurisprudence.<sup>33</sup> The first step to establish such precedent in Iraq was the Dujail trial, the IST's first, and arguably most complicated criminal

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<sup>29</sup> Wald, M. Patricia "Symposium: International Criminal Tribunals in the 21<sup>st</sup> Century: Iraq, Cambodia, and International Justice" (2006): p. 5.

<sup>30</sup> Iraqi High Criminal Court Law": 4 See amended IST statute, article 4.4

<sup>31</sup> "Dujail: Trial and Error": p. 9.

<sup>32</sup> Dougherty, "Iraq's Failed Tribunal," pp. 65-68.

<sup>33</sup> Bassiouni, "Events leading to the Creation of the IHT" (2006), p. 4.



proceeding.<sup>34</sup> This trial was disorderly, and served as a poor example for future IST proceedings. Unlike previous international criminal trials such as the ICTY and ICTR, which enjoyed highly regarded, professional staff, IST administrators in Dujail failed to perform even basic duties.<sup>35</sup> Judges were unprofessional, exchanged heated debate with defendants, lacked prior experience in conducting complex trials, and neglected aspects of a criminal procedure.<sup>36</sup> Accused were not given specific charges for which they were tried and the defense was denied examination of witnesses, and the prosecution was routinely granted more time to present evidence.<sup>37</sup> Because of the inexperience and inconsistency of judges and administrators, the IST has been seen as a kangaroo court, without the capacity to properly conduct criminal trials.<sup>38</sup>

The success IST was also limited the scope of crimes it investigated. Dujail and other IST proceedings lacked the clarity to link former high level Ba'ath officials to 'System' crimes, or those committed by Saddam's regime as a whole. It is commonplace in trials against oppressive regimes to call expert witnesses to explain how the regime operated. This gives a clear description of chains of command and how the "machine" operates. In Dujail and Anfal, no such witness was called.<sup>39</sup> IST proceedings focused on the crimes of the defendants instead of their function within

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<sup>34</sup> Nedelsky, Stan. *The Encyclopedia of Transitional Justice*, p. 269. ; Human Rights Watch, "Judging Dujail: The First Trial Before the Iraqi High Tribunal," p. 76.

<sup>35</sup> Heller, "A Poisoned Chalice," pp. 1-2.

<sup>36</sup> The International Center for Transitional Justice. "Dujail: Trial and Error?" November 2006: p. 13.

<sup>37</sup> Heller, "A Poisoned Chalice" p. 2.

<sup>38</sup> Dougherty, Beth, "Victor's Justice, Victim's Justice Iraq's Flawed Tribunal," *Middle East Policy* 11(2)2004 : p. 64.

<sup>39</sup> ICTJ, "Dujail: Trial and Error?": p. 12.

the broader regime. As a result, the IST has largely become the "Saddam" and "Majid" trials, contrary to its aim to assign responsibility for Ba'ath crimes as a whole.

Perhaps a larger black eye to the reputation of the IST, however, was the lack of personal security. As mentioned above, the IST's main court proceedings (2004-2007) occurred during the most violent phase during the US occupation. In such a volatile environment, the tribunal's ability to function was compromised on a basic level. Field missions to collect evidence, such as the exhuming of grave and corroborating testimony, were severely limited by US security concerns.<sup>40</sup> The divisiveness of IST proceedings and limited capacity of the tribunal compromised the personal security of its staff. In the IST's first trial, eight IST staff were tragically killed including one investigative judge, the chief of security, and six defense lawyers.<sup>41</sup> Worse, there was no systemized witness protection program run by the IST, for those asked by the court to provide testimony. This led to the targeting and murder of multiple witnesses after trial proceedings.<sup>42</sup>

The lack of personal security also hindered the IST's effectiveness and fairness. Beyond the obstacles of heavy security, IST judges—particularly those defending former Ba'ath officials—were under extreme pressure to reach a conviction. At its core, the IST functioned in a war zone and atmosphere of perpetual fear. Indicting the accused was a way of fighting back against those who targeted them. Justice Richard Goldstone, the Chief prosecutor in the ICTY and ICTR cases

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<sup>40</sup> Faramarzi, Scheherazade, "Saddam Trial Hampered by Violence in Iraq." *Associated Press* (September 30, 2004): 1.

