

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

ORAL ARGUMENT SCHEDULED FOR MARCH 8, 2005]

DEC 29 2004

No. 04-5393

RECEIVED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SALIM AHMED HAMDAN,

Petitioner-Appellee,

v.

DONALD H. RUMSFELD, ET AL.,

Respondents-Appellants.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**BRIEF OF *AMICUS CURIAE* PROFESSOR NOAH FELDMAN,
FORMER SENIOR CONSTITUTIONAL ADVISOR TO
THE COALITION PROVISIONAL AUTHORITY
DURING THE U.S. OCCUPATION OF IRAQ,
IN SUPPORT OF PETITIONER-APPELLEE AND
AFFIRMANCE OF THE DECISION OF THE DISTRICT COURT**

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December 29, 2004

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**CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASES**

Pursuant to D.C. Circuit Rule 28(a), I certify as follows:

A. Parties and Amici.

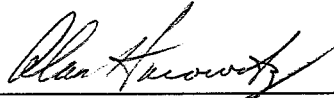
As far as I am aware after review of the electronic docket sheets for this case in this Court and in the district court, except for *Amicus Curiae* Professor Noah Feldman, *Amicus Curiae* International Law and National Security Law Professors, *Amicus Curiae* 305 United Kingdom and European Parliamentarians, and *Amicus Curiae* American Center for Law and Justice appearing before this Court, all parties and *amici curiae* appearing before the district court and in this Court in this case are listed in the Brief for Appellants dated December 8, 2004.

B. Rulings Under Review.

To the best of my knowledge, all references to the rulings at issue in this case before this Court are also listed in the Brief for Appellants.

C. Related Cases.

As listed in part C of the Certificate As to Parties, Rulings, and Related Cases filed with the Brief for Appellants, 19 cases brought by detainees at the Guantanamo Bay Naval Base are pending in the U.S. District Court for the District of Columbia. Counsel is not aware of any other cases that are related to this case before this Court.



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GLOSSARY

CPA.....	Coalition Provisional Authority
Geneva III	Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949
Geneva IV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949
Hague Regulations	Convention (II) of July 29, 1899, with respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907
ICCPR.....	International Covenant on Civil and Political Rights, Dec. 19, 1966
Interim Iraqi Constitution	Transitional Administrative Law
Iraqi Criminal Procedure Law	Iraqi Law No. 23 of 1971, Feb. 14, 1971
Order 48	CPA Order No. 48, Dec. 9, 2003
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* Authorities upon which we chiefly rely are marked with asterisks

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Noah Feldman is Associate Professor of Law at New York University School of Law. From April to July 2003, Professor Feldman served as Senior Constitutional Advisor to the Office of Reconstruction and Humanitarian Assistance in Iraq and its successor, the Coalition Provisional Authority (“CPA”), which carried out the functions of government in occupied Iraq. After leaving the CPA, Professor Feldman served *pro bono* as adviser to members of the Iraqi Governing Council responsible for drafting the Interim Iraqi Constitution (the “Transitional Administrative Law”) that was signed on March 9, 2004 and went into effect on June 29, 2004.¹ Professor Feldman thus is uniquely qualified to address the legal and policy issues relating to CPA authorization of the Statute of Iraqi Special Tribunal (the “Tribunal Statute”), which established the adjudicative body that will try Saddam Hussein and senior members of his Ba’thist regime for crimes against humanity, war crimes, and other offenses. This brief is presented on behalf of Professor Feldman in his personal capacity and not on behalf of any other party or the U.S. Government.

The establishment of the Iraqi Special Tribunal is relevant to review of the district court decision in *Hamdan v. Rumsfeld et al.*, 2004 U.S. Dist.

¹ Law of Administration for The Statue of Iraq for the Transitional Period, Mar. 8, 2004, <http://www.cpa-iraq.org/government/TAL.html> (accessed Dec. 28, 2004).

LEXIS 22724 (D.D.C. November 8, 2004), because of two fundamental similarities between the Tribunal and the military commission that would try Salim Ahmed Hamdan. Both are adjudicative bodies established under the authority of the Commander in Chief, U.S. Const., art. II, sec. 2, cl. 1, to try individuals for serious violations of international and domestic law. Both are governed by norms of international law.

Moreover, consideration of the Tribunal's rules is desirable to promote a consistent U.S. policy regarding protections for the accused. Countries around the world view both the Tribunal and the military commission as reflecting the policy of the United States toward an emerging legal order for prosecuting war crimes, crimes against humanity, and the global war against terror. United States policy with respect to this emerging legal order and its constituent adjudicative bodies is affected by decisions of all three branches of government, each with its own independent constitutional responsibilities. Decisions of U.S. courts are perceived around the world as an inextricable part of U.S. policy regarding the legal order required for implementing international law and promoting the interests of the United States.

The interest of *Amicus Curiae* thus lies in facilitating an understanding that can lead to a unified and coordinated policy of the United

States. To that end, this brief draws this Court's attention to relevant positions taken by the United States with respect to the Iraqi Special Tribunal and to ramifications that this Court's decision inevitably will have on the Iraqi Special Tribunal and similar tribunals throughout the world.

As set forth in the attached certificate of counsel, both parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

In authorizing the Statute of the Iraqi Special Tribunal, the CPA fulfilled the international obligations of the United States and furthered its policy interests by ensuring the Tribunal would try persons in accord with internationally-recognized standards of justice and due process. See CPA Order No. 48, CPA/ORD/9 Dec 2003/48 ("CPA Order 48"), and annexed Tribunal Statute, attached as Appendix A. These standards, which will apply to the trials of Saddam Hussein and senior members of his Ba'ath Party, guarantee fundamental rights, including the rights of the accused to be present at trial and to confront adverse witnesses and evidence. The district court correctly held that inadequate guarantees of these same rights rendered the commission set to try Mr. Hamdan inadequate as a matter of law. 2004 U.S. Dist. LEXIS 22724 at *36-*53. Affirmance of that decision will encourage adherence to this rule of law by similar tribunals around the

world, including the Iraqi Special Tribunal, and acknowledge that the United States recognizes its duties under international law.

ARGUMENT

I. OVERVIEW OF THE CPA AND ITS AUTHORIZATION OF THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL

Understanding the nature of the governing authority of the Coalition Provisional Authority (“CPA”) and the context within which the CPA operated will clarify the manner in which the CPA authorized the Statute establishing the Iraqi Special Tribunal as well as the significance of the substantive provisions in the Statute.

A. Establishment of the CPA.

The CPA exercised the powers of government in occupied Iraq from May 16, 2003, until June 29, 2004. During this period of formal, legal occupation, the CPA was vested with all legislative, executive, and judicial authority necessary to administer Iraq, and to create conditions for the Iraqi people to freely determine their future, “including by advancing efforts to restore and establish national and local institutions for representative governance and facilitating economic recovery and sustainable reconstruction and development.” CPA Reg. No. 1, CPA/REG/16 May 2003/01, § 1(1)-(2). The CPA was formed in order to carry out the legal duties of the United States and its Coalition partners as legal occupants of Iraq. CPA Reg. No. 1, § 1(2). These duties arose under The Hague

Regulations, including its Article 43, under United Nations Security Council Resolutions 1483 (2003), 1500 (2003), and 1511 (2003), and under Geneva Conventions III and IV.² Because these duties of the occupant bind individual nations, the United States and its Coalition partners were jointly and severally responsible for their fulfillment.³

The President fulfilled the civilian components of the international law obligations of the United States as occupant of Iraq through the creation of the CPA. The President managed the CPA pursuant to his constitutional powers as Commander in Chief, with input from Coalition partners. The President exercised these powers by ensuring that the U.S. Presidential

² Convention (II) of July 29, 1899, with respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, adopted Oct. 18, 1907, 1 U.S.T. 647 (“Hague Regulations”); U.N. S.C. Res. 1483, U.N. Doc. S/RES/1483, May 21, 2003 (“Resolution 1483”), para. 5 (declaring international law applicable to the occupation of Iraq); U.N. S.C. Res. 1500, U.N. Doc. S/RES/1500, Aug. 14, 2003, pmb. (reaffirming applicability of Resolution 1483); U.N. S.C. Res. 1511, U.N. Doc. S/RES/1511, Oct. 16, 2003, para. 1 (reaffirming applicability of international law to the occupation of Iraq); Geneva Convention Relative to The Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (“Geneva III”); Geneva Convention Relative to the Protection of Civilian Persons in the Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 135 (“Geneva IV”).

