

# ANNEX 5: MECHANISMS IN THE MIDDLE EAST

## IRAQ: IRAQ HIGH TRIBUNAL

### Conflict Background and Political Context

Iraq emerged from the Ottoman Empire with a British-installed monarchy that in 1921 secured minority Sunni Arab rule in a country with a Shia majority, a large Sunni Kurdish minority, and a multitude of smaller ethnic, religious, and linguistic minorities.<sup>2573</sup> A military coup in 1958 ultimately resulted in rule by the Pan-Arabist Ba’ath Party in 1968. The powerful vice president of the new government, Saddam Hussein, became president in 1979. Hussein tolerated no dissent in an increasingly totalitarian state and further narrowed control of the regime to trusted family and friends from his home village of Tikrit.

Iraq invaded Iran in 1980, resulting in a disastrous war of attrition that only ended eight years later, after the United States threw its support to Hussein and Iran assented to a ceasefire agreement.<sup>2574</sup> Hussein had used chemical weapons against Iranian forces, and in the “Anfal Campaign” of 1988, he had turned them against the restive Kurdish population of northern Iraq. The genocidal campaign resulted in the deaths of an estimated 50,000–100,000 Kurds.<sup>2575</sup>

Despite the Anfal Campaign and continued severe repression of the majority Shia population and minority groups, Saddam Hussein maintained Western support until Iraqi forces invaded and annexed Kuwait in August 1990. The United Nations Security Council passed a series of resolutions demanding Iraq’s withdrawal from Kuwait, and the United States formed a large international coalition to evict Iraqi forces.<sup>2576</sup> By the end of February 1991, the coalition had driven Iraqi forces out of Kuwait, but the First Gulf War left Hussein in power.

Hussein retaliated with brutality against southern Shias who had risen up against him—partly in response to U.S. instigation—during the First Gulf War. Kurds were partially protected from the regime’s reprisals through the imposition of a no-fly zone in the north. Western states ensured that sanctions against Iraq remained in place throughout the 1990s, punctuated by periodic U.S.-led military strikes against Iraqi forces meant to enforce Iraqi cooperation with UN weapons inspectors.<sup>2577</sup>

Following the September 11, 2001, terrorist attacks on the United States, the U.S. and U.K. governments began to make claims of Iraqi involvement in the attacks. The two governments manipulated intelligence information to support this false claim, as well as false claims that Saddam Hussein maintained significant stockpiles of chemical and biological weapons of mass destruction.<sup>2578</sup>

In March 2003, the United States and United Kingdom led an invasion of Iraq without explicit prior authorization from the UN Security Council. The Second Gulf War had declared their aims to “disarm Iraq of weapons of mass destruction, to end Saddam Hussein’s support for terrorism, and to free the Iraqi people.”<sup>2579</sup> Many international law experts viewed the invasion as illegal.<sup>2580</sup>

Baghdad fell in April 2003, and a U.S.-dominated provisional administration took formal control of the country. The Coalition Provisional Authority (CPA), led by a U.S. ambassador, struggled to administrate a country it was ill equipped to govern.<sup>2581</sup> The CPA and the CPA-appointed Iraqi Governing Council (IGC) launched a disastrous “de-Ba’athification” process that fed a growing Sunni Arab insurgency.<sup>2582</sup> Sectarian violence mounted. In 2004, emerging evidence that U.S. forces tortured, sexually abused, and committed other grave violations against Iraqi prisoners held in the Abu Ghraib prison outside Baghdad further undermined the legitimacy of the U.S. presence.<sup>2583</sup> In this context, the Iraqi High Tribunal (IHT), created by the CPA and IGC in December 2003, faced immense questions of legitimacy from the start.

## **Existing Justice-Sector Capacity**

Under Saddam Hussein, Iraq’s legal framework was inadequate and outdated, lacking in transparency and accountability provisions as well as human rights. The judiciary lacked independence,<sup>2584</sup> although the Hussein regime often relied on parallel court structures—including the Revolutionary Court, the Ministry of Interior Court, and military courts—to target its opponents rather than the ordinary courts falling under the Ministry of Justice.<sup>2585</sup> Hussein manipulated and corrupted the judicial system to serve political goals and marginalized key legal actors such as prosecutors and public defenders. Many vulnerable groups lacked access to justice.<sup>2586</sup> The use of confessions obtained through torture further compromised the system.<sup>2587</sup> Due to the large number of parallel courts, Iraq had relatively few jurists within the normal justice system. While many judges and prosecutors within the normal judicial system were not Ba’ath Party members, the process of de-Ba’athification further depleted the ranks of the normal justice system, leaving an

insufficient number of jurists to handle the new volume of post-transition cases.<sup>2588</sup> There was also significant damage to infrastructure—approximately 75 percent of the courts in Iraq were destroyed during the war, including 90 percent of the courts in Baghdad. Most had been left as burned-out shells devoid of even electrical lines or water pipes, including the Ministry of Justice building in Baghdad.<sup>2589</sup> Court records and files likewise were destroyed.