<sup>41</sup> Fam, Mariam, "Defense in Saddam Trial Demands Security" *Associated Press* (October 21, 2005): 1.

<sup>42</sup> Chwalisz, Natalie, "The Trial of Saddam Hussein: A Success of Justice or a Set-up for Failure?" *The Atlantic Community* pp. 35-37.

said of the IST plainly, "How can you have a trial with bombs going off daily, people being attacked daily? How can you expect a court to sit in Baghdad and be able to operate and have a fair trial?"<sup>43</sup>

### **Effects on Iraqi Reconciliation**

These faults bore substantial impacts on the tribunal's capacity to direct transitional justice in Iraq. Certainly, promoting unity and collectively confronting history in such a religious, ethnically, and geographically divided country is a complex, if not courageous, undertaking. However, the IST failures in lustration, procedure, and security preempted any possible positive effects the IST had in achieving this goal. If anything, the IST hindered reconciliation and furthered an already deep sectarian divide.

The term 'reconciliation' varies widely in meaning and function in different contexts. Before examining the IST's effect on promoting reconciliation, it is necessary to define this term within the context of the IST. For the purposes of this paper, I define reconciliation as a broad, relationship-building exercise, or, "a process through which a society moves from a divided past to a shared future."<sup>44</sup> This is a long, deep process, often without explicit results. The end goal is to, "mov[e] toward a relatively cooperative and amicable relationship... after a rupture to relations involving extreme injury to one or more sides."<sup>45</sup> In the context of the IST, this is

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<sup>43</sup> Drumbl, Mark, "What is the Relationship Between the Saddam Trial and the Level of Violence in Iraq?" in *Saddam on Trial* supra note 22: 210.

<sup>44</sup> Citation in Bloomfield, David, "Reconciliation: an Introduction," in *Reconciliation After Violent Conflict: A Handbook*: 7-8 ;

<sup>45</sup> Kriesberg, Louis. 2007. "Reconciliation: Aspects, Growth, And Sequences". *International Journal of Peace Studies*. 12 (1): 2

achieved through redress of past injustices of Ba'ath crimes, both directly between former Ba'ath officials and victims of the Ba'ath regime, broadly defined, and between the Arab Shi'a, Arab Sunni, and Kurdish communities which divided under the Ba'ath dictatorship. There are also specific duties associated with this definition. In order to successfully redress past injustice and achieve reconciliation the IST must: establish a clear narrative of Ba'ath crimes, assign personal accountability for these crimes, and provide an official record of Ba'ath oppression to prevent similar crimes in the future.<sup>46</sup> In this section, I relate the successes and failures of the IST to fulfilling these duties, and the tribunal's overall impact on reconciliation in post-Saddam Iraq.

On a basic level, the court succeeded in convicting high-level Ba'ath officials known to have committed egregious crimes against the Iraqi people. Thus, the IST assigned some personal accountability for Ba'ath crimes. Saddam Hussein and Ali 'Chemical,' among the most famous perpetrators of Ba'ath crimes, were given death sentences. While Tariq Aziz and other members of Saddam's cabinet were sentenced to life in prison.<sup>47</sup> As a domestic tribunal, the victims played a direct, symbolic role in these convictions by testifying before their perpetrators, in their nation's capital, and in their native language. IST sentences were done by, and for the Iraqi people.<sup>48</sup> An overwhelming majority of Iraqis agreed there must be some kind of prosecution of high-level Ba'ath party officials, which was achieved.<sup>49</sup> In this sense, the IST provided

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<sup>46</sup> Triponel, Anna "Can the Iraqi Special Tribunal Further Reconciliation in Iraq?" *Cardozo Journal of International And Comparative Law*. 15 (2):287-290.

<sup>47</sup> Rassi, Christopher. "Lessons Learned from the Iraqi High Tribunal": pp. 1-2. ; Trahan, Jennifer "A Critical Guide to the Iraqi High Tribunal's Anfal Judgment": p. 310.