³ See U.N. Security Council Resolution 1483, para. 5 (“call[ing] upon all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions and the Hague Regulations of 1907.”); Restatement of the Law, Third, Foreign Relations Law of the United States (1987), § 207 (providing that “[a] state is responsible for any violation of its obligations under international law resulting from action or inaction by ... (c) any organ, agency, official, employee, or other agent of a government or of any political subdivision, acting within the scope of authority or under color of such authority.”).

Envoy to Iraq, L. Paul Bremer, served as the CPA Administrator, the top official of the occupation government, and reported directly to the U.S. Secretary of Defense and through him to the President.⁴ As a matter of domestic U.S. law, the President derived authority to oversee the occupation of Iraq from the Congressional authorization for the use of force in Iraq, see Pub. L. No. 107-243, 116 Stat.1498 (2002), and from his constitutional powers as Commander in Chief.

B. CPA Authorization of the Statute of the Iraqi Special Tribunal.

During the period of occupation, the CPA issued twelve regulations, one hundred orders, and seventeen memoranda to establish the rule of law and public life and order in Iraq. Among the most prominent acts of the CPA was issuance of Order 48, authorizing a statute establishing the Iraqi Special Tribunal that would try members of the former regime of Saddam Hussein and the Ba‘th Party for certain criminal offenses. The Statute gave the Tribunal jurisdiction over any Iraqi national or resident of Iraq accused

⁴ See Statement by the Press Secretary to the President, May 6, 2003 (announcing that L. Paul Bremer, III, will serve as Presidential Envoy to Iraq and “senior Coalition official in Iraq”, will report to the Secretary of Defense, and will advise the President, through the Secretary, on policies designed to achieve American and Coalition goals in Iraq), available at <http://www.whitehouse.gov/news/releases/2003/05/20030506-5.html> (accessed Dec. 28, 2004); Overview of the CPA (stating that “Ambassador L. Paul Bremer, III was named Presidential Envoy to Iraq on May 6, 2003 and in this capacity is the Administrator of the Coalition Provisional Authority.”), available at <http://www.iraqcoalition.org/bremerbio.html> (accessed Dec. 28, 2004).

of committing war crimes, crimes against humanity, genocide, and violations of specified Iraqi laws between July 17, 1968, and May 1, 2003, whether in the Republic of Iraq or elsewhere, including crimes not committed in armed conflict. See Tribunal Statute, Arts. 1 & 11-14.

The manner in which the CPA authorized the Statute of the Iraqi Special Tribunal reflects the circumstances and legal constraints under which the CPA operated. The CPA promulgated the statute by order, an act the CPA defined as “binding instructions or directives to the Iraqi people that create penal consequences or have a direct bearing on the way Iraqis are regulated, including changes to Iraqi law.”⁵ The CPA had authority under international law to issue Order 48 because the Statute was designed “to prevent any threat to public order by revenge actions or vigilantism and to promote the rule of law in accordance with applicable international law.” CPA Order 48, pmbl. In specifying the goal of “prevent[ing] any threat to public order,” *id.*, the CPA identified the Tribunal as necessary to the maintenance of public life and order (“la vie et l’ordre publics”), which is required of occupants under Article 43 of the Hague Regulations.⁶ For that

⁵ CPA Description of Its Forms of Legal Action, available at <http://www.iraqcoalition.org/regulations/> (accessed Dec. 28, 2004).

⁶ Hague Regulations, Art. 43 (providing that “[t]he authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his

reason, establishment of the Tribunal was also consistent with Geneva IV, which permits the occupying power to modify penal structures where continuation of the existing structures would “constitute a threat to its security”. Geneva IV, Art. 64.

In addition, the CPA issued the order in close collaboration with Iraqi officials. As noted in Order 48, the CPA approved the Statute only after it had been discussed extensively with the Iraqi Governing Council, an interim consultative body of local officials established by the CPA. CPA Order 48, § 1(1). Technically, CPA Order 48 also delegated to the Iraqi Governing Council the authority to promulgate the Statute that had been developed in these discussions. *Id.* To ensure the Statute served its two intended purposes of preserving public order and promoting the rule of law, it was necessary for the CPA Administrator to reserve the unilateral authority “to alter the statute ... or any elements of crimes or rules of procedure developed for the Tribunal, if required in the interests of security.” *Id.*, § 1(6).

First, as has been noted, the United States could not, consistently with international law, delegate its duty to comply with international law in Iraq. Thus, even though the CPA, in effect, promulgated the tribunal Statute

power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”).

through the Iraqi General Council, the CPA Administrator retained residual authority to discharge the occupant's obligation to implement the statute consistently with applicable international law until a sovereign Iraqi government could assume legislative and juridical responsibility for the Tribunal and its underlying statute. Second, exercise of jurisdiction by the Tribunal directly implicated the security of U.S. and other Coalition troops in Iraq. As noted, a fundamental purpose of the Tribunal was to avoid "any threat to public order by revenge actions and vigilantism." *Id.*, pmbl. To achieve this goal, Iraqis had to accept the Tribunal's rules and procedures as a legitimate substitute for self-help. Deviations from standards of international law or due process could inflame passions and lead to violence. On the one hand, if proceedings seemed inadequate to the task of prosecuting Saddam Hussein, victims of his regime might turn to vigilantism against their former oppressors. If, on the other hand, proceedings were perceived as inconsistent with international standards of justice and due process, Iraqis sympathetic to the former regime might use these deficiencies as an excuse for violence against the Coalition forces.

These two purposes of the Tribunal made it imperative that the CPA not only retain ultimate control over establishment of the Tribunal during formal occupation, *id.*, § 1(6), but also "give all possible assistance" to the

Tribunal including after the transfer of sovereignty. To that end, the United States has pledged to pay \$75 million for the court's annual budget and provide judicial training for the newly appointed judges and prosecutors.⁷ This support remains in place even after the transfer of sovereignty to the Iraqi transitional government.

II. FUNDAMENTAL PROTECTIONS AFFORDED THE ACCUSED UNDER THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL

The Tribunal Statute guarantees the accused a number of basic rights at the pre-trial, trial, and post-trial phases. These guarantees, which shall be the focus of this brief, further demonstrate the care taken by the CPA, in consultation with the Iraqi Governing Council, to ensure that any tribunal formed pursuant to the Article II war powers of the Commander in Chief would comply fully with the requirements of due process, the rule of law, and international legal conventions, and would preserve public order in Iraq. CPA Order 48, pmbl. To that end, the CPA fully guaranteed rights of presence and confrontation to the accused and did not subject them to exceptions.

⁷ See Transcript of Statement by L. Paul Bremer, III, Administrator, CPA, April 23, 2004, available at http://www.cpa-iraq.org/transcripts/20040423_page_turn.html (accessed Dec. 28, 2004).

A. Nature of Fundamental Rights of the Accused Specified by the Tribunal Statute and Related Laws.

Accused individuals are entitled to counsel from the outset of the proceedings, when the Tribunal acts as a preliminary investigative body in accordance with the civil law tradition in Iraq. Tribunal Statute, art. 18(c). Once a *prima facie* case is established, the investigative judge is obligated to prepare an indictment authorizing arrest, which must be confirmed or dismissed by the chief investigating judge. *Id.*, arts. 18(d) & 19(a). Upon arrest, the accused must immediately be informed of the charges against him or her. *Id.*, art. 21(a). The accused is entitled to a public, pre-trial arraignment. *Id.*, art. 20(c). At that public hearing, the accused is informed promptly and in detail of the nature, cause, and content of the charges, and is given the opportunity to communicate freely with counsel of his or her choice, including non-Iraqi counsel who can assist lead counsel. *Id.*, art. 20(d)(1)-(2). If the accused does not have counsel, the accused is entitled to be informed of the right to counsel and the right to have counsel assigned and paid for by the Tribunal. *Id.*, art. 20(d)(4).