Early on, the CPA focused on transferring justice matters to the Iraqi Ministry of Justice, including the supervision over prisons in order to prevent abuses. By 2004, the CPA had vetted judges, dismissing those thought to be corrupt or guilty of human rights abuses and reappointing others who had been dismissed by Hussein.<sup>2590</sup> Primarily, efforts to rebuild the national judiciary were spearheaded through re-establishing the Council of Judges. The council is structurally separated from the ministry and given authority over court budgets, personnel, security, and property.<sup>2591</sup> The council then evolved into the Higher Judicial Council pursuant to Article 45 of the Transitional Administrative Law (TAL) and CPA Order 100, section 3(13). The CPA also established the Central Criminal Court of Iraq in 2004 with nationwide jurisdiction and a mandate to concentrate on the more serious crimes that other courts were often reluctant to deal with, including terrorism and organized crime.<sup>2592</sup> One of the challenges the CPA faced in taking these early steps was the weakness of the investigative agencies and intimidation, especially targeted at judges.<sup>2593</sup>

The current constitution was approved by a referendum that took place on October 15, 2005. Members of the Iraqi Constitution Drafting Committee drafted a constitution to replace the TAL.<sup>2594</sup> The constitution provided for the Higher Judicial Council, which manages and supervises the affairs of the federal judiciary. It oversees the affairs of the various judicial committees; nominates the chief justice and members of the Court of Cassation, the chief public prosecutor, and the chief justice of the Judiciary Oversight Commission; and drafts the budget of the judiciary.<sup>2595</sup> Article 90 of the constitution provides for the Iraqi Supreme Court, an independent judicial body that interprets the constitution and determines the constitutionality of laws and regulations. It acts as a final court of appeals.<sup>2596</sup> Despite the constitutional protection for human rights and freedoms, Iraqi activists and human rights organizations have repeatedly expressed concern about several violations by the government including unfair trials, arbitrary detention, and torture.<sup>2597</sup>

Several trainings for IHT judges and prosecutors were conducted between 2004 and 2006 by the United States Institute of Peace, the International Bar Association, the Institute for International Criminal Investigations, the Department of Justice/U.K.

Foreign Office, the International Institute for Higher Studies in Criminal Science, the Global Justice Center, and the International Human Rights Law Institute. Many institutions and individuals involved in such trainings opposed the IHT's provision for the death penalty, even though there was broad support for this in Iraqi society. Some of the internationals involved in training drew a distinction between training and institutional support; for them, training did not constitute an endorsement of the IHT as an institution, but provided an opening to improve fair trial standards and international human rights norms, including with regard to the death penalty.<sup>2598</sup>

## **Existing Civil Society Capacity**

Hussein's regime repressed civil society. It brought civil society groups under control through intimidation and by rewarding loyal organizations. It created new organizations under the umbrella of the Ba'ath Party and repressed organizations that failed to support the regime.<sup>2599</sup> Throughout this era, nearly every civic institution that existed was affiliated with the Ba'ath Party.<sup>2600</sup>

Iraqi civic space witnessed major opening after the fall of Hussein's regime, and thousands of organizations were established and registered under the CPA's authority.<sup>2601</sup> However, many civil society actors lacked knowledge and skills in human rights, community development, outreach services, and other areas.<sup>2602</sup> Most early organizations were dedicated to humanitarian and relief efforts, but they have since begun to focus on human rights and democratic development, including elections and constitutional reform.<sup>2603</sup>

Civil society also struggled to maintain independence from political actors and many therefore lack credibility and legitimacy. Since 2003, many political parties created local NGOs that align with or promote their agendas. Only a small fraction of NGOs are considered to be impartial, non-religious, or non-political.<sup>2604</sup> Many Iraqis perceive new NGOs to be Western-funded and a reminder of subjugation.<sup>2605</sup> NGOs and civil society organizations still face many obstacles in Iraq, including bureaucratic delays in registering, threats from ISIS and terrorist groups, and limits on their activities.<sup>2606</sup>

## **Creation**

The creation of the Iraqi High Tribunal, sometimes called the Iraqi Special Tribunal,<sup>2607</sup> was intertwined with the American-led invasion of Iraq in March 2003.

Beginning in 1991, the United States, the United Nations, and the Arab League had discussed inchoate proposals to prosecute senior members of the Saddam Hussein's Ba'athist regime in Iraq.<sup>2608</sup> In the wake of the 2003 invasion of Iraq, the Bush administration, Iraqi exiles, the UN, and international NGOs considered various prosecutorial mechanisms, including an ad hoc international tribunal and a mixed/hybrid tribunal similar to the Special Court for Sierra Leone. These suggestions, though favored by a coalition of international NGOs, were rejected by the U.S. administration. A post-invasion draft plan to prosecute higher-level perpetrators at the IHT, while sending lower-level perpetrators to ordinary national courts, was rendered untenable by the disarray of Iraq's judicial institutions and the country's descent into violent chaos between 2004 and 2006.<sup>2609</sup>

In December 2003, the CPA delegated authority to the Iraqi Governing Council to establish the IHT; the CPA order included the IHT Statute and set out four conditions for the IGC to observe in creating the court:<sup>2610</sup>

1. The IGC would establish elements of the crimes under IHT jurisdiction consistent with international law and Iraqi law (as amended by the CPA);
2. The IGC should ensure that the IHT operate in conformity with international standards;
3. CPA rulings would prevail over any conflicting IGC or IHT ruling or judgment prior to the transfer of sovereignty to Iraqi authorities; and
4. The IHT must allow for the appointment of foreign judges.<sup>2611</sup>

The IGC ordered establishment of the IHT by decree on December 10, 2003.<sup>2612</sup> U.S. forces captured Saddam Hussein three days later.

Following the transfer of sovereignty to Iraqi authorities in 2005, the Iraqi Transitional National Assembly passed an amended statute establishing the IHT into law in October 2005.<sup>2613</sup> The IHT was created with the aim of "bringing personal accountability to those Ba'athists who were responsible for depriving Iraqis of their human rights."<sup>2614</sup> Iraq adopted a new constitution in 2005 that makes explicit mention of the IHT.<sup>2615</sup> One day following the IHT's formal creation in October 2005, the *Dujail* trial began. (See the *Prosecutions* section, below.) The IHT operated until its dissolution in 2011–2012.<sup>2616</sup>

## **Legal Framework and Mandate**

The CPA order and subsequent Iraqi legislation granted the IHT jurisdiction over genocide, crimes against humanity, war crimes, and other crimes under Iraqi law committed between July 17, 1968, and May 2003 (the period of rule by Saddam Hussein).<sup>2617</sup> The IHT has personal jurisdiction over Iraqi citizens for crimes committed inside or outside of Iraq.<sup>2618</sup> The tribunal has primacy over other Iraqi courts for the serious crimes within its jurisdiction.

