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Regime Change and the Restoration of the Rule of Law in Iraq

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Introduction

After Allied forces overthrew Hitler's regime at the end of World War II, the US blueprint for running Germany included dismantling the Nazi Party, dismissing Nazis from government employment, prosecuting Hitler and his officials as war criminals, dissolving all German courts and forbidding any political activity without permission from US military authorities.

Following the overthrow of Saddam Hussein's regime in 2003, the United States tried to use the same strategy in Iraq, albeit using a new formula. Coalition Provisional Authority (CPA) Order No. 1¹ was issued to de-Baathificate² Iraqi society. CPA Order No. 2³ dissolved the Iraqi intelligence and security agencies, and the armed forces, as well as dismissed the Baathist employees and members of those organizations. Subsequently, CPA Order No. 15 was issued with the stated purpose of reforming the "Iraqi justice system [which] has been subjected to political interference and corruption over the years of Iraqi Baath Party rule."⁴ This order established the Judicial Review Committee, which dismissed a large number of judges and prosecutors.

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On September 13, 2003 the CPA issued Order No. 35,⁵ which re-established the Council of Judges that had existed prior to the Hussein regime, and charged it with the supervision of Iraq's judicial and prosecutorial systems. Order No. 35 gave the Council of Judges independence from the Ministry of Justice in terms of its budget and authority. At the end of 2003, the CPA issued Order No. 48,⁶ which gave the Governing Council⁷ the authority to establish an Iraqi Special Tribunal.⁸ These were important steps in the transitional justice process. Even though the strategy used in Iraq was modeled after the successful US policy in post-World War II Germany, policies in Iraq failed to take into consideration the history of the country following the assassination of the Iraqi royal family in 1958.

Iraq's modern history is full of stories that illustrate the lack of the rule of law. In 1958 General Abdul Kareem Qassim ended the royal regime, which had been in power since 1921. He executed the king and his family without trial, as well as Prime Minister Nori Al-Saed, who is today considered one of the most respected politicians of that period. Qassim changed Iraq from a monarchy to a republic. The royal family's executions were illegal and based on a desire for revenge, a trait that many believe is deeply entrenched in Iraqi culture. History repeated itself five years later when a group of Baath Party members and military officers headed by General Abdul Salam Arif overthrew the regime. Qassim and his officials were executed. Qassim's body was thrown in the Tigris River and never found.

The Baath Party conducted another coup in 1968, when General Ahmed Hassan Al-Baker took power. Then in July 1979, Saddam Hussein became president when he overthrew General Al-Baker. Hussein's reign was bloody from the start: on his first day in office he held a meeting with high-level Baath Party leaders and accused certain members of attempting a coup. He asked them to leave the room. They were never seen again; rumors circulated that they had been executed.

During Hussein's presidency, Iraqis suffered tremendously. One of the hardships was the deportation of Iraqis of Iranian origin. Numerous families were sent back to Iran under difficult and dangerous circumstances. These families were left on the border during the Iran-Iraq war; that was the first step to dividing Iraqis based on race. Older Iraqis of Iranian origins were sent back to Iran, while younger men, aged eighteen to forty, were arrested and executed.⁹ The government seized and sold all their property and belongings.

In 1988 the regime used chemical weapons against Kurdish villages because they had allegedly supported Iran in its war with Iraq; those allegations were later proven wrong. The Al-Anfal attack on the Kurds began in February 1988 and ended in mid-September despite the fact that a ceasefire was announced on August 8, 1988. The fact that the attacks continued even after the ceasefire was announced made it clear that the operation was intended to annihilate the Kurds.¹⁰

The cruelest page in Iraq's history was written on a single day in March 1991, when Hussein quelled an uprising in the south by killing, it is estimated, over two thousand men, women and children, and burying them in mass graves.¹¹ These killings led to suppressed anger and a desire for revenge in the hearts of the Shiites and the Kurds.

After the fall of Hussein's regime in 2003, it was important to find a salve for the wounds the Hussein era had wrought.

The Judicial System in Iraq

Reliable judicial institutions are critical to developing stable nations, and establishing and expanding the rule of law. In Iraq, however, the role of judicial institutions is sometimes confusing to the public because before 2003 many courts were not part of the judiciary or because the Ministry of Justice circumvented the judicial system entirely in applying its own concepts of justice. Outside the judicial system, courts could be found in the Ministry of Interior, the General Security Agency and the intelligence agencies. These courts often answered to the president's office alone.