The accused is entitled to a speedy trial without undue delay. *Id.*, arts. 20(d)(3) & 21(b). The accused must be given “adequate time and facilities for the preparation of [a] defense” for the trial. *Id.*, art. 20(d)(2). The accused is presumed innocent, *id.*, art. 20(b), and cannot to be compelled to

testify against himself or herself, or compelled to confess guilt. *Id.*, art. 20(d)(6). The accused has the right to be present at his or her trial, *id.*, art. 20(d)(4), and has the right to “examine, or have examined, the witnesses against” him or her. *Id.*, art. 20(d)(5). The accused also has the right to compel attendance of witnesses and to examine witnesses on his or her behalf under the same conditions as adverse witnesses. *Id.* Protections accorded victims and witnesses will not diminish these rights of the accused. *Id.*, art. 22.

Finally, the accused is given the right to appeal a verdict to an Appeals Chamber, *id.*, arts. 25-26, comprised of nine individuals of high moral character, impartiality, and integrity, who are sitting or former judges. *Id.*, arts. 4(c) & 5(a)-(b). The Appeals Chamber has the power to affirm, reverse, or revise the verdict. *Id.*, art. 25(b).

To ensure that the protections set forth in the Tribunal Statute are fully guaranteed, the Tribunal is charged with implementing these protections in its rules of procedure and evidence. *Id.*, art. 16. The Tribunal is now engaged in the delicate task of drafting these rules, which are subject to the Transitional Administrative Law (“TAL”), and pursuant to Article 16 of the Tribunal Statute, must be guided by Law No. 23 of 1971, Feb. 14, 1971 (the

“Iraqi Criminal Procedure Law”)⁸, which was amended by CPA

Memorandum No. 3, CPA/MEM/27 June 2004/03.

Both the Transitional Administrative Law and the Iraqi Criminal Procedure Law further guarantee protections to the accused. For example, the Transitional Administrative Law parallels Article 20(d)(6) of the Tribunal statute and expressly prohibits torture and the use of evidence obtained through torture. TAL Art. 15(J). In addition, under the Iraqi Criminal Procedure Law, an accused “may make observations on evidence given” at the initial investigation stage and cannot be removed from the courtroom during the course of the trial unless he or she violates the rules of court. Iraqi Criminal Procedure Law, paras. 63(A) & 157.

To ensure full compliance with international human rights law including Geneva IV, the CPA also modified the Iraqi Criminal Procedure Law to provide additional protections for the accused. CPA Memorandum No. 3, pmb1. (referencing purpose of compliance with human rights). Under these modifications, the CPA guaranteed that persons detained in occupied Iraq would be afforded protections including the following: the right to be advised of their rights upon arrest, *id.*, § 4; the right to consult with an

⁸ All references in this brief to said law are to the translation posted on the web site of the U.S. military, available at <https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/85256a1c006ac77385256d34006030dc/Body/M2/Iraqi%20Criminal%20Procedure%20Code%20English.pdf?OpenElement> (accessed Dec. 28, 2004).

attorney within three days of detention if the detainee is suspected of committing a felony, *id.*, § 5(1)(b); the right to an arraignment within 90 days if the accused is charged with a crime, *id.*, § 5(1)(d); in the case of persons detained for security reasons by multinational forces, the right to an initial review of the grounds for internment within seven days of detention and subsequent periodic reviews if internment is continued and review by a committee for long-term internments, *id.*, § 6; and the right to counsel, including if necessary court-appointed counsel, when the accused appears before any Iraqi court, *id.*, § 7.

B. The CPA Did Not Authorize the Tribunal to Place Limitations Upon The Right of the Accused to Confrontation and Presence.

Of particular interest to this case is the fact that the Tribunal Statute authorized by the CPA specifically guaranteed, without exception, the rights of confrontation and presence that the district court found inadequately guaranteed by the military commission that would try Salim Ahmed Hamdan. See Hamdan, 2004 U.S. Dist. LEXIS 22724 at *37-53 (district court holding limitations set forth at 32 C.F.R. §§ 9.5-9.6 not legally valid). These rights were guaranteed under the Tribunal Statute for all persons tried by the Tribunal.

With respect to the confrontation right of the accused, as noted above, the CPA ensured that the accused would have the right to “examine, or have examined, the witnesses against him” including the right to compel attendance of witnesses and examine witnesses under the same conditions as adverse witnesses can be compelled and examined. Tribunal Statute, art. 20(d)(5). In connection with this guarantee, the CPA did not, for example, authorize the Tribunal to make exceptions to the right to confront witnesses and examine evidence if the evidence or testimony contains protected information or implicates a state secret. Cf. 32 C.F.R. §§ 9.5(e), (h) (military commission rules preventing defendant from accessing evidence or confronting witnesses against him where the evidence or witness testimony constitutes protected information, *id.* at § 9.6(d)(5), or a state secret, § 9.9).⁹

As noted above, the CPA also ensured that the Statute of the Iraqi Special Tribunal guaranteed the accused the right, without exception, “to be tried in his presence.” Tribunal Statute, art. 20(d)(4). In connection with this guarantee, the CPA did not, for example, authorize the Tribunal to conduct closed proceedings that excluded the accused. Cf. 32 C.F.R. at

⁹ Cf. also *Crawford v. Washington*, 124 S. Ct. 1354 (2004) (Scalia, J.) (holding that out-of-court testimony against accused cannot be admitted consistently with U.S. Const. amend. VI, if the accused lacked prior opportunity for cross-examination).

§ 9.5(k) (permitting exclusion of defendant from closed proceedings and from discussing the substance of these proceedings with his counsel).

Rather than authorizing such limitations upon the rights of confrontation and presence, the CPA took additional measures to ensure their full and unfettered implementation by the Tribunal. In particular, as noted above, Article 16 of the Tribunal Statute requires that the Tribunal be guided by the Iraqi Criminal Procedure Law in implementing the Tribunal Statute. As noted, under the Iraqi Criminal Procedure Law, the accused “may make observations on evidence given” at the initial investigation stage, para. 63(A), and the accused cannot be removed from the courtroom during the trial unless he or she violates the rules of court, *id.*, para. 157. The Tribunal will consider these rights because the CPA did not modify or limit the scope of these provisions when it amended the Iraqi Criminal Procedure Law. See CPA Memorandum No. 3, § 2 (declaring that all provisions of the Iraqi Criminal Procedure Law “shall continue in force unless expressly modified by” Memorandum No. 3).

Accordingly, the substance of the Tribunal Statute shows that the CPA viewed full guarantees of fundamental rights, such as the right of the accused to confront adverse witnesses and evidence and the right to be present at trial, to be feasible and practical in Iraq. Moreover, as discussed

in the following section, the CPA guaranteed these protections to fulfill the legal duties and policy interests of the United States.

III. LAW AND POLICY GROUNDS FOR U.S. INSISTENCE UPON PROTECTIONS AFFORDED TO THE ACCUSED

The CPA ensured that the Tribunal Statute specified these fundamental protections for the accused because these protections were necessary to carry out the purposes of the CPA in establishing the Tribunal. As noted, in authorizing the Tribunal statute, the CPA was “[d]etermined to prevent any threat to public order by revenge actions or vigilantism and to promote the rule of law in accordance with applicable international law.” CPA Order 48, pmb1. Thus, the CPA had both legal and policy motivations to ensure that the Tribunal afforded fundamental rights to the accused.