The initial statute was poorly drafted, and the structure of the IHT contained many features alien to Iraqi law and contrary to international human rights norms. American drafters failed to incorporate civil law elements of the Iraqi legal system, such as the differing roles of investigative judges and prosecutors in the evidence-gathering stage and at the trial stage.<sup>2619</sup> The 2005 law, in contrast to the previous CPA order, instructed the tribunal to follow the 1971 Iraqi Code of Criminal Procedure. The CPA, prior to the establishment of the IHT, had issued Order No. 7 to amend the Iraqi Criminal Code in order to bring it in conformity with international law.<sup>2620</sup> The IHT promulgated separate Rules of Procedure and Evidence, but conducted its first trial mainly within the general Iraqi legal framework.<sup>2621</sup> Some observers noted the inadequacy of the national criminal procedure laws for prosecution of complex serious crimes cases,<sup>2622</sup> while other observers argued that Iraq's legal system does not recognize court-fashioned rules, and instead, praised the use of the national rules.<sup>2623</sup>

The substantive provisions of the IHT statute on international crimes, genocide (Article 11), crimes against humanity (Article 12), and war crimes (Article 13), were modeled on the Rome Statute. Article 14 of the statute presented a number of violations that preexisted under Iraqi law, such as “the wastage and squandering of national resources, pursuant to Article 2(g) of the Punishment of Conspirators against Public Safety and Corrupters of the System of Governance Law 7 of 1958.”

## **Location**

The IHT was based in the capital, Baghdad. Although it never happened, the statute provided that upon the recommendation of the IHT president, the tribunal could also sit “in any other Governorate in Iraq as determined by the Governing Council or the Successor Government.”<sup>2624</sup>

## Structure and Composition

Iraqis staffed the IHT, assisted by some internationals, almost all of whom were Americans. The IHT president (not a sitting judge) was originally Salem Chalabi, a prominent Iraqi exile, appointed by the United States. His appointment was controversial and furthered skepticism about the IHT's genuine political independence.<sup>2625</sup>

The IHT comprised three Trial Chambers and a Cassation (Appeals) Chamber, with appeals regulated by the Rules of Procedure and Evidence.<sup>2626</sup> The staff was entirely Iraqi, although the IHT statute allowed for the appointment of foreign judges, investigative judges, and prosecutors.<sup>2627</sup> The statute required the appointment of foreign nationals “to act in advisory capacities or as observers to the Trial Chambers and to the Appeals Chamber.”<sup>2628</sup>

The IHT's Defense Office provided funding for defense counsel, and an international defense adviser was appointed in the midst of the *Dujail* trial. For security reasons, the identities of the judges were not disclosed.

Despite intense national and global interest, the IHT conducted almost no outreach or public relations apart from televising partial proceedings of the Saddam Hussein trial.

Direct staff assistance by internationals was almost exclusively provided by Americans. The U.S. Regime Crimes Liaison Office (RCLO), staffed by prosecutors and investigators from the U.S. Department of Justice, “assumed the responsibility for setting a prosecutorial strategy, training the judges and prosecutors, providing resources and personnel for investigations, evidence gathering, and establishing the IHT's infrastructure.”<sup>2629</sup> Very little other foreign assistance existed. One international expert assisted the defense, and a British expert assisted the judges of the Trial Chamber. Gradually, American involvement lessened and Iraqi ownership of the tribunal increased. While observers generally considered the American assistance to be professional and sound, “the role of the RCLO had a chilling effect both on the Iraqi desire to seek other external advice, and on the willingness of other international experts to participate.”<sup>2630</sup> U.S. assistance dropped dramatically following the execution of Saddam Hussein in December 2006; by 2008, only four American legal advisors remained.<sup>2631</sup> In addition, the application of the death penalty by the IHT meant that many European Union member states and most international NGOs were unwilling to offer technical assistance.

## Prosecutions

*Dujail Trial:* The IHT held its first trial (known as the *Dujail* trial) against Saddam Hussein and eight co-accused for crimes against humanity committed in the town of Dujail between 1982 and 1984. Several senior defendants were accused of crimes against humanity and executed in early 2007,<sup>2632</sup> and several lesser defendants were accused of aiding and abetting crimes against humanity (two were convicted).<sup>2633</sup> The trial began on October 19, 2005. On November 2006, the Trial Chamber released its judgment, and the Cassation Chamber issued its judgment on December 2006. Saddam Hussein was executed on December 30, 2006, in a hanging that drew widespread international condemnation.<sup>2634</sup> Serious evidentiary gaps led to criticisms of the Trial Chamber’s factual findings, and of lack of serious appellate review, including failure to present evidence fully meeting the evidentiary standard of proof and *mens rea*. For the lesser defendants, almost no evidence was presented to establish their level of knowledge, but rather, knowledge was assumed through their status as Ba’ath party members, not proven through actual or constructive knowledge. The standards of proof required for the taking of such overbroad judicial notice were not articulated. In addition, the filings and investigations of the prosecution and the investigative judges did not illuminate the patterns and schemes of repression during the long Ba’athist regime—a major disappointment to victims and advocates.<sup>2635</sup>