<sup>48</sup> Newton, Michael. "The Iraqi Special Tribunal": p. 47.

<sup>49</sup> Gersh, "Poor Judgment": p. 287.

some personal accountability for the Iraqi people and help heal the wounds of the Ba'ath regime.

However, the tribunal failed in most other areas to redress Ba'ath injustice and promote reconciliation. For one, the IST did not establish a clear record of the extent of Ba'ath crimes. The small scope of crimes examined throughout proceedings does not represent the widespread oppression under the Ba'ath regime. As mentioned, the IST became mainly the Dujail and Anfal trials. These investigations covered only a fraction of Ba'ath crimes. Whereas the Anfal found several high-level Ba'ath officials responsible for the killing of 182,000 Kurds, over a million Kurds were killed, left Iraq, or forcibly resettled in the Iran-Iraq War.<sup>50</sup> No IST investigation was made into what are arguably Saddam's most serious crimes: war crimes during the Iran-Iraq War (1980-1988) and the invasion of Kuwait (1990-1991), and the mass starvations in 1995-1996.<sup>51</sup> These three periods account for the deaths of almost two million Iraqis, in a population of what in 2003 was twenty-six million.<sup>52</sup> Saddam's death sentence alone involved the murder of 148 Iraqi civilians, where his involvement has been proven in the deaths of at least 300,000 Iraqis. After his execution in 2006, all charges were dropped.<sup>53</sup> Even if the IST provided some level of personal accountability, it failed to represent the total scope of brutal Ba'ath repression.<sup>54</sup>

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<sup>50</sup> Trahan, "A Critical Guide to Anfal": p. 3.; Adelman, Howard "Humanitarian Intervention: the Case of the Kurds," *International Journal of Refugee Law* Vol. 4 no. 1 (1992): p. 7.

<sup>51</sup> Dougherty, "Iraq's Flawed Tribunal" pp. 70-71.

<sup>52</sup> Gersh, "Lessons Learned": p. 218-220. Pp. "Iraq Population, by Year" Index Mundi, 2011. Retrieved April 22, 2015: <http://www.indexmundi.com/facts/iraq/population>

<sup>53</sup> Drumbl, Mark "Looking Beyond Due Process" *Saddam on Trial* ed. Michael P Scharf, Gregory s McNeal (Durham, North Carolina: Carolina Academic Press 2006): 168

<sup>54</sup> Dougherty, "Iraq's Failed Tribunal," pp. 71-72.

The IST also failed to gap Iraq's Sunni-Shi'a split by systematically excluding a major part of the population from tribunal proceedings. This misrepresented the makeup of Iraqi society and weakened the legitimacy of the court.<sup>55</sup> It also furthered sectarianism between Shi'a and Sunni, rather than promoting a "shared future."<sup>56</sup> Sunnis felt targeted by the trials of former Ba'ath officials while Shi'a thought the IST was too lenient. In Saddam's trial, 84% of Shi'a Arabs were worried he would be wrongly acquitted, compare to the 68% of Sunni Arabs who feared he would be wrongly convicted. Throughout the IST's main proceedings, both groups remained almost diametrically opposed.<sup>57</sup> If anything, the IST further divided these groups.<sup>58</sup>

Finally, the IST failed to establish an official narrative of the Ba'ath regime. Because of its instability, unfairness, and illegitimacy, the IST is largely viewed as a sham. Few Iraqis see the IST as a legitimate court and the international community largely sees it as a victor's trial.<sup>59</sup> This lack of trust preempts any attempt to establish a general consensus of Ba'ath crimes, the IST is seen as illegitimate.<sup>60</sup> Moreover, without guaranteed fairness or justice, a culture of impunity remains in Iraq. Instead using legal means, Iraqis are more likely to seek justice through extra-legal means to reconstruct their society.<sup>61</sup> The IST's failure as legitimate narrative of Ba'ath crimes

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<sup>55</sup> Chwalisz, "The Trial of Saddam Hussein," pp. 18-20.