Because the Iraqi legal system is so complex, it is useful to review the judicial system as it existed prior to 2003, and then address the changes that have occurred since Saddam's overthrow.

The Judicial System before 2003

Iraq's temporary constitution of 1970¹² referred to the judicial system in only two simple, vague articles in chapter 4. Article 60 addressed the types of courts and procedures for appointing judges and for their retirement, and Article 61 addressed the General Prosecutor Department.

Civil Procedures and Action Law No. 83 of 1969¹³ categorized the types of courts in Articles 31 through 35 as the Courts of First Instance, including the Courts of Personal Status (for Muslims) and Courts of Personal Issues (for non-Muslims); the Courts of Appeal; and the Courts of Cassation, the highest courts in Iraq.

According to Article 137 of Criminal Procedures Code Law No. 23 of 1971,¹⁴ the criminal courts included the Courts of Misdemeanor, Courts of Felony and Courts of Cassation (the appellate courts). Articles 1 through 136 explained the authority of investigative judges and the procedures to be followed. Juvenile court procedures were covered in Articles 233 through 242.

It was not until enactment of Judicial Organization Law No. 160 in 1979¹⁵ that courts were categorized through Article 11 into ten civil and criminal courts, including Juvenile Courts, Investigative Courts and Labor Courts. At the same time,

the law clarified that the Courts of Appeal (also called Courts of Cassation) are the highest courts of Iraq. In addition to these courts, there were “special courts” that were independent from the Council of Justice¹⁶ and the Ministry of Justice. Most of these courts were established to serve for a temporary purpose, such as the court established in 1970 to prosecute Mohammed Al-Madhlum and other defendants for allegedly conducting a coup attempt. Other special courts, such as those associated with the Ministry of Interior and the General Security Agency, were permanent. Their decisions were usually sent to the president’s office, not to the Court of Cassation.

The procedures for the Council of Justice’s courts included investigation, trial and appeal for criminal cases; and first-degree court session, Supreme, and cassation for civil cases. The special courts, which were all criminal courts connected to the Revolutionary Command Council,¹⁷ handled political cases, and their decisions were final. However, a copy of the decision would be sent to the president’s office for approval if the verdict was the death penalty. In all other cases the decision was sent for review only.

The system continued to function in this manner until the regime was overthrown in April 2003.

The Judicial System after 2003

After the fall of the Hussein regime and the establishment of the CPA, US Ambassador Paul Bremer, the CPA Administrator, issued CPA Order No. 35,¹⁸ which gave the Council of Judges independence from the Ministry of Justice in terms of budget and authority. The Council expanded the number of courts to one in each province and two in Baghdad, giving the country a total of sixteen. Kurdistan¹⁹ is the only region where courts do not fall under the Council of Judges. Following the first Gulf War, the three provinces in Kurdistan came under the protection of the international community and were semi-independent from the central government in terms of its judicial system. Kurdistan has its own separate Cassation Court and Courts of Appeal.

The requirements to be a judge in the Iraqi judicial system differ not only from those of the United States, but from those of most other judicial systems as well. Some nations elect their judges; others like Jordan, Egypt and Italy appoint them; while still others, like the United States, use both election and appointment. In order for an individual to be a judge in Iraq, he must fulfill the requirements found in Article 36(1) of the Iraq Judicial Organization Law. These requirements are to have graduated from law school with a bachelor of laws degree, have three years’ experience in the legal field, be no younger than twenty-eight or older than forty-five, be born of Iraqi parents, be married and have no criminal record.

An individual becomes a judge by applying to the Judicial Institute and being accepted into its internship program. That program consists of two years of working for and with judges in the morning and taking classes in the evening. To graduate the student must demonstrate his mastery of the legal and judicial sciences, and pass the required exams and tests.

There is an exception in Article 36(3) that allows a lawyer, who must be younger than forty-five, to be appointed as a judge by presidential order without the Judicial Institute degree with ten years of legal experience.