*Anfal Trial:* A second trial, this one against Saddam Hussein, Ali Hassan al-Majif, and five other codefendants, began on August 21, 2006. (After the execution of Saddam on December 30, 2006, his case was withdrawn from the trial.) The defendants were charged with genocide, crimes against humanity, and war crimes, in reference to the planning and executing a series of attacks in 1988 against Kurds in northern Iraq, using chemical weapons and killing up to 182,000 civilians.<sup>2636</sup> On June 24, 2007, in a 963-page judgment, the IHT delivered a guilty verdict against five defendants and dismissed charges against one defendant.<sup>2637</sup> The Cassation Chamber affirmed the verdict on September 4, 2007, in a decision criticized for a lack of “serious legal review” and a mere 30-day appellate review period—inadequate given the complexity of the case and charges.<sup>2638</sup>

*Subsequent Trials:* Little has been written about the IHT’s subsequent atrocity crimes prosecutions. A third case (known as the *Merchants Case*), based on charges stemming from the 1992 executions of 42 merchants by the Ba’athist regime, began in November 2008 and resulted in guilty verdicts on March 11, 2009, for eight codefendants.<sup>2639</sup> The trial was described as “politically significant” because

the victims were Sunni, and the tribunal hoped it would help to counter Sunni perceptions that the IHT is a tool of Shia and Kurdish vengeance.<sup>2640</sup> At the time of the tribunal's dissolution in July 2011, there had been a total of 175 convictions and 133 acquittals.<sup>2641</sup> Cases involving other states, in particular Kuwait and Iran, were never heard.<sup>2642</sup>

## Legacy

The IHT's lack of legitimacy and procedural shortcomings have limited the possibility for it to leave a positive legacy in Iraq. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions cited "glaring flaws" in the trial of Saddam Hussain, noting that the legal rights of the defendants had been "impeded."<sup>2643</sup> The Human Rights Council's working group on arbitrary detention concluded that the trial failed to meet the basic fair trial standards.<sup>2644</sup> International human rights organizations came to similar conclusions. Human Rights Watch cited numerous problems in the *Dujail* trial, including with regard to the IHT's independence and impartiality, its protection of defense rights, and "evidentiary gaps" that impeded "the accuracy of many of the trial judgment's factual findings, in particular concerning the knowledge and intent of the defendants."<sup>2645</sup> Amnesty International raised similar concerns about the IHT's flaws and failures in the course of the *Dujail* trial.<sup>2646</sup>

Extensive trainings in matters of international criminal law and legal procedure surely enhanced the capacity of some Iraqi judges, prosecutors, and other officials. Interaction with (mostly American) lawyers in the Regime Crimes Liaison Office surely also added value. However, without adequate safeguards to ensure the protection of basic fair trial and other international standards, it is doubtful that the IHT made a substantial positive contribution to rule-of-law development in Iraq. As Human Rights Watch noted, "The hope that the [*Dujail*] trial might have served as a model of impartial justice for a 'new era' Iraq, by upholding international human rights law and enforcing international criminal law, remains unfulfilled."<sup>2647</sup>

Furthermore, the IHT appears to have contributed to divisions in Iraqi society. The tribunal lacked legitimacy with broad swathes of the population. Not only was it created by an occupying power despised by many Iraqis, but it lacked autonomy from the U.S. government and Iraq's then Shia-dominated government. For many Sunnis watching the swift trial and execution of Saddam Hussein, which was accompanied by executioners chanting pro-Shia militia slogans,<sup>2648</sup> proceedings at

the IHT looked more like another front in mounting sectarian warfare rather than any kind of new exercise in impartial justice.<sup>2649</sup> Many Kurds looking forward to the IHT pronouncing a verdict on Saddam Hussein's responsibility for the Anfal massacres had their hopes for justice and redress dashed by Hussein's execution prior to the end of the trial, following his conviction in the *Dujail* trial.<sup>2650</sup> To the extent that the IHT was introducing new concepts into Iraqi law, poor public communications and an absence of outreach inhibited its ability to make these understood by the broader population.

## **Financing**

Shortly after its establishment, CPA Administrator Paul Bremer announced that the United States would contribute \$75 million to the IHT.<sup>2651</sup> By July 2007, the annual U.S. contribution specifically to support trials for international crimes had climbed to \$128 million, with significant additional funds in support of such related expenses as judicial security and facilities, a witness protection program, and detention facility infrastructure.<sup>2652</sup> Other estimates put the annual budget of the tribunal—whose establishing statute provides that its funding and costs will be borne by the Iraqi state budget—at \$138 million.<sup>2653</sup>

The funding was meant to support—among other things—the work of the Regime Crimes Liaison Office, whose staff played a leading role in supporting tribunal investigations and operations; the provision of security to both court personnel and defense lawyers; the exhumation of mass graves; upgrading facilities for storing and handling evidence; the building of courtrooms; the conduct of investigations, including interrogations; and the training of staff.<sup>2654</sup>

## **Oversight and Accountability**

The IHT's Rules of Procedure and Evidence included principles for judicial independence and impartiality.<sup>2655</sup> However, in practice, the appointment process for IHT judges and prosecutors created at least the appearance of political influence.

The CPA made the initial appointments and issued procedures for the IHT, leading to criticism that the IHT lacked independence from American administrators. Even after the transfer to Iraqi authorities in 2005, however, appointment procedures were highly problematic and jeopardized the IHT's independence. Judges and prosecutors

were nominated by the Supreme Juridical Council and approved by the Council of Ministers (up to 20 tribunal investigating judges could be appointed under the statute). The Council of Ministers (a political body) was empowered under the IHT statute to transfer judges to another court for any reason.<sup>2656</sup> In addition, as part of a national de-Ba'athification process, no member of the staff (including judges) could have been a member of the Ba'ath party. Officials involved in the de-Ba'athification process wielded it as a political weapon against IHT judges, who were removed or threatened with removal. An internal de-Ba'athification committee for the IHT was created in 2006, in an attempt to prevent further political intimidation of the judges, but instead "consolidated a new power elite inside the Tribunal."<sup>2657</sup> The tribunal suffered from high turnover rates among judges, even within single trials; only one original judge from the *Dujail* Trial Chamber was present at the final hearing, after six substitutions and three changes of presiding judge.