<sup>56</sup> Triponel, "Reconciliation in Iraq?" pp. 298-299.

<sup>57</sup> Nedelsky, Stan "Iraqi High Tribunal," *The Encyclopedia of Transitional Justice*. P. 268.

<sup>58</sup> Triponel, "Reconciliation in Iraq?" pp. 306-307.

<sup>59</sup> Dougherty, "Iraq's Flawed Tribunal," pp. 68-69.

<sup>60</sup> Ibid. p. 61.

<sup>61</sup> Triponel, "Reconciliation in Iraq," p. 301.

has preempted positive reconciliation and has disavowed hopes for reconciliation and further destabilized Iraqi society.<sup>62</sup>

Overall, the IST has not achieved its potential in redressing Ba'ath injustice and promoting reconciliation. While the IST has held individuals accountable for crimes under the Ba'ath regime, it fails to connect these crimes towards the broader, system of Ba'ath oppression and thus fails to establish an official Iraqi record of Ba'ath crimes. Because of this disconnect, as well as its reputation as a kangaroo court, the IST has not helped Iraq move from "a divided past to a shared future." Indeed, most scholars agree that the IST, if anything, has contributed negatively to reconciliation and peace-building in a post-Saddam Iraq.<sup>63</sup>

### **Lessons Learned**

There are several specific lessons which can be learned from the IST's failures and negative impact on reconciliation. In this section I identify two specific changes to the IST which would have alleviated some of these failures and better redressed Ba'ath crimes in promoting reconciliation in Iraq.

First, instead of an aggressive, exclusionary policy of lustration, the IST should have included Ba'ath members in trial proceedings. Inclusive lustration, which allows former Ba'ath members to participate in nation-building efforts under certain restrictions, would overall strengthen the IST. For one, it would allow experienced, professional Iraqi law professionals to participate in tribunal proceedings, which the

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<sup>62</sup> Drumbl, Mark A., "The Iraqi High Tribunal and the Rule of Law: Challenges" *Proceedings of the Annual Meeting (American Society of International Law)* 100, April 2006 p. 83.

<sup>63</sup> Chwalisz, "The Trial of Saddam," p. 53.

IST desperately needed.<sup>64</sup> Allowing Iraqis to participate in trial proceedings irrespective of political affiliation—within reason-- would also strengthen the legitimacy of the IST.<sup>65</sup> Whereas the IST was seen as a victor's trial, including former Ba'ath members during the prosecution of Ba'ath criminals is a positive step towards representing a mixed, impartial judiciary.

A less aggressive policy of lustration would also promote reconciliation. This would show Sunni Arabs, who felt marginalized by the tribunal, that the IST represents a collective vision of Iraqi society, rather than the view of those who simply agree with the aims of the CPA and the Shia-led coalition. Inclusive lustration would also be a positive force for reconciliation in the Shi'a community, who feel the trial did not do enough to punish the Ba'ath regime. Including Ba'ath officials in trial proceedings would show Shi'a that all Iraqis—even Ba'ath members—suffered under the Ba'ath regime and should be part of rebuilding Iraqi society.<sup>66</sup> Overall, the inclusion of former Ba'ath members in trial proceedings urges Sunni and Shi'a to confront their past together, rather than in a Shia-led, victor's trial. In this sense, inclusive lustration would further reconciliation more so than the IST's policy of aggressively exclusive vetting, and also dovetail with the IST's and CPA's joint goal of building a coalition-based Iraq.

Second, instead of a domestic tribunal, high-level Ba'ath officials should have been tried in an international court. Conducting the IST as a domestic trial is a laudable effort at nation building, and has some previous precedent as a hybrid

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<sup>64</sup> ICTJ, "Dujail: Trial and Error," p. 8.