A. Legal Grounds for Protections to the Accused.

In forming the CPA, the United States understood its duty to ensure that the CPA scrupulously complied with international law principles of due process and rule of law. This duty applied to establishment of the Tribunal because, under Geneva IV, courts established by an Occupying Power must act “in accordance with general principles of law.” Geneva IV, art. 67. The CPA therefore ensured that the Tribunal Statute included the key protections for the accused found in Article 14(3) of the International Covenant on Civil and Political Rights, including the right to be present at trial and to confront

witnesses.¹⁰ As noted above, the CPA did not authorize limitations on these rights, consistent with the views the United States had expressed in ratifying the ICCPR. In giving advice and consent on the ICCPR ratification, the Senate declared that

States Party to the Covenant should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant, even when such restrictions and limitations are permissible under the terms of the Covenant.¹¹

Because the Tribunal was empowered to try the specified individuals regardless of their status, whether prisoner of war, civilian, or otherwise, the United States also had to ensure the Tribunal offered protections mandated for prisoners of war and unlawful combatants under Geneva III and IV. Geneva III prohibits “passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” Geneva III, art. 3(1)(d).¹² Moreover, “[i]n no

¹⁰ International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, reprinted in 6 I.L.M. 368 (1967) (“ICCPR”), art. 14(3)(d)-(e). The United States ratified the ICCPR in 1992. See Executive Session; ICCPR, 138 Cong. Rec. S4781-01, April 2, 1992 (reproducing text of resolution of Senate providing advice and consent).

¹¹ 138 Cong. Rec. S 4784 (reciting Part III(2) of the resolution of the Senate providing advice and consent on the ratification of the ICCPR).

¹² See also Geneva IV, Art. 3(1)(d) (identical to same article of Geneva III); International Covenant on Civil and Political Rights, Dec. 19, 1966, Art. 14(1), 999 U.N.T.S. 171

circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and in particular, the procedure of which does not afford the accused the rights and means of defence provided at Article 105.” *Id.*, art. 84. These rights and means of defense include a right to counsel and a right to confer with counsel, a right to an arraignment and notice of the charges, a right to receive, prior to the trial, documents normally communicated to the accused under the laws of the detaining power, and a right to call witnesses. *Id.*, art. 105. The accused also has the right of appeal. *Id.*, art. 106. Further, unlawful combatants must receive protections “not less favorable than” these rights and means of defense. Geneva IV, art. 146.

Neither the potential security threats associated with the trial of former Ba‘th party members nor other exigencies and difficulties on the ground in transitional Iraq trumped or excused compliance with these requirements of international law. Indeed, the decision by the United States to remit Saddam Hussein for trial by the Tribunal reflects the commitment of

(requiring that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”).

the President to ensuring that Mr. Hussein is tried through a process that will withstand international scrutiny.¹³

B. Policy Grounds for Guaranteeing Protections to the Accused.

From the perspective of policy, the CPA was aware of two pressing reasons to ensure scrupulous adherence to principles of full due process. First, the CPA fully understood that the Tribunal would perform most of its operations after the CPA ceased to exist and sovereignty had been transferred to an Iraqi government. The CPA therefore wished to create a basis for adherence to rule of law principles by the future sovereign Iraqi government.¹⁴

Second, the CPA recognized that the Tribunal and its proceedings would be subject to extensive public scrutiny throughout the world, and especially in the Arabic-speaking world, where regime trials are expected to be broadcast on live satellite television and to be closely followed.

¹³ Transcript of Presidential News Conference, December 15, 2003, available at <http://www.whitehouse.gov/news/releases/2003/12/20031215-3.html>; see also The Trial of Saddam Hussein, *The Economist*, Oct. 21, 2004 (citing statement by U.S. official advising Tribunal that Saddam Hussein will be tried in accordance with the highest standards of international justice), available at http://www.economist.com/displayStory.cfm?story_id=3315746 (accessed Dec. 28, 2004).

¹⁴ See CPA Order 48, pmbl. (declaration of purpose “to promote the rule of law” is aspiration for post-occupation Iraq because compliance with international law was already duty during occupation).

Therefore, in supporting the protections guaranteed by the Statute and CPA Order 48, the United States communicated to the world audience that regime criminals could be tried safely and efficiently in compliance with international law and fundamental due process principles. These protections were presented as an internationally sanctioned alternative for Iraqi jurists, who had “expressed a great deal of outrage at the manner in which the Hussein regime imposed its will on the Iraqi people through the use of Special or ‘Revolutionary’ courts conducted by untrained minions.”¹⁵ To that end, within hours of the capture of Saddam Hussein, the President declared that the United States

will work with the Iraqis to develop a way to try him in a – [sic] that will stand[sic] international scrutiny, I guess is the best way to put it. ... And of course we want it to be fair. And of course, we want the world to say, well, this – he got a fair trial. Because whatever justice is meted out needs to stand international scrutiny.... justice will be delivered to him in a way that is transparent and for the world to see.¹⁶

Given the preeminent role of the United States within the Coalition, the Tribunal Statute authorized by the CPA serves as a model to the world of the commitment of the United States to the rule of law.

¹⁵ Michael A. Newton, *The Iraqi Special Tribunal: Securing Sovereignty from the Ground Up*, Manuscript Published by The Federalist Society for Law and Public Policy Studies (2004), available at <http://www.fed-soc.org/pdf/Newton.pdf> (accessed Dec. 28, 2004).

¹⁶ Transcript of Presidential News Conference, December 15, 2003.

IV. THE IMPORTANCE OF THE COURT'S DECISION IN THIS CASE

Like the establishment of the Iraqi Special Tribunal and the Supreme Court's decisions in *Rasul v. Bush*, 124 S. Ct. 2686 (2004), *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), and *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004), the decision of this Court in this case will be read throughout the world as evidencing the views of the United States as to the legal order appropriate to prosecution of war crimes, crimes against humanity, and the global war against terror. Judges, legislators, and executive officials in many countries will view the decision as indicating what protections for the accused are understood by the United States to be required under international law and as a matter of fundamental due process.

As Iraq moves forward with the trials of Saddam Hussein and other members of his regime, legislators in the newly-elected government and judges on the Iraqi Special Tribunal inevitably will interpret the decision of this Court as a signal of what the United States and its Coalition partners meant by requiring implementation of the Statute to comply with international standards of justice, CPA Order 48 § 2(2), and of what the United States expects with respect to the principles of the rule of law. As has already been recognized by the district court in this case, by creating the

Guantanamo commission that would try Mr. Hamdan without these fundamental protections,

[t]he government has asserted a position starkly different from the positions and behavior of the United States in previous conflicts, one that can only weaken the United States' own ability to demand application of the Geneva Conventions to Americans captured during armed conflicts abroad. ... [O]ther governments have already begun to cite the United States' Guantanamo policy to justify their own repressive policies

2004 U.S. Dist. LEXIS 22724 at *28-*29. This concern is of particular moment in Iraq because, in transferring sovereignty to the transitional government in Iraq in June 2004, the United States and its Coalition partners relinquished residual authority over implementation of the Tribunal Statute. See CPA Order No. 100, CPA/ORD/28 June 2004/100, § 19(a) (rescinding § 1(6) of CPA Order 48). If the United States permits itself to abrogate the fundamental rights of presence and confrontation in trying Salim Ahmed Hamdan, the Iraqi legislature to be elected in January 2005, as sovereign, may amend the Tribunal Statute, or Tribunal judges may make corresponding changes to the rules of evidence and procedure for the Tribunal that are still being drafted.

In short, if the decision of the district court is not affirmed, the rule of law may be threatened in Iraq and elsewhere. It is therefore crucial that the Court take into account the implications of its decision for Iraq, the need to

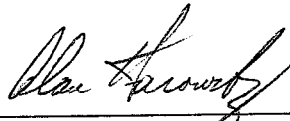
advance fundamental rights under international law, and the need for consistency with the policy goals motivating establishment of the Special Tribunal in Iraq.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully requests that the decision of the district court be affirmed.