The Iraqi government also held sway over the judiciary in other ways. Amid ongoing violence in Baghdad, the Iraqi prime minister controlled funds for protection allowances and travel to the fortified International Zone, a crucial measure for a tribunal in which at least five staff members and three defense lawyers were killed during the first trial.

Informal means of oversight were limited at the IHT. The International Center for Transitional Justice and Human Rights Watch were the only public organizations permitted to formally observe the *Dujail* trial throughout. While NGO and media attention to the tribunal shed light on its many shortcomings, this attention all but disappeared following Saddam Hussein's execution. According to some observers, the near-complete withdrawal of the media together with the pullout of U.S. advisors following Saddam's execution may have fueled greater dysfunction in subsequent proceedings.<sup>2658</sup> There were reports of greater political interference, not only from the Iraqi government but also from the U.S. side. For example, the United States, which at the time was courting Sunni allies for the fight against Al-Qaeda, reportedly pressured the Iraqi Presidential Council to stop the execution of three Sunni defendants convicted in the *Anfal* trial.<sup>2659</sup>

## **LEBANON: SPECIAL TRIBUNAL FOR LEBANON**

### **Conflict Background and Political Context**

On February 14, 2005, an explosion in downtown Beirut killed 22 people: former Prime Minister Rafik Bahaa-Edine Hariri, nine members of his convoy, and 13 civilians who were nearby. An additional 226 people were injured. Hariri's assassination took place "in a political and security context marked by acute polarization around the Syrian influence in Lebanon and the failure of the Lebanese State to provide adequate protection for its citizens."<sup>2660</sup>

At least in part due to its location, bordering both Syria and Israel, Lebanon has repeatedly served as a battleground for the parties to the Arab-Israeli conflict.<sup>2661</sup> The political history of Lebanon includes a tragic, protracted civil war (1975-1990), Syrian military presence (1976-2005), and significant Syrian influence over Lebanese affairs.<sup>2662</sup> Following the withdrawal of Israeli forces from Lebanon in 2000 (which coincided with Hariri's 2000-2004 term as prime minister), some political figures began to call for the reduction of the Syrian presence in Lebanon. This led to conflict between Hariri and Lebanese President Émile Lahoud.<sup>2663</sup> This division culminated in a dispute over the amendment of the presidential constitutional term—which for Lahoud was due to expire in 2004.

A string of political assassinations and bombings occurred in 2004 and 2005, including Hariri's February 2005 assassination. A network of Syrian agents and intelligence agencies, deeply linked to Lebanese politics, was widely suspected to be behind the assassinations. Following the assassinations, international pressure mounted on Syria to withdraw its troops from Lebanon, following a 29-year presence there; the last Syrian troops left the country in April 2005.<sup>2664</sup>

Lebanese politics are driven by sectarianism, nationalism, and Syria's involvement. The increasing electoral domination of the Syrian-backed political wing of Hezbollah means a strong reluctance, and at times resistance, to adequately investigate political crimes, including the assassination and attempted assassination of politicians in 2004 and 2005. Political divisions deepened in 2011, a year of political paralysis in Lebanon. In January, the coalition government, led by Prime Minister Saad Hariri (son of the assassinated prime minister), collapsed. Najib Mikati replaced Saad Hariri as prime minister, raising fears of a deal with Hezbollah political leaders to end cooperation with the Special Tribunal for Lebanon (STL)

in order to preserve a fragile minority government coalition.<sup>2665</sup> Lebanon lacked a stable government until June 2011, when the political wing of Hezbollah formed a majority government, again led by Najib Mikati.<sup>2666</sup> The Hezbollah political wing maintains deep ties with Syria and strongly opposes the STL. Over the course of 2012, the escalating anti-government revolt in Syria placed increasing pressure on Hezbollah's ties to Syria.

After the STL announced four indictments of Hezbollah members in June 2011, leading Hezbollah politicians stated that the country would not contribute its required assessment to the court. They eventually relented in November 2011, but Hezbollah political leaders have vowed that the suspects in the Hariri case would not be arrested and handed over to the STL.

### **Existing Justice-Sector Capacity**

Lebanon's justice sector suffered greatly from the 1975–1990 civil war, and in a 2005 assessment, the World Bank observed that the sector had yet to recover.<sup>2667</sup> The judiciary is prone to political influence, there is a lack of technical capacity in multiple areas, and the Lebanese public seems to lack confidence in the sector. An assessment by the UN Development Programme in 2016 noted these and additional problems, including inadequate resources for the national judiciary and prosecutors, and inadequate protection for fair trial rights.<sup>2668</sup>

A UN fact-finding mission to Lebanon following the Hariri assassination referenced many of these same problems with regard to the domestic investigation into the assassination: the justice system exhibited a lack of coordination, professionalism, technical skill, and requisite equipment.<sup>2669</sup> The mission concluded that “the local investigation has neither the capacity nor the commitment to succeed. It also lacks the confidence of the population necessary for its results to be accepted.”<sup>2670</sup>