<sup>65</sup> David, Roman, "From Prague to Baghdad," pp. 366-368

<sup>66</sup> Ibid. pp. 366-368.



court.<sup>67</sup> However, the IST was unable to perform basic duties as a criminal court and did not give complex proceedings the attention to detail necessary to ensure due process.<sup>68</sup> International criminal courts are designed to deal with these types of trials. The IST as an international tribunal would have provided the attention to detail, experienced staff, and clarity in procedure necessary to function on a basic level. Instead of struggling to understand and integrate international law into a system with little capacity and no precedent for prosecuting such cases, the IST should have been conducted as an international trial itself.

Moreover, the IST reaped little benefit in conducting the trial in Iraq. International tribunals have been largely criticized for their distance from the original conflict. However, the IST could not capitalize on its proximity to post-Saddam Iraq. If anything, this temporality—geographic, political, and otherwise—hindered the IST's effectiveness and ability to direct reconciliation. Constrained by the chaos of the US occupation, the IST struggled to find eyewitnesses testimony, integrate Iraqi actors, and access evidence, perhaps more so than in the ICTY or ICTR. US troops prevented IST judges from conducting investigations and Iraqis were not allowed access to the court.<sup>69</sup>

In fact, the dangers of conducting IST trials inside post-Saddam Iraq almost ended the tribunal completely.<sup>70</sup> As demonstrated, the IST suffered from a lack of

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<sup>67</sup> Gersh, "Poor Judgment," pp. 11-15.

<sup>68</sup> Dougherty, "Iraq's Failed Tribunal," pp. 62-64.

<sup>69</sup> Chwalisz, "The Trial of Saddam Hussein" pp. 31-32.

<sup>70</sup> "Burns, John and Hauser, Christine," Third Lawyer in Hussein Trial is Killed" *NYTimes* June 21, 2006. Retrieved April 25, 2015 ([http://www.nytimes.com/2006/06/21/world/middleeast/21cnd-lawyer.html?\\_r=0](http://www.nytimes.com/2006/06/21/world/middleeast/21cnd-lawyer.html?_r=0))

security, which limited the tribunal's effectiveness. IST staff and witnesses were targeted by Iraqi militant groups and in some cases, kidnapped or killed. The IST's main trials were compromised by their surrounding war zone and are thus seen as a kangaroo court. Conducting the IST outside of this context would have eliminated these security threats which exposed the IST to the chaos of post-Saddam Iraq and marred the tribunal as illegitimate. Insulating the IST from such a volatile political environment would strengthen the legitimacy of the tribunal by ensuring stability and safety in trial proceedings. In turn, an international tribunal outside the chaos of Iraq would better promote reconciliation through establishing a more legitimate record of Ba'ath crimes, rather than the slipshod, divisive results of Dujail and Anfal.

### **A Case for Syria**

The IST should not be written off as a complete failure. In fact, its lessons in seeking justice in a post-conflict society have become more and more relevant as the Middle East descends deeper into sectarian strife and civil conflict. At the end of such conflicts, countries such as Yemen, Libya, and Syria, will be forced to make similar decisions in prosecuting former war criminals in a post-conflict environment. With each criminal trial, court actors will have to determine the effect the trial will play on rebuilding society and promoting reconciliation. The IST serves as a valuable resource in evaluating the implementation of such courts and how their proceedings should be conducted.

Syria's civil war serves as a particularly relevant case study. On the surface, Syria and Iraq are opposites. There has always been an enormous discrepancy between both Ba'ath parties' goals and behavior, which is reflected in their tumultuous

relations. Both countries have been historic rivals, which has become further entrenched from regional issues like oil pipelines, water disputes, and the Iran-Iraq War.<sup>71</sup> Still, they share underlying similarities. Both countries were a product of the colonial powers' carving up of the Middle East after World War I, which is reflected in their diverse ethnic makeup of Kurd, Sunni, and Shi'a.<sup>72</sup> Moreover, both countries have struggled with similar internal issues. Syria and Iraq have long fought Kurdish autonomy along their borders with Turkey, which has increasingly destabilized each country. Perhaps more drastic, Syria and Iraq have also struggled to control their shared border, which has led to the rise of Sunni militias and massive, uncontrolled migration through both countries.<sup>73</sup>