Respectfully submitted,

Dated: December 29, 2004



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APPENDIX A

CPA ORDER NO. 48 AND ANNEXED STATUTE OF THE IRAQI SPECIAL TRIBUNAL

COALITION PROVSIONAL AUTHORITY ORDER NUMBER 48

DELEGATION OF AUTHORITY REGARDING AN IRAQI SPECIAL TRIBUNAL

Pursuant to my authority as Administrator of the Coalition Provisional Authority (CPA), and under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolution 1483 (2003), Resolution 1500 (2003), and Resolution 1511 (2003),

Noting the call in U.N. Security Council Resolution 1483 for accountability for the crimes and atrocities committed by the previous Iraqi regime,

Acting on the appeal by the U.N. Security Council in Resolution 1483 to Member States to deny safe haven to those members of the previous Iraqi regime who are alleged to be responsible for crimes and atrocities and to support actions to bring them to justice;

Acknowledging that the Governing Council, reflecting the general concerns and interests of the Iraqi people, has expressed a desire to establish a Special Tribunal to try members of the Ba'athist regime accused of atrocities and war crimes,

Determined to prevent any threat to public order by revenge actions or vigilantism and to promote the rule of law in accordance with applicable international law,

I hereby promulgate the following:

Section 1 Delegation of Authority

- 1) The Governing Council is hereby authorized to establish an Iraqi Special Tribunal (the "Tribunal") to try Iraqi nationals or residents of Iraq accused of genocide, crimes against humanity, war crimes or violations of certain Iraqi laws, by promulgating a statute, the proposed provisions of which have been discussed extensively between the Governing Council and the CPA and are set forth at Appendix A.
- 2) The statute shall establish the Tribunal, including its chambers, and set forth its jurisdiction, competence, and organization:
- 3) The statute shall provide rules for the appointment of qualified judges, prosecutors, and a director of administration.
- 4) The Governing Council shall be authorized to promulgate elements of crimes, the provisions of which shall be coordinated with the CPA.

5) The Governing Council may delegate to the judges of the Tribunal the power to promulgate rules of procedure, the provisions of which shall be coordinated with the Governing Council and the CPA.

6) The Administrator reserves the authority to alter the statute creating the Iraqi Special Tribunal, or any elements of crimes or rules of procedure developed for the Tribunal, if required in the interests of security.

Section 2

Terms and Conditions

The authority delegated under Section 1 of this Order shall be subject to the following terms and conditions:

1) The Governing Council will ensure that it promulgates a description of the elements that will apply to the crimes listed in the statute establishing the Tribunal, and that these elements are consistent with Iraqi law, as modified by CPA Orders, and international law.

2) The Governing Council will ensure that the Tribunal meets, at a minimum, international standards of justice.

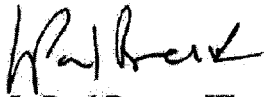
3) In the event that, prior to the final transfer of governance authority to the transitional Iraqi administration, a conflict arises between any promulgation by the Governing Council or any ruling or judgment by the Tribunal and any promulgation of the CPA, the promulgation of the CPA shall prevail.

4) Non-Iraqi nationals may be appointed as judges of the Special Tribunal.

Section 3

Effective Date

This Order shall enter into force on the date of signature and shall remain in force unless rescinded in writing by me or until the establishment of a representative, internationally recognized government of Iraq.

 12/10/03
L. Paul Bremer III
Administrator

THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL

SECTION ONE

The Establishment, Organization and Competence of the Tribunal

PART ONE

Establishment and Competence of the Tribunal

Article 1.

- a) A Tribunal is hereby established and shall be known as The Iraqi Special Tribunal (the "Tribunal"). The jurisdiction and functioning of the Tribunal and its associated bodies as defined in Article 3 below shall be governed by the provisions of this Statute. The Tribunal shall be an independent entity and not associated with any Iraqi government departments.
- b) The Tribunal shall have jurisdiction over any Iraqi national or resident of Iraq accused of the crimes listed in Articles 11 to 14 below, committed since July 17, 1968 and up until and including May 1, 2003, in the territory of the Republic of Iraq or elsewhere, including crimes committed in connection with Iraq's wars against the Islamic Republic of Iran and the State of Kuwait. This includes jurisdiction over crimes listed in Articles 12 and 13 committed against the people of Iraq (including its Arabs, Kurds, Turcomans, Assyrians and other ethnic groups, and its Shi'ites and Sunnis) whether or not committed in armed conflict.
- c) The Tribunal shall only have jurisdiction over natural persons.

Article 2.

The Tribunal shall have its seat in the City of Baghdad, or, following a written proposal made by the President of the Tribunal, in any other Governorate in Iraq as determined by the Governing Council or the Successor Government.

PART TWO

Organization of the Tribunal

Article 3.

- a) The Tribunal's judiciary shall consist of the following:
 - 1. one or more Trial Chambers;
 - 2. an Appeals Chamber, which shall have the power to review the decisions of the Trial Chambers referred to above; and
 - 3. the Tribunal Investigative Judges.
- b) The Tribunal will also have a Prosecutions Department.
- c) The Tribunal will also have an Administration Department, which shall provide administrative services to the Tribunal's judiciary and the Prosecutions Department.

PART THREE
The Trial Chambers and the Appeals Chamber

Article 4.

- a) The Chambers shall be composed of permanent independent judges, and independent reserve judges.
- b) Each Trial Chamber shall consist of five permanent judges.
- c) (i) The Appeals Chamber shall be composed of nine members. Once appointed the Appeals Chamber shall select one of its members to fill the position of President of the Appeals Chamber. No member of any Trial Chamber can simultaneously be a member of the Appeals Chamber or a Tribunal Investigative Judge.
(ii) The President of the Appeals Chamber shall also be the President of the Tribunal and will overview the administrative and financial aspects of the Tribunal.
- d) The Governing Council or the Successor Government, if it deems necessary, can appoint non-Iraqi judges who have experience in the crimes encompassed in this statute, and who shall be persons of high moral character, impartiality and integrity.

PART FOUR
Qualification and Selection of the Judges

Article 5.

- a) The permanent and reserve judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required for appointment to the highest judicial offices. In the overall composition of the Chambers, due account shall be taken of the experience of the judges in criminal law and trial procedures.
- b) Iraqi candidates for permanent and reserve judges in the Trial Chambers need not be serving judges, and could be lawyers and jurists (who should also have the necessary experience and qualifications). Judges in the Appeals Chamber must be serving or former judges.
- c) Judges are to be nominated and appointed by the Governing Council or the Successor Government, after consultation with the Judicial Council.
- d) The permanent judges of each Trial Chamber shall elect a Presiding Judge from amongst their number, who shall oversee the work of the Trial Chamber as a whole.
- e) The permanent and reserve judges shall be appointed for a term of five years. The terms and conditions of service shall be those of the judges of the Iraqi judicial system as set out in the Law Number 160 of 1979 (Judicial Organization Law), save that matters of compensation shall be set by the Governing Council or the Successor Government in light of the increased risks associated with the position.

f) (1) A judge shall be disqualified for any of the following reasons:

- i. He or she has a criminal record including a felony unless the felony is a political or false charge made by the Ba'ath Party regime;
- ii. He or she has made a material misrepresentation; or
- iii. He or she fails to carry out his or her duties without good reason.

(2) The decision to disqualify a judge shall be taken by the majority of permanent judges of the Tribunal after conducting appropriate investigations.

(3) The decision to disqualify the President shall be taken by the Governing Council or the Successor Government.

PART FIVE

The Presidency of the Tribunal

Article 6.

a) The President shall:

- (1) chair the proceedings of the Appeals Chamber.
- (2) assign the judges to particular Trial Chambers;
- (3) assign, from time to time, any reserve judges to a Trial Chamber; and
- (4) have overall responsibility for the administration of the Tribunal.

b) The President of the Tribunal shall be required to appoint non-Iraqi nationals to act in advisory capacities or as observers to the Trial Chambers and to the Appeals Chamber. The role of the non-Iraqi nationals shall be to provide assistance to the judges with respect to international law and the experience of similar tribunals (whether international or otherwise), and to monitor the protection by the Tribunal of general due process of law standards. In appointing such non-Iraqi experts, the President of the Tribunal shall be entitled to request assistance from the international community, including the United Nations.

c) The non-Iraqi advisors and observers referred to in the above paragraph shall also be persons of high moral character, impartiality and integrity. In this regard, it would be preferable that such non-Iraqi advisor or observer shall have the following experience: (i) such person shall have acted in either a judicial or prosecutorial capacity in his or her respective country, or (ii) such person shall have experience in international war crimes trials or tribunals.