### **Existing Civil Society Capacity**

Civil society in Lebanon must navigate religious and sectarian division, while operating in a difficult security environment.<sup>2671</sup> Nongovernmental organizations also struggle to influence policymaking in part because of the opacity of Lebanon's Byzantine political structures.<sup>2672</sup> Following the 2005 Syrian withdrawal, there was a surge in the number of registered NGOs, making Lebanon one of the more vibrant countries for civil society in the region.<sup>2673</sup> Nevertheless, despite engagement with

the court through meetings and outreach events, civil society organizations have had a limited role in commenting on STL matters in Lebanese media, and their involvement in transitional justice issues has been largely donor-driven.<sup>2674</sup>

## **Creation**

In April 2005, following a request by the Lebanese government and discussions with the UN Secretary-General, the Security Council established the UN International Independent Investigation Commission (UNIIC). The Security Council mandated it “to assist the Lebanese authorities in their investigation of all aspects of this terrorist act, including to help identify its perpetrators, sponsors, organizers and accomplices.”<sup>2675</sup> The commission was preceded by a brief one-month UN fact-finding mission dispatched by the Secretary-General.<sup>2676</sup>

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## **The UN International Independent Investigation Commission (2005–2009)**

The Security Council created UNIIC to assist Lebanese authorities in investigating the Hariri assassination, and extended and expanded its mandate several times. UNIIC was a hybrid investigative mechanism: international in mandate and composition but integrated with national authorities. Its backers viewed it as a necessary bulwark against political interference into investigations and a means to ensure cooperation from neighboring states.

Unlike other investigative commissions, which were seen as distinct precursors to prosecution mechanisms—for example, in the former Yugoslavia and Rwanda—UNIIC effectively became the investigative component of the subsequently created STL’s Office of the Prosecutor. It operated while negotiations were underway for the STL’s creation, and when its mandate expired in February 2009, the commissioner, Daniel Bellemare, was named the first STL prosecutor.<sup>2677</sup> UNIIC was based in Lebanon (except for a temporary relocation to Cyprus for several months in 2006) and increased operations in The Hague in the run-up to the handover of its files to the STL.

UNIIC played a critical role in collecting evidence, including conducting a full-scale examination of the crime scene. UNIIC investigated a multinational and powerful network, based in Syria, which had carried out a string of political assassinations in Lebanon, including allegedly that of Prime Minister Rafik Hariri.<sup>2678</sup>

As killings and bombings continued even after the December 2005 creation of UNIIIC, the government of Lebanon expressed its desire to the UN “to establish a tribunal of an international character.”<sup>2679</sup> The Security Council tasked the Secretary-General with exploring options, and in March 2006, it requested that he consult with the Lebanese government on the creation of a tribunal.<sup>2680</sup> Eight months later, the Secretary-General issued a report to the Security Council that outlined the design of what would become the STL.<sup>2681</sup> The Security Council and government of Lebanon signed an agreement to create the STL in January and February 2007.<sup>2682</sup> However, after a four-month deadlock in the Lebanese Parliament prevented the agreement’s ratification, a majority of the parliament’s members wrote to the Secretary-General to request that the Security Council use its Chapter VII authority to create the tribunal.<sup>2683</sup> The Security Council did so in May 2007.<sup>2684</sup> The STL commenced operations in March 2009 with an initial three-year mandate, which the Secretary-General extended for a further three years in 2012<sup>2685</sup> and again in 2015.<sup>2686</sup>

## **Legal Framework and Mandate**

The STL’s mandate is to prosecute Hariri’s assassination and any other connected criminal acts in Lebanon between October 1, 2004, and December 12, 2005, of similar nature and gravity; investigation of later acts is also possible if agreed upon by the UN and Lebanon, with Security Council consent.<sup>2687</sup> It has primary and concurrent jurisdiction over Lebanese national courts.<sup>2688</sup> The STL has asserted its primary jurisdiction through communications from the Pre-Trial Chamber to the Lebanese prosecutors, ordering them to defer proceedings to the tribunal.<sup>2689</sup>

The applicable law at the STL is the Lebanese Criminal Code.<sup>2690</sup> An Appeals Chamber ruling stated that the STL is bound to follow domestic law “unless unreasonable ... or not consonant with international principles and rules binding on Lebanon.”<sup>2691</sup> In practice, this means the STL “read[s] Lebanese law in the context of ‘international obligations undertaken by Lebanon with which, in the absence of very clear language, it is presumed any legislation complies.’”<sup>2692</sup> The interplay between Lebanese and international law at the STL (in essence, an international tribunal applying domestic law) causes some legal confusion. Additionally, legal scholars and observers note that the STL’s jurisdictional structure reflects the steady “internationalization” of law; and that through due process norms and concepts, it is “embedding international standards in a domestic jurisdiction.”<sup>2693</sup>

The STL Appeals Chamber made a landmark jurisprudential contribution toward defining the crime of terrorism under international law, marking “the first time that an international tribunal has authoritatively confirmed a general definition of terrorism under international law.”<sup>2694</sup> While emerging international norms may prohibit granting immunity to heads of state for atrocity crimes, the norm against sovereign immunity for terrorism is not considered to be crystallized.<sup>2695</sup>

The STL Statute outlines modes of responsibility recognized in Lebanese law and in international criminal law. In case of conflict, the legal regime more favorable to the accused will apply.<sup>2696</sup> The judges of the tribunal adopted the Rules of Procedure and Evidence in March 2009, as required by the statute.<sup>2697</sup>

The statute is silent regarding sovereign immunity but states that any amnesty granted shall not be a bar to prosecution.<sup>2698</sup> The statute recognizes evidence collected by UNIIC, a UN body that investigated the Hariri assassination and led to the creation of the STL.<sup>2699</sup> The statute explicitly allows trials in absentia if proper steps have been taken to seek custody of the accused.<sup>2700</sup> In case of conviction in absentia, the accused has the right to be retried. The STL statute also mandates legal representation of the accused when tried in absentia.<sup>2701</sup>

## **Location**

The STL sits in Leidschendam, a suburb of The Hague in the Netherlands. The agreement between the UN and Lebanon mandates that the STL have its seat outside of Lebanon and also that an investigations and public relations office be established in Lebanon, subject to arrangements with the government.<sup>2702</sup> The office in Beirut has also facilitated cooperation and outreach initiatives.