On a higher level, the current chaos in the Syrian Civil War resembles that of the Iraqi insurgency under US occupation. Both conflicts are protracted, sectarian struggles supported by local militias. In particular, both conflicts have deepened the Shi'a-Sunni divide and further separated an already fractionalized population.<sup>74</sup> Close to 80% of Assad's regime is Aloui, an offshoot of Shi'a, whereas almost all in the Free Syrian Army are Sunni.<sup>75</sup> The tragically high loss of life in the conflict represents a similar breaking down of the delicate alliance between ethno-religious groups as in the Iraq insurgency. Tragically, almost four million refugees have fled Syria for

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<sup>71</sup> Drysdale, Alasdai. "Syria and Iraq—the Geopathology of a Relationship" *GeoJournal*, Vol. 28, No. 3. The Middle East and the Emerging New World Order (November 1992):354-356.

<sup>72</sup> Ibid. p. 349.

<sup>73</sup> Yacoubnia, Mona. "Syria's Relations with Iraq" *Insight Turkey*, Vol. 9, No 1, 2007. p. 117-119.

<sup>74</sup> "Syrian Civil War—Overview" BBC News, March 24, 2015. Retrieved April 25, 2015. (<http://www.bbc.com/news/world-middle-east-14703856>)

<sup>75</sup> Carpenter, Ted Galen. 2013. "Tangled Web: The Syrian Civil War and Its Implications". *Mediterranean Quarterly*. 24 (1): 2-3.

surrounding countries and around 220,000 Syrians have lost their lives due to civil unrest.<sup>76</sup>

Also similar to Iraq's Ba'ath regime, Bashar Al-Assad has lost his legitimacy in the eyes of the international community.<sup>77</sup> Over the course of Syria's now four year conflict, Bashar's widespread repression of his own population has leaked out of the brutal conflict. Over 11,000 people have been identified to have been severely tortured by secret agents in the Assad regime, although the total number is likely higher.<sup>78</sup> Bashar has also terrorized his population with deadly gas attacks, leading to the deaths of thousands of civilians through chlorine gas.<sup>79</sup> Inevitably, like Ba'ath regime in Iraq after similar mukhbarat torture and gas attacks, the Syrian regime has been deemed an illegitimate leader of Syria, and cannot reasonably function as the sole ruling authority in Syria after such brutal crimes against its people.<sup>80</sup>

### **Applying the Lessons of the IST**

The destruction Ba'ath officials have unleashed on the Syrian people and their standing as criminals within the international community necessitates a criminal trial for their egregious crimes during and before the Syrian Civil War. In an ideal post-conflict Syria, such a trial is likely. The similarly chaotic nature of post-Saddam Iraq

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<sup>76</sup>"Registered Syrian Refugees," UNHCR, Syrian Regional Refugee Response, Inter-agency Information Portal. April 14, 2015. Accessed April 22, 2015. <http://data.unhcr.org/syrianrefugees/regional.php>

<sup>77</sup> Siryoti, Hirsch, Baron, "Assad is no Longer A Legitimate Ruler, Says UN Secretary-General" *Israel HaYom*, June 8, 2012.

<sup>78</sup> Crane, David and Silva, Desmond De, "A Report Into The Credibility Of Certain Evidence Of Persons Incarcerated By The Current Syrian Regime" p. 4.

<sup>79</sup> "Report on the Alleged Use of Chemical Weapons" United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic, August 21, 2013.

<sup>80</sup> Polk, William R. "Understanding Syria: From Pre-Civil War to Post-Assad" *The Atlantic*. December 10, 2013.

and the type of crimes committed provide a starting point for what a Syrian tribunal could look like. Moreover, the results of the IST provide vital insights into how such a trial should be run to promote transitional justice after the Syrian Civil War.

First, such a trial should include the Aloui minority in its proceedings. As I have shown, the IST would have benefited from including Ba'ath members in the tribunal in terms of legitimacy and promoting reconciliation. Like Iraq, Syria's Sunni-Shi'a divide is entrenched after forty years of brutal dictatorship. A Syrian tribunal should be careful not to further deepen this split by excluding Alouis from the process of redressing past injustice. Like in Iraq this would not only decrease the legitimacy of the trial by representing only one 'side,' but also serve as a rallying point for further sectarian divide. By contrast, an inclusionary process could serve as a joint step towards a "shared future," as well as legitimizing the new Syrian government in the eyes of the international community.