PART SIX

Tribunal Investigative Judges

Article 7.

a) The Tribunal Investigative Judges shall be appointed in order to investigate individuals for the commission of crimes stipulated in Articles 11 to 14.

b) Tribunal Investigative Judges are to be nominated and appointed by the Governing Council or the Successor Government, after consultation with the Judicial Council.

c) There shall be up to twenty permanent Tribunal Investigative Judges, and up to ten reserve investigative judges.

d) The permanent and reserve investigative judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required for appointment to the highest judicial offices. In the selection of investigative judges, due account shall be taken of the experience of the judges in criminal law and trial procedures.

e) The Tribunal Investigative Judges shall be headed by a Chief Tribunal Investigative Judge, who shall be chosen by the Tribunal Investigative Judges from among them.

f) The Chief Tribunal Investigative Judge shall assign cases to individual tribunal investigative judges.

g) Each Office of the Tribunal Investigative Judge shall be composed of the Tribunal Investigative Judge and such other qualified staff as may be required.

h) In accordance with Iraqi criminal procedure, each Tribunal Investigative Judge shall have the power to issue subpoenas, arrest warrants and indictments with respect to individuals that they are investigating.

i) Each Tribunal Investigative Judge may gather evidence from whatever source he considers suitable.

j) Each Tribunal Investigative Judge shall act independently as a separate organ of the Tribunal. He or she shall not seek or receive instructions from any Governmental Department, or from any other source, including the Governing Council or the Successor Government.

k) The decisions or orders of the Tribunal Investigative Judge can be appealed to the Appeals Chamber within fifteen days of the notification or deemed notification of the decision.

l) Each Tribunal Investigative Judge shall be appointed for a term of three years. The terms and conditions of service shall be those of the investigative judges of the Iraqi judicial system as set out in Law Number 160 of 1979 (Judicial Organization Law), save that matters of compensation shall be set by the Governing Council or the Successor Government in light of the increased risks associated with the position.

m) (1) Any Tribunal Investigative Judge shall be disqualified for any of the following reasons:

- i) He or she has a criminal record including a felony unless the felony is a political or false charge made by the Ba'ath Party regime;
- ii) He or she has made a material misrepresentation; or
- iii) He or she fails to carry out his or her duties without good reason.

(2) The decision to disqualify a Tribunal Investigative Judge shall be taken by the majority of permanent judges of the Tribunal, after conducting appropriate investigations.

n) The Chief Tribunal Investigative Judge shall be required to appoint non-Iraqi nationals to act in advisory capacities or as observers to the Tribunal Investigative Judges. The role of the non-Iraqi nationals and observers shall be to provide assistance to the Tribunal Investigative Judges with respect to the investigations and prosecution of cases covered by the this Statute (whether in an international context or otherwise), and to monitor the protection by the Tribunal Investigative Judges of general due process of law standards. In appointing such advisors, the Chief Tribunal Investigative Judge shall be entitled to request assistance from the international community, including the United Nations.

o) The non-Iraqi advisors and observers referred to in this Article shall also be persons of high moral character, impartiality and integrity. In this regard, it would be preferable that such non-Iraqi advisor or observer shall have the following experience: (i) such person shall have acted in either a judicial or prosecutorial capacity in his or her respective country, or (ii) such person shall have experience in international war crimes trials or tribunals.

SECTION TWO

Other Departments of the Tribunal

PART ONE

The Prosecutions Department

Article 8.

a) The Prosecutions Department shall be responsible for the prosecution of persons responsible for crimes within the jurisdiction of the Tribunal.

b) Each Prosecutor shall act independently. He or she shall not seek or receive instructions from any Governmental Department or from any other source, including the Governing Council or the Successor Government.

c) The Prosecutions Department shall consist of up to twenty Prosecutors.

d) Prosecutors are to be nominated and appointed by the Governing Council or the Successor Government after consultation with the Judicial Council.

e) The Prosecution Department shall be headed by a Chief Prosecutor, who shall be selected from among the Prosecutors.

f) (1) A prosecutor shall be disqualified for any of the following reasons:

- i) He or she has a criminal record including a felony unless the felony is a political or false charge made by the Ba'ath Party regime;
- ii) He or she has made a material misrepresentation; or
- iii) He or she fails to carry out his or her duties without good reason.

(2) The decision to disqualify a Prosecutor shall be taken by the Chief Prosecutor, after conducting appropriate investigations.

g) Each Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.

h) The Chief Prosecutor shall assign individual cases to a Prosecutor. Such Prosecutor shall have the right to be involved in the investigative stages of a case and shall be the individual who prosecutes such case, consistent with the powers granted to prosecutors pursuant to Law Number 23 of 1971 (Iraqi Criminal Procedure Law).

i) Each Prosecutor shall be appointed for a term of three years. The terms and conditions of service shall be those of prosecutors of the Iraqi judicial system as set out in Law Number 159 of 1979 (The Law of Prosecutors), save that matters of compensation shall be set by the Governing Council or the Successor Government.

j) The Chief Prosecutor shall be required to appoint non-Iraqi nationals to act in advisory capacities or as observers to the prosecutors. The role of the non-Iraqi nationals and observers shall be to provide assistance to the prosecutors of the Tribunal with respect to the investigations and prosecution of cases covered by this Statute (whether in an international context or otherwise), and to monitor the performance of the Prosecutor. In appointing such advisors, the Chief Prosecutor shall be entitled to request assistance from the international community, including the United Nations.

k) The non-Iraqi advisors and observers referred to in this Article shall also be persons of high moral character, impartiality and integrity. In this regard, it would be preferable that such non-Iraqi advisor or observer shall have the following experience: (i) such person shall have acted in a prosecutorial capacity in his or her respective country, or (ii) such person shall have experience in international war crimes trials or tribunals.

PART TWO
The Administration Department

Article 9.

- a) The Administration Department shall consist of a Director of the Administration Department and such other staff as may be required.
- b) The Administration Department shall be responsible for the administration and servicing of the Tribunal and the Prosecutions Department.
- c) The Director of the Administration Department shall initially be appointed by the Governing Council or the Successor Government. He or she shall serve for a three year term and be eligible for reappointment. The terms and conditions of service of the Director of the Administration Department shall be those of a General Director in an Iraqi government department .
- d) The staff of the Administration Department shall be appointed by the Director of the Administration Department.
- e) The Director of the Administration Department shall appoint a public relations expert to the position of spokesman of the Tribunal. Such spokesman shall give regular briefings to the press and the public at large with respect to the developments relating to the Tribunal.

SECTION THREE
Jurisdiction and Crimes

PART ONE
Jurisdiction of the Tribunal

Article 10.

The Tribunal shall have jurisdiction over any Iraqi national or resident of Iraq accused of the crimes listed in Articles 11 - 14, committed since July 17, 1968 and up and until May 1, 2003, in the territory of Iraq or elsewhere, namely:

- a) The crime of genocide;
- b) Crimes against humanity;
- c) War crimes; or
- d) Violations of certain Iraqi laws listed in Article 14 below.

PART TWO
The Crime of Genocide

Article 11.

- a) For the purposes of this Statute and in accordance with the Convention on the Prevention and Punishment of the Crime of Genocide, dated December 9, 1948, as ratified by Iraq on January 20, 1959, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

1. killing members of the group;
2. causing serious bodily or mental harm to members of the group;
3. deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
4. imposing measures intended to prevent births within the group; and
5. forcibly transferring children of the group to another group.

b) The following acts shall be punishable:

1. genocide;
2. conspiracy to commit genocide;
3. direct and public incitement to commit genocide;
4. attempt to commit genocide; and
5. complicity in genocide.