The Judicial Authority in Iraq

According to Article 89 of the Iraqi Constitution of 2005, “The federal juridical power is comprised of the Higher Juridical Council, the Federal Supreme Court, the Federal Court of Cassation, the Public Prosecution Department, the Judiciary Oversight Commission, and other federal courts that are regulated in accordance with the law.”²⁰

The Higher Juridical Council

The Higher Juridical Council oversees the affairs of the judicial committees.²¹ It is comprised of the following:

- The Court of Cassation: There are two Courts of Cassation now in Iraq; one is federal for all of Iraq except the northern region of Iraq, Kurdistan, where there is another just for that region.
- The Supreme Court: There are sixteen Supreme Courts all over Iraq except in Kurdistan.
- The Board of the Supreme Judicial Council: The Council is comprised of the following:
 - The President: He is the Chief Justice of the Judicial Authority in Iraq; therefore he is the Chief Justice of the Court of Cassation, the Federal Supreme Court and the Supreme Judicial Council.
 - The Chief Justice Deputies of the Federal Court of Cassation. There are five justices.
 - The sixteen Chief Judges of the Supreme Courts
 - The Director of the Public Prosecution Department
 - The Director of the Judiciary Oversight Commission
 - The Director of the State Council.

According to Article 91 of the Iraqi Constitution, the Higher Juridical Council exercises the following authorities:

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First: To manage the affairs of the judiciary and supervise the federal judiciary.

Second: To nominate the Chief Justice and members of the Federal Court of Cassation, the Chief Public Prosecutor, and the Chief Justice of the Judiciary Oversight Commission, and to present them to the Council of Representatives [the Parliament of Iraq] to approve their appointment.

Third: To propose the draft of the annual budget of the federal judiciary authority, and present it to the Council of Representatives for approval.

Federal Supreme Court

Article 93 provides that the Federal Supreme Court shall have jurisdiction over the following:

First: Overseeing the constitutionality of laws and regulations in effect.

Second: Interpreting the provisions of the Constitution.

Third: Settling matters that arise from the application of the federal laws, decisions, regulations, instructions, and procedures issued by the federal authority. The law shall guarantee the right of direct appeal to the Court to the Council of Ministers, those concerned individuals, and others.

Fourth: Settling disputes that arise between the federal government and the governments of the regions and governorates, municipalities, and local administrations.

Fifth: Settling disputes that arise between the governments of the regions and governments of the governorates.

Sixth: Settling accusations directed against the President, the Prime Minister and the Ministers, and this shall be regulated by law.

Seventh: Ratifying the final results of the general elections for membership in the Council of Representatives.

Eight[h]: A. Settling competency disputes between the federal judiciary and the judicial institutions of the regions and governorates that are not organized in a region.

B. Settling competency disputes between judicial institutions of the regions or governorates that are not organized in a region.

Decisions of the Federal Supreme Court are final and binding for all authorities.²²

Court of Cassation

According to Article 12 of Judicial Organization Law No. 160 of 1979,²³ the Court of Cassation is considered the highest federal court in Iraq. There was only one Court of Cassation in Iraq before the establishment of the Court of Cassation in Kurdistan. The Court of Cassation supervises all the courts of Iraq. There are no trials at the Court of Cassation; it reviews other courts' judgments.

The Court of Cassation has the following committees:

- The General Committee, which is comprised of the thirty judges of the Court of Cassation. These consist of the chief justice, five justice deputies and all justices in the Court of Cassation.
- The High Committee: It has seven justices—a chief and six justices.
- The Civil Committee: It has five justices—a chief and four justices.
- The Criminal Cases Committee: It has five justices—a chief and four justices.
- The Committee of Personal Status: It has three justices—a chief and two justices.

Public Prosecution Department

The Public Prosecution Department is regulated by Public Prosecution Law No. 159 of 1979.

The goals of the Public Prosecution Department are as follows:

- protect the State's order;
 - participate in revealing crimes;
 - supervise the exercise of the law, the regulations and the penalties;
 - evaluate current regulations;
 - monitor the criminal phenomena and recommend solutions to reduce them;
- and
- work on protecting the family, the cell of the society.

The Public Prosecution Department is comprised of a director and two deputies, at least one prosecutor in each felony court, and two prosecutors and their deputies on the board of the Department.