Second, a Syrian tribunal for former high-level Ba'ath officials should be conducted by a competent, international court rather than a hybrid or domestic Syrian tribunal. As demonstrated, any real reconciliation efforts in the IST were preempted by its deplorable lack of personal security and organization. Given the volatile climate of Syrian's Civil War, it is likely such a trial, if conducted in Syria, would be susceptible to violence and sectarian strife. Instead, an experienced, international tribunal, outside the reach of the chaos of a post-Civil War Syria, is essential to ensure the basic functions of a criminal court and promote an environment insulated from Syrian politics.

Third, a Syrian trial should only be conducted once there is some level of stability in the country itself. A large reason for the IST's failure to direct reconciliation was its limited capacity during the Iraqi insurgency and continued instability in Baghdad. Because of the IST's proximity to Iraq's civil strife, its major verdicts were seen as illegitimate and impartial, and largely written off as victor's justice. Conducting a Syrian tribunal after the stabilization of the conflict—albeit a good way down the road—separates the tribunal from the conflict itself. This would help the court establish a narrative of Ba'ath crimes and strengthen the legitimacy of such a tribunal as an official record of oppression under Assad's regime.

Finally, more should be done to plan for a post-civil war Syria *now*. The IST was in many ways an afterthought in achieving broader CPA goals in a post-Saddam Iraq. The tribunal was a courageous effort in a post-2003 Iraq, but the lack of clear planning and procedure ended in overall hurting Iraqi reconciliation. Early preparation for a Syrian tribunal would show to current Ba'ath officials that they will be held accountable for their egregious crimes against the Syrian populace. Moreover, it would also reaffirm the international community's resolve towards seeking justice for these crimes, and provide hope to victims that there may one day be justice for their suffering.

## **Limitations**

There are of course, major limitations at this point to prescribing specific recommendations for a post-Assad Syria. These conflicts are in many ways dissimilar. The Iraqi insurgency was the result of a prolonged US occupation, whereas the Syrian conflict was sparked by a revolution but has long since devolved into a fight between

the Syrian people and the Syrian government. Radical Islamic groups like ISIS and the Nusra Front have played a much larger role in the Syrian Civil War than in the Iraqi insurgency, having taken large parts in the East of the country.

Perhaps most importantly, there is no clear sign whether regime forces, the Free Syrian Army, or ISIS will take Syria. Within these options, respectively, there is diminishing possibility of a fair trial for former Ba'ath officials and an increasing possibility that they would be executed without trial. If rebels capture Assad, there is little doubt he will be killed in a similar way to Mu'amar Qaddafi or Pol Pot. There is simply no way to know what the end of the Syrian Civil War will hold. Even if there is a criminal trial for former Ba'ath officials, there would still be mass crimes against humanity unaccounted for within the context of the Syrian Civil War. Crucially, the Civil War has become extremely volatile because all sides have resorted to increasingly dirtier and deadlier measures to achieve their aims. In fact, the rule of ISIS in large parts of Eastern Syrian is considered to be more brutal than that of Assad's regime. A criminal tribunal against only high-level Ba'ath officials could frame what are really egregious crimes committed by Syrian rebels as victims fighting for freedom under an oppressive regime.

## **Conclusion**

From the chaos of insurgents in the North West of Iraq to the unraveling of Syrian civil society, discourse on the Iraq and Syrian conflicts has become increasingly bleak. Any deep analysis of these conflicts yields two societies sinking deeper into chaos with an ever dimmer future. My recommendations for a Syrian tribunal instead represent the hope that there may eventually be some progress in the

region. That, even with the deteriorating security and refugee crises Syria may be able to learn from past mistakes in Iraq. Such a tribunal represents both a process and a goal. Even with the dimmest of futures, we *must* think of rebuilding Syria after its tragic Civil War.



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