PART THREE

Crimes Against Humanity

Article 12.

a) For the purposes of this Statute, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

1. Murder;
2. Extermination;
3. Enslavement;
4. Deportation or forcible transfer of population;
5. Imprisonment or other severe deprivation of physical liberty in violation of fundamental norms of international law;
6. Torture;
7. Rape, sexual slavery, enforced prostitution, forced pregnancy, or any other form of sexual violence of comparable gravity;
8. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Tribunal;
9. Enforced disappearance of persons; and
10. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

b) For the purposes of paragraph a):

1. "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in the above

paragraph against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack;

2. "Extermination" includes the intentional infliction of conditions of life, such as the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

3. "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

4. "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

5. "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions;

6. "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity; and

7. "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, the State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

PART FOUR

War Crimes

Article 13.

For the purposes of this Statute, "war crimes" means:

a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

1. Willful killing;
2. Torture or inhuman treatment, including biological experiments;
3. Willfully causing great suffering, or serious injury to body or health;
4. Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
5. Willfully denying the right of a fair trial to a prisoner of war or other protected person;
6. Compelling a prisoner of war or other protected person to serve in the forces of a hostile power;

7. Unlawful confinement;
8. Unlawful deportation or transfer; and
9. Taking of hostages.

b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

1. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
2. Intentionally directing attacks against civilians objects, that is, objects which are not military objectives;
3. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a peacekeeping mission in accordance with the Charter of the United Nations or in a humanitarian assistance mission, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
4. Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
5. Intentionally launching an attack in the knowledge that such attack will cause widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
6. Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
7. Killing or wounding a combatant who, having laid down his arms or having no longer means of defense, has surrendered at discretion;
8. Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
9. The transfer, directly or indirectly, by the Government of Iraq or any of its instrumentalities (including by an instrumentality of the Arab Socialist Ba'ath Party), of parts of its own civilian population into any territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
10. Intentionally directing attacks against buildings that are dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
11. Subjecting persons of another nation to physical mutilation or to medical or scientific experiments of any kind that are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

12. Killing or wounding treacherously individuals belonging to the hostile nation or army;
13. Declaring that no quarter will be given;
14. Destroying or seizing the property of an adverse party unless such destruction or seizure be imperatively demanded by the necessities of war;
15. Declaring abolished, suspended or inadmissible in a court of law, or otherwise depriving, the rights and actions of the nationals of the adverse party;
16. Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
17. Pillaging a town or place, even when taken by assault;
18. Employing poison or poisoned weapons;
19. Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
20. Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
21. Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
22. Committing rape, sexual slavery, enforced prostitution, forced pregnancy, or any other form of sexual violence of comparable gravity;
23. Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
24. Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
25. Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under international law; and
26. Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

c) In the case of an armed conflict, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:

1. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
2. Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
3. Taking of hostages; and
4. The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

d) Serious violations of the laws and customs of war applicable in armed conflict not of an international character, within the established framework of international law, namely, any of the following acts:

1. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
2. Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
3. Intentionally directing attacks against personnel, installations, material, units, or vehicles involved in a peacekeeping mission in accordance with the Charter of the United Nations or in a humanitarian assistance mission, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
4. Intentionally directing attacks against buildings that are dedicated to religion, education, art, science, or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
5. Pillaging a town or place, even when taken by assault;
6. Committing rape, sexual slavery, enforced prostitution, forced pregnancy, or any other form of sexual violence of comparable gravity;
7. Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
8. Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
9. Killing or wounding treacherously a combatant adversary;
10. Declaring that no quarter will be given;
11. Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind that are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons; and
12. Destroying or seizing the property of an adversary, unless such destruction or seizure be imperatively demanded by the necessities of the conflict.

PART FIVE

Violations of Stipulated Iraqi Laws

Article 14.

The Tribunal shall have the power to prosecute persons who have committed the following crimes under Iraqi law:

- a) For those outside the judiciary, the attempt to manipulate the judiciary or involvement in the functions of the judiciary, in violation, *inter alia*, of the Iraqi interim constitution of 1970, as amended;

- b) The wastage of national resources and the squandering of public assets and funds, pursuant to, *inter alia*, Article 2(g) of Law Number 7 of 1958, as amended; and
- c) The abuse of position and the pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country, in accordance with Article 1 of Law Number 7 of 1958, as amended.

SECTION FOUR

Individual Criminal Responsibility

Article 15.

- a) A person who commits a crime within the jurisdiction of this Tribunal shall be individually responsible and liable for punishment in accordance with this Statute.
- b) In accordance with this Statute, and the provisions of Iraqi criminal law, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Tribunal if that person:
 - 1. Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
 - 2. Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
 - 3. For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
 - 4. In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - i. Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Tribunal; or
 - ii. Be made in the knowledge of the intention of the group to commit the crime;
 - 5. In respect of the crime of genocide, directly and publicly incites others to commit genocide;
 - 6. Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
- c) The official position of any accused person, whether as president, prime minister, member of the cabinet, chairman or a member of the Revolutionary Command Council, a member of the Arab Socialist Ba'ath Party Regional Command or Government (or an instrumentality of either) or as a responsible Iraqi Government official or member of the Ba'ath Party or in any other capacity, shall not relieve such person of criminal

responsibility nor mitigate punishment. No person is entitled to any immunity with respect to any of the crimes stipulated in Articles 11 to 14.

- d) The fact that any of the acts referred to in Articles 11 to 14 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to submit the matter to the competent authorities for investigation and prosecution.
- e) The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

SECTION FIVE

Rules of Procedure and Evidence

Article 16.

The President of the Tribunal shall draft rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters (including regulations with respect to the disqualification of judges or prosecutors), where the applicable law, including this Statute does not, or does not adequately provide for a specific situation. He shall be guided by the Iraqi Criminal Procedure Law. Such rules shall be adopted by a majority of the permanent judges of the Tribunal.

SECTION SIX

General Principles of Criminal Law

Article 17.

a) Subject to the provisions of this Statute and the rules made thereunder, the general principles of criminal law applicable in connection with the prosecution and trial of any accused person shall be those contained: (i) in Iraqi criminal law as at July 17, 1968 (as embodied in The Baghdadi Criminal Code of 1919) for those offenses committed between July 17, 1968 and December 14, 1969; (ii) in Law Number 111 of 1969 (the Iraqi Criminal Code), as it was as of December 15, 1969, without regard to any amendments made thereafter, for those offenses committed between December 15, 1969 and May 1, 2003; and (iii) and in Law Number 23 of 1971 (the Iraqi Criminal Procedure Law).

b) In interpreting Articles 11 to 13, the Trial Chambers and the Appellate Chamber may resort to the relevant decisions of international courts or tribunals as persuasive authority for their decisions.

c) Grounds for exclusion of criminal responsibility under the said Iraqi Criminal Code shall be interpreted in a manner consistent with the Statute and with international legal obligations concerning the crimes within the jurisdiction of the Tribunal.

- d) The crimes stipulated in Articles 11 to 14 shall not be subject to any statute of limitations.

SECTION SEVEN

Investigations and Indictment

Article 18.

- a) The Tribunal Investigative Judge shall initiate investigations *ex-officio* or on the basis of information obtained from any source, particularly from the police, and governmental and non-governmental organizations. The Tribunal Investigative Judge shall assess the information received or obtained and decide whether there is sufficient basis to proceed.
- b) The Tribunal Investigative Judge shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Tribunal Investigative Judge may, as appropriate, request the assistance of the relevant governmental authorities concerned, who shall be required to provide full co-operation with the request.
- c) If questioned by a Tribunal Investigative Judge, the suspect shall be entitled to be assisted by counsel of his or her own choice, including the right to have legal assistance assigned to him or her without payment by him or her in any such case if he or she does not have sufficient means to pay for it. The suspect is entitled to have non-Iraqi legal representation, so long as the principal lawyer of such suspect is Iraqi.
- d) Upon a determination that a *prima facie* case exists, the Tribunal Investigative Judge shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute.

PART ONE

Review of Indictment

Article 19.

- a) If the Chief Tribunal Investigative Judge is satisfied that a *prima facie* case has been established by the Tribunal Investigative Judge, then he/she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed without prejudice.
- b) Upon confirmation of an indictment, the Tribunal Investigative Judge may, at the request of the Chief Tribunal Investigative Judge, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

PART TWO
Rights of the Accused

Article 20.