The tasks of the Public Prosecutor are

- asking for public rights in front of the judiciary;
- supervising the collection of information and the detection of crimes;

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- attending investigation sessions conducted by the investigative judge;
- visiting detention centers and prisons;
- attending trials at the Felony and Misdemeanor Courts, but not at sessions of the Court of Cassation; and
- appealing the decisions and/or the procedures of the investigative and/or the trial judges.

Judiciary Oversight Commission

The Commission has a director, a deputy director and judicial supervisors. The Judiciary Oversight Commission supervises the judiciary and the decisions of the courts. It also follows up on the rank of the judiciary personnel and the judiciary records.

Other Courts

There are two types of courts under the judiciary authority in Iraq: civil courts and criminal courts.

Civil Courts. Civil courts are divided into the Courts of First Instance, the Courts of Appeal or Supreme Courts, the Courts of Personal Status, the Courts of Civil Matters and the Labor Courts.

The Courts of First Instance have one judge each. The courts handle cases of debt, real estate, contracts and compensation for illegal work. The decisions of the courts are usually considered primary and are reviewed by the Courts of Appeal, which consist of panels of three judges.

The Courts of Personal Status have one judge apiece and handle marriage, divorce, wills and estates for Muslims.

The Courts of Civil Matters each have one judge and handle marriage, divorce, wills and estates for non-Muslims.

The Labor Courts have one judge each and handle labor cases.

Criminal Courts. There are two different kinds of criminal courts, depending on the age of the defendant: Criminal Courts for Adults and Juvenile Courts.

Defendants in the Criminal Courts for Adults are adults who are over the age of eighteen at the time the alleged crime was committed. There are three courts that handle criminal cases. The Investigation Courts, each consisting of one judge, conduct the investigation from the time the crime is committed until the case is referred to a trial court. There is one Investigation Court or more in each location that has a Court of First Instance.²⁴

The trial courts are the Felony and Misdemeanor Courts. The Felony Courts are equivalent to the civil Supreme Courts. They are established in the centers of the provinces. The cases are referred to the Felony Courts by the investigative judges. The court has the right to either conduct the trial²⁵ or hear an appeal of the investigative judge's decision. The Felony Courts consist of three-judge panels, and the courts' decisions are usually based on the majority of opinions. The Misdemeanor Courts are usually established wherever there is a Court of First Instance. Cases of misdemeanor violations are referred to the courts by the investigative judges.

The Juvenile Courts handle those cases in which the defendant is younger than eighteen but older than nine.²⁶ The Juvenile Courts are divided into the investigation chamber and the trial court. The chamber in the trial court is comprised of a chief judge, a right member who is a specialist in sociology and a left member who should have a law degree with experience as investigator or legal assistant.

The Iraqi High Tribunal

After US and coalition forces entered Iraq and the discussion turned to promoting the rule of law in Iraq, concerned parties began to wonder how Saddam Hussein would be prosecuted—whether he would be tried by Iraqi courts or whether he would be prosecuted by an international court similar to the International Criminal Tribunal for the former Yugoslavia (ICTY).

Given the political disagreements among the five permanent members of the Security Council concerning the war in Iraq, obtaining Security Council approval for the establishment of an ICTY-type international court was not an available option. Moreover, history shows that such international courts take years to conduct trials and reach decisions; therefore, it was logical to try Hussein in Iraq.

In December 2003, the CPA issued Order No. 48,²⁷ which gave Iraq's Governing Council the authority to establish an Iraqi Special Tribunal "to try Iraqi nationals or residents of Iraq accused of genocide, crimes against humanity, war crimes or violations of certain Iraqi laws."²⁸ This Tribunal was established as an independent entity of the judicial system by Statute Number 1 of 2003 of the Iraqi Governing Council. That statute was replaced by Law No. 10 of 2005,²⁹ which also renamed the Tribunal as the Iraqi High Tribunal (IHT).

The Iraqi Constitution considers the IHT to be a transitional court in a transitional period with the duty to examine "the crimes of the defunct dictatorial regime and its symbols."³⁰ The IHT has jurisdiction over Iraqi nationals or residents of Iraq accused of war crimes, genocides and crimes against humanity committed between July 17, 1968 and May 1, 2003 in Iraq or elsewhere.³¹ The Council of Representatives has the right to dissolve the Tribunal after the completion of its work.³²

The IHT is independent, both financially and administratively, from the Higher Juridical Council of Iraq.