## **Structure and Composition**

In its structural features, the STL resembles a hybrid tribunal: it applies Lebanese and international law, retains concurrent and primary jurisdiction over Lebanese courts, and employs mixed national/international judges and staff. But the STL contains several structural innovations: (1) a predecessor international investigations body that essentially became the Office of the Prosecutor (OTP); (2) participation of victims in the proceedings, using elements of civil law; and (3) the establishment of a defense office as an independent organ of the court, outside of the Registry. Thus the STL has four organs: Chambers, the OTP, the Defense Office, and the Registry.

## ***Chambers***

The Pre-Trial Chamber consists of one international investigative judge according to the inquisitorial model. The investigating judge collects evidence, reviews indictments, and can revise charges proposed by the prosecutor. Two international judges and one Lebanese judge sit on the Trial Chamber. Two alternate judges (Lebanese and international) sit in reserve. A second Trial Chamber can be created upon request of the STL president or the Secretary-General.<sup>2703</sup> Two Lebanese and three international judges sit on the Appeals Chamber. The STL uses an appointment method similar to the Khmer Rouge Tribunal in Cambodia (the only two international tribunals to do so).<sup>2704</sup> The UN Secretary-General appoints international judges and prosecutors recommended by a “selection panel.”<sup>2705</sup> Lebanese judges are nominated by the Lebanese Supreme Council of the Judiciary and appointed by the UN Secretary-General.<sup>2706</sup> The Secretary-General is required to consult with the government of Lebanon on all judicial and prosecutorial appointments.

## ***Prosecutor***

The Secretary-General appoints the international prosecutor, upon the recommendation of the selection panel, for a three-year term. The Secretary-General also appoints a Lebanese deputy prosecutor to a three-year term, but the agreement does not require the deputy prosecutor’s nomination by the selection committee. The STL’s first prosecutor had served as the commissioner of the UNIIIC, ensuring continuity in operations between the two legally distinct bodies.

## ***Defense Office***

The Defense Office is an independent organ of the court, existing outside the Registry, a structural innovation at international tribunals.<sup>2707</sup> The Defense Office itself does not represent individual suspects or accused, but develops and supports a list of lawyers who can be appointed as defense counsel. It published its first list of 120 attorneys in September 2011. Privately retained counsel require Defense Office verification as being competent before they can appear before the STL. The office provides training to lawyers on international criminal law and STL procedure. The STL structure and procedure reflect inquisitorial features of the Lebanese civil law model, with certain divergences. For example, the Defense Office had to negotiate a memorandum of understanding with Lebanese authorities so that STL defense attorneys could carry out investigations in Lebanon—a role usually reserved for Lebanon’s investigating judges.

## **Registry**

The Secretary-General appoints the registrar who is the STL's only UN staff member.<sup>2708</sup> The Registry, located in The Hague, also has a field office in Beirut. It provides court management, security, and administrative support to the STL and is also responsible for external and diplomatic relations (including witness relocation agreements and bilateral cooperation agreements with states and organizations). Sub-offices of the Registry include the Outreach and Legacy Office (based in Beirut), the Public Affairs/Press Office (separate from the OTP press office), the Victims Participation Unit (VPU), and the Detention Unit.

## **Victim Participation**

The VPU assists victims in applying to participate in the trial and provides administrative and legal support. Following the civil law model, victims can participate in the trial by accessing and submitting evidence, cross-examining witnesses (at the discretion of the Trial Chamber), and seeking damages in national courts on the basis of STL judgments. However, victims before the STL are “much more limited than the Lebanese *partie civile* model of participation.”<sup>2709</sup> Terrorism proceedings in Lebanon are mainly held before military tribunals that do not allow civil party participation. Victims can only participate as parties after the confirmation of indictments and cannot join as criminal parties.<sup>2710</sup> In August and September 2017, legal representatives of 72 victims of terrorism presented evidence in the case of *Ayyash et al.*<sup>2711</sup>

## **Prosecutions**

As of October 2017, the STL had one case in trial, a second under investigation, and two completed cases of contempt of court.

In the first case, *Ayyash et al.*, four persons are on trial in absentia in relation to the Hariri assassination.<sup>2712</sup> Judges confirmed charges of conspiracy to commit a terrorist act and other charges in June 2011, and the court transmitted arrest warrants to Lebanese authorities. A fifth accused subsequently died, and judges subsequently added another by ordering the joinder of two cases. The trial opened in January 2014, but as of October 2017, all four accused remained at large.

As of October 2017, a second case was still in the investigation stage. In August 2011, the prosecutor asserted jurisdiction over three terrorist attacks targeting three Lebanese politicians in 2004 and 2005; the OTP believes these incidents are linked to the Hariri assassination.<sup>2713</sup>

The court has also considered requests for the disclosure of information related to the detention of individuals in Lebanon pursuant to UNIIIC investigations. In one case, judges have ordered a process of disclosure to an individual pursuing claims in Lebanese courts for unlawful detention; with regard to another case, STL judges have ruled against such a request.<sup>2714</sup>

The STL also charged two individuals and two media companies for contempt and obstruction of justice.<sup>2715</sup> The charges were in relation to media reports containing information about alleged confidential STL witnesses. Karma Mohamed Tahsin Al Khayat and Al Jadeed S.A.L./New TV were ultimately acquitted. Ibrahim Mohamed Ali Al Amin and Akhbar Beirut were both found guilty. Al Amin was sentenced to a €20,000 fine and Akhbar Beirut to a €6,000 fine.