- a) All persons shall be equal before the Tribunal.
- b) Everyone shall be presumed innocent until proven guilty before the Tribunal in accordance with the law.
- c) In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of the Statute and the rules of procedure made hereunder.
- d) In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to a fair hearing conducted impartially and to the following minimum guarantees:
 - 1. to be informed promptly and in detail of the nature, cause and content of the charge against him;
 - 2. to have adequate time and facilities for the preparation of his defense and to communicate freely with counsel of his own choosing in confidence. The accused is entitled to have non-Iraqi legal representation, so long as the principal lawyer of such accused is Iraqi;
 - 3. to be tried without undue delay;
 - 4. to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - 5. to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute and Iraqi law; and
 - 6. not to be compelled to testify against himself or to confess guilt, and to remain silent, without such silence being a consideration in the determination of guilt or innocence.

SECTION EIGHT
Trial Proceedings

Article 21.

a) A person against whom an indictment has been issued shall, pursuant to an order or an arrest warrant of the Tribunal Investigative Judge, be taken into custody, immediately informed of the charges against him and transferred to the Tribunal.

b) The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with this Statute and the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

c) The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea.

d) The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence. The decision to close the proceedings shall be exercised on a very limited basis.

Article 22.

The Tribunal shall, in its rules of procedure and evidence, provide for the protection of victims and witnesses. Such protection measures shall take into account the rights of the accused and shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the identity of the victim or witness.

Article 23.

a) The Trial Chambers shall pronounce judgments and impose sentences and penalties on persons convicted of crimes within the jurisdiction of the Tribunal.

b) The judgment shall be rendered by a simple majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 24.

a) The penalties that shall be imposed by the Tribunal shall be those prescribed by Iraqi law (especially Law Number 111 of 1969 of the Iraqi Criminal Code), save that for the purposes of this Tribunal, sentences of life imprisonment shall mean the remaining natural life of the person.

b) Subject to paragraph a) above, the penalties for crimes under Article 14 shall be those prescribed under the relevant provisions of Iraqi law

c) The penalty for crimes under Articles 11 to 13 shall be determined by the Trial Chambers, taking into account the factors contained in paragraph d) and e) below.

d) A person convicted of:

1. An offence involving murder or rape as defined under Iraqi law; or
2. An offence ancillary to such offence of murder or rape,

shall be dealt with as for an offence of, as the case may be, murder or rape or the corresponding ancillary offences in relation to murder or rape.

e) The penalty for any crimes under Articles 11 to 13 which do not have a counterpart under Iraqi law shall be determined by the Trial Chambers taking into account such factors as the gravity of the crime, the individual circumstances of the convicted person and relevant international precedents.

f) The Trial Chambers may order the forfeiture of proceeds, property or assets derived directly or indirectly from that crime, without prejudice to the rights of the *bona fide* third parties.

g) In accordance with Article 307 of the Iraqi Criminal Procedure Code, the Tribunal has authority to confiscate any goods prohibited by law regardless of whether the case has been discharged for any lawful reason.

SECTION NINE

Review and Appeals Proceedings

PART ONE

Appellate Proceedings

Article 25.

a) The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

1. an error on a question of law invalidating any decision;
2. an error of procedure; or
3. an error of material fact which has occasioned a miscarriage of justice.

b) The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

c) Where a verdict of acquittal is reversed by the Appeals Chamber, the case shall be referred back to a Trial Chamber for retrial.

PART TWO

Review Proceedings

Article 26.

a) Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the Tribunal an application for review of the judgment.

b) The Appeals Chamber shall reject the application if it considers it to be unfounded. If it determines that the application has merit, it may, as appropriate:

1. Reconvene the original Trial Chamber;
 2. Constitute a new Trial Chamber; or
 3. Retain jurisdiction over the matter,
- with a view to, after hearing the parties, arriving at a determination on whether the judgment should be revised.

SECTION TEN

Enforcement of Sentences

Article 27.

Sentences shall be carried out by the legal system of Iraq in accordance with its laws.

SECTION ELEVEN

General Principles and Other Matters

Article 28.

The judges, investigative judges, prosecutors and the Director of the Administration Department shall be Iraqi nationals, except as provided for in Article 4(d).

Article 29.

a) The Tribunal and the national courts of Iraq shall have concurrent jurisdiction to prosecute persons for those offences prescribed in Article 14 that fall within the jurisdiction of the Tribunal.

b) The Tribunal shall have primacy over all other Iraqi courts with respect to the crimes stipulated in Articles 11 to 13.

c) At any stage of the procedure, the Tribunal may demand of any other Iraqi court to transfer any case being tried by it involving any crimes stipulated in Articles 11 to 14 to the Tribunal, and such court shall be required to transfer such case.

Article 30.

a) No person shall be tried before any other Iraqi court for acts for which he or she has already been tried by the Tribunal, in accordance with Articles 300 and 301 of the Iraqi Criminal Procedure Code.

b) A person who has been tried by any Iraqi court for acts constituting crimes within the jurisdiction of the Tribunal may be subsequently tried by the Tribunal only if the Tribunal determines that the previous court proceedings were not impartial or independent, were designed to shield the accused from international or Iraqi criminal responsibility, or the case was not diligently prosecuted, provided that the requirements of Article 303 of the Iraqi Criminal Procedure Code are met or one of the conditions contained in Article 196 of the Iraqi Civil Procedure Code apply.

c) In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Tribunal shall take into account the extent to which any penalty imposed by an Iraqi court on the same person for the same act has already been served.

Article 31.

a) The Tribunal, the judges, the Tribunal Investigative Judges, the Prosecutors, the Director of the Administration Department and their staffs shall have immunity from civil suits for their official acts.

b) Other persons, including the accused, required at the seat of the Tribunal shall be accorded such treatment as is necessary for the proper functioning of the Tribunal.

Article 32.

For purposes of this statute, the "Governing Council" shall mean the Governing Council of Iraq established on July 13, 2003. The powers conferred on the Governing Council in this Statute shall be transferred to the executive authority in any future government (the "Successor Government") established following the disbanding of the Governing Council.

Article 33.

No officer, prosecutor, investigative judge, judge or other personnel of the Tribunal shall have been a member of the Ba'ath Party.

Article 34.

Arabic shall be the official language of the Tribunal.

Article 35.

The expenses of the Tribunal shall be borne by the regular budget of the Government of Iraq.

Article 36.

The President of the Tribunal shall submit an annual report of the Tribunal to the Governing Council or the Successor Government.

Article 37.

The Governing Council or the Successor Government has the powers to establish other rules and procedures in order to implement this Statute.

Article 38.

This law shall become effective on the 10th day of December, 2003 and shall be published in the Official Gazette.

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE**

I certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 14 point and, according to the word count feature of the word processing program used to prepare this brief, contains 5,470 words in its body inclusive of footnotes (which does not exceed the applicable 7,000 word limit).



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**CERTIFICATE OF COMPLIANCE WITH RULE 29 OF THE
FEDERAL RULES OF APPELLATE PROCEDURE AND D.C.
CIRCUIT RULE 29 AS TO BRIEFS FILED BY *AMICUS CURIAE***

I certify, pursuant to Fed. R. App. P. 29(a) and D.C. Circuit Rule 29(b), that on December 18, 2004, counsel to the Appellee indicated that Appellee consents to the filing of this brief, and on December 22, 2004, counsel to Appellants, Robert M. Loeb, Esq., of the U.S. Department of Justice, indicated that Appellants consent to the filing of this brief. I also certify, pursuant to D.C. Circuit Rule 29(d), that the Iraqi Special Tribunal presents a unique precedent that does not fall within the scope of other *amicus curiae* briefs I know have been or may be filed. Therefore, the presentation in this brief cannot meaningfully be merged with other *amicus curiae* briefs, especially in the accelerated briefing period set for this case.



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CERTIFICATE OF SERVICE

I certify that on this December 29, 2004, I have caused the original of the foregoing brief and 14 copies to be sent by hand delivery to the Court for filing, and 2 copies of the same brief to be served upon the following counsel of record by hand delivery or in the specified manner requested:

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