The IHT contains two entities: the judicial and prosecution committees. The Judicial Committee consists of the Appeal Chamber, the Trial Chamber, the Investigative Judges and the Prosecution. The Appeal Chamber has a chief judge and eight judges. It is equivalent to the Court of Cassation. The Trial Chamber has a chief judge and four judges. It is equivalent to the Felony Courts. The investigative judges are a chief judge and twenty-four investigative judges. They are each the equivalent of the Investigative Courts. The prosecution has a chief and sixteen prosecutors. It is equivalent to the Public Prosecution Department under the Higher Juridical Council. There is a separate Administrative Department to support the IHT.

The New Rule of Law in Iraq

The Iraqi High Tribunal began its mission in 2004. By the end of 2006, it had made substantial headway in addressing the claims presented to it, and processing the documents and other evidence that supported those claims. As the number of complainants increased from different parts of the country, however, it became important to open additional offices, to reduce the amount of work in the Baghdad headquarters. Offices were opened in Sulaymaniyah and Erbil to cover the northern region of Iraq, in Najaf to cover the central region and in Basra to cover the southern region. All four offices were supplied with the necessary personnel, investigative resources and equipment to facilitate their tasks. These offices and the headquarters in Baghdad interviewed thousands of witnesses, victims and complainants.

Additionally, they dealt with a huge number of documents. In addition to the official Iraqi government records, the IHT received approximately eighteen tons of documents during the first six months of its existence. It was impossible to read and authenticate each document manually; therefore it was important to find a process to organize and categorize them. The documents were moved to a special building and more than one hundred individuals specialized in analyzing documents were hired. The documents were categorized, scanned and entered into an electronic database.

The investigative judges, along with their staff of investigators and paralegals, went through the documents they needed in the cases to which they were assigned. At the same time, prosecutors and defense attorneys were provided access to the documents used in the investigation. The electronic database proved to be an

effective way to save time and effort. Millions of important documents were categorized in that database.

A huge issue in Iraq was the mass graves in which the victims of the Hussein regime's atrocities were buried. Two sources were used in locating the burial sites. The first source was witnesses who helped not just in locating them and establishing the year they were buried, but also in identifying the victims.³³ The second source was non-governmental human rights organizations, working in coordination with US military forces, who used modern technology in locating the graves. More than 250 mass grave sites were found; each contained more than eighty skeletal remains.

Because the grave sites were often found in isolated locations, the concerned Iraq government ministries (Ministry of Human Rights, Ministry of Health and the Archaeology Department) didn't possess the resources to investigate each site. The IHT, with the support from the Regime Crimes Liaison Office based in the US embassy in Iraq, was able to hire international experts and purchased a mobile laboratory to assist in the investigation of the grave sites. Taken together, the testimony of the witnesses, the documentary evidence and the mass graves starkly illustrated the policy of the former regime toward each group of victims.

Conclusion

Many experts have questioned the work of the Iraqi High Tribunal. In doing so, however, the critics neglected to analyze its work in the context of Iraq's modern judicial history. The IHT achieved justice and helped keep peace in Iraq in the period immediately following the fall of the former regime in 2003. It represented the hopes of Iraqis for the rule of law, and contributed to the process of restoring faith and confidence in the Iraqi judicial system.

Notes

1. CPA Order No. 1, De-Ba'athification of Iraqi Society (May 16, 2003). All CPA orders and regulations are available at <http://www.cpa-iraq.org/regulations/> (then hyperlink by name of order or regulation). The CPA was established as a transitional government following the invasion of Iraq by the United States, United Kingdom and the other members of the coalition of the willing which was formed to oust the government of Saddam Hussein. The CPA's authority was set forth in CPA Regulation No. 1 and was based on "relevant U.N. Security Council resolutions, and the laws and usages of war." *Id.*, pmb1.

2. "De-Baathification" is a term the CPA used to describe ridding the country of Baathism by dismissing high-ranking Baath Party members from government employment.

3. CPA Order No. 2, Dissolution of Entities (May 23, 2003).

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4. CPA Order No. 15, Establishment of the Judicial Review Committee, pmb. (June 23, 2003).