## **Legacy**

The STL “provides Lebanon with an important chance to use an independent criminal justice mechanism to challenge the tradition of political violence in Lebanon.”<sup>2716</sup> The International Center for Transitional Justice has identified three possible ways the STL could leave a positive legacy in Lebanon: through legal developments in specific cases, by strengthening Lebanese investigative and judicial capacities, and through the so-called demonstration effect of the STL in raising awareness of accountability and the rule of law.<sup>2717</sup> With regard to the last of these, much may hinge on whether accused persons, and anyone the court may convict in absentia, is ever arrested. A permanent failure to secure arrests through state cooperation could reinforce impressions that judicial institutions are ineffective. The tribunal’s limited mandate also leaves grave crimes committed during the course of the civil war unaddressed, so even if the STL ultimately achieves its aims of accountability for the Hariri assassination and related attacks, many Lebanese will still have unfulfilled hopes of justice.<sup>2718</sup>

## **Financing**

The agreement states that 51 percent of the tribunal’s cost will be funded by voluntary contributions from UN Member States, with the government of Lebanon contributing the remaining 49 percent.<sup>2719</sup> In an arrangement designed to ensure funding for the STL, the agreement stated that the STL would only begin to function once it had received funding for its first year, plus “pledges of contributions equal to

the anticipated expenses of the following two years.”<sup>2720</sup> Resolution 1757 empowers the UN Secretary-General and the Security Council to seek “alternate means of financing” if sufficient voluntary contributions are not secured.<sup>2721</sup>

In 2007, the Secretary-General anticipated required expenses of US\$35 million for the first year, US\$45 million for the second year, and US\$40 million for the third year. The court’s approved budget for 2017 was approximately US\$68 million.<sup>2722</sup>

In 2011, Lebanon initially refused to provide financing to the tribunal, after the announcement of the first four indictments and ahead of the expiry of the tribunal’s mandate in February 2012. The confluence of these events led some observers to fear that Lebanon would use its required contribution as a negotiation tool over the renewal of the mandate, and some decried the shared funding model of the STL.<sup>2723</sup> Despite the cascade of difficulties for the tribunal, however, Lebanon submitted its payment and did not attempt to block the renewal.

## **Oversight and Accountability**

Under the agreement between the UN and Lebanon that established the STL, the parties shall “consult concerning the establishment of a management committee.”<sup>2724</sup> Accordingly, ahead of the STL’s opening, a group of donor countries—led by the United Kingdom and including Germany, the Netherlands, the United States, France, and Lebanon—formed a management committee to provide input and coordination on nonjudicial policy, including financial decisions. This donor committee resembles a similar mechanism established to provide support to the Special Court for Sierra Leone.

The STL Rules of Procedure and Evidence include provisions on recusal of judges due to conflicts of interest<sup>2725</sup> and contempt of court.<sup>2726</sup> A code of ethics governing the conduct of counsel before the STL is derived from three main sources: (1) the STL’s Statute, Rules of Procedure and Evidence, and case law; (2) the Code of Professional Conduct for Counsel Appearing Before the Tribunal; and (3) the Code of Professional Conduct for Defense Counsel and Legal Representatives of Victims Appearing Before the Special Tribunal for Lebanon.<sup>2727</sup> Directives on victims’ legal representation<sup>2728</sup> and on the appointment and assignment of defense counsel<sup>2729</sup> provide some degree of additional oversight with regard to legal aid. With approval of the STL president, judges may also communicate misconduct to the relevant professional body in the counsel’s national jurisdiction.<sup>2730</sup>

# **SYRIA: INTERNATIONAL, IMPARTIAL AND INDEPENDENT MECHANISM ON SYRIA**

## **Conflict Background and Political Context**

While the Syrian regime has a long history of brutal repression, the current conflict that has engulfed the country and the larger region dates back to the Arab Spring. Following scattered protests in early 2011, by July thousands of Syrians had joined demonstrations against the Assad regime in cities across the country. By that time, what had begun as peaceful demonstrations increasingly turned to armed clashes with the Syrian army and security apparatus, along with the emergence of various rebel groups.<sup>2731</sup> The first and main rebel group at the time was the Free Syrian Army (FSA), a group founded by defectors from the Syrian army and security forces in August 2011.<sup>2732</sup> Different, smaller groups operated across the country in affiliation with the FSA; however, the emergence of jihadist groups such as the Islamic Front and Jayish Al-Islam marked a turning point as the conflict took on more sectarian contours, pitting the country's Sunni majority against the president's Shia Alawite sect. Regional and world powers—ranging from Russia to Turkey to the United States—were drawn into the conflict, while the rise of the Islamic State in Syria and Levant (ISIS) has added a further dimension.<sup>2733</sup>

As of late 2017, six years of conflict had led more than five million Syrians to flee the country and internally displaced a further 6.3 million people.<sup>2734</sup> The Syrian Center for Research Policy has documented 470,000 deaths, twice as many as the UN's figures.<sup>2735</sup> In 2017, Human Rights Watch also documented more than 117,000 detentions or disappearances, the vast majority perpetrated by government forces.<sup>2736</sup> Systemized torture and extensive killing in Syrian prisons has been well documented, including through photographic evidence of thousands of victims.<sup>2737</sup>

## **Existing Justice-Sector Capacity**

Emergency laws have governed Syria since the Ba'ath regime came to power in 1963. Those laws created an environment where the authorities “abused the most basic rights and freedoms of the