5. CPA Order No. 35, Re-Establishment of the Council of Judges (Sept. 13, 2003).

6. CPA Order No. 48, Delegation of Authority Regarding Establishment of an Iraqi Special Tribunal (Dec. 9, 2003).

7. The Governing Council was formed on July 13, 2003. It included twenty-five members chosen by the US-led coalition: thirteen Shiite Muslims, five Sunni Muslims, five Kurds, one Christian and one Turk. The Council's priorities were to achieve stability and security, revive the economy and deliver public services. See Iraq Governing Council, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/world/iraq/igc.htm> (last visited June 23, 2009).

8. The name of the court was later changed from Iraqi Special Tribunal (IST) to Iraqi High Tribunal (IHT) in 2005. See *infra* p. 11 and note 29.

9. It was not known until 2003 that they were executed.

10. For more information about the Al-Anfal genocide, see HUMAN RIGHTS WATCH, GENOCIDE IN IRAQ (1993), available at <http://www.hrw.org/reports/1993/iraqanfal/>. According to the chief prosecutor at the trial of those responsible for the campaign against the Kurds, up to 182,000 civilians were killed.

11. Hussein's regime killed more than half a million Iraqis. This number does not include the victims of the wars in Iraq between 1980 and 2003. See, e.g., Secondary Wars and Atrocities of the Twentieth Century, <http://users.erols.com/mwhite28/warstat3.htm#sadhus> (last visited June 19, 2009).

12. Interim Constitution of Iraq (1970), available at <http://www.gjpi.org/library/primary/iraqi-constitution/> (then 1970 Interim Constitution hyperlink).

13. Unofficial translation available at <http://www.gjpi.org/library/primary/statutes/> (then Civil Procedure and Actions Law No. 83 of 1969 hyperlink).

14. Criminal Procedures Code (Law No. 23), Feb. 14, 1971. An unofficial version of the code is available at <http://www.gjpi.org/library/primary/statutes/> (then Criminal Procedure Code 23 of 1971 hyperlink) [hereinafter Law No. 23].

15. Judicial Organization Law (Law No. 160), Dec. 10, 1979, available at <http://www.gjpi.org/wp-content/uploads/judicial-organization.pdf> [hereinafter Law No. 160].

16. This was the organization that replaced the Council of Judges during the Hussein regime and was itself replaced by the re-established Council of Judges in 2003. In turn, the Council of Judges was itself replaced in 2004 by the Higher Juridical Counsel. CPA Order No. 100, Transition of Laws, Regulations, Orders, and Directives Issued by the Coalition Provisional Authority § 3 (June 28, 2004).

17. For information on the role of the Revolutionary Command Council, see IRAQ: A COUNTRY STUDY (Helen Chapin Metz ed., 1988), available at <http://countrystudies.us/iraq/>.

18. *Supra* note 5.

19. Kurdistan Iraq is the northern region of the country. It contains three provinces: Erbil, Sulaymaniyah and Duhok. For more information on Kurdistan Iraq, see the Kurdistan Regional Government website at <http://www.krg.org/>.

20. Const. (2005) (Iraq). The UN, UK and US agreed-on English translation of the Constitution is available at <http://www.gjpi.org/library/primary/iraqi-constitution/> (then 2005 Constitution – English hyperlink).

21. *Id.*, art. 90.

22. *Id.*, art. 94.

23. Law No. 160, *supra* note 15.

24. *Id.*, art. 35

25. Law No. 23, *supra* note 14, art. 265.
26. Article 233, *id.*, established a minimum age of seven to be prosecuted in Juvenile Court. The Juveniles Welfare Law (Law No. 76) art. 3, July 20, 1983, *available at* <http://www.gjpi.org/wp-content/uploads/juvenile-welfare-law-76-of-1983.pdf>, increased the minimum age to ten for prosecution.
27. *Supra* note 6.
28. *Id.*, § 1, ¶ 1.
29. Law of the Supreme Iraqi Criminal Tribunal (Law No. 10), Oct. 18, 2005, *available at* http://www.cpa-iraq.org/human_rights/Statute.htm [hereinafter Law No. 10].
30. Const. (2005) (Iraq), *supra* note 20, art. 134.
31. Law No. 10, *supra* note 29, art. 10.
32. Const. (2005) (Iraq), *supra* note 20, art. 134.
33. Genocide against Kurds stopped in 1988, while that against Arabs continued after 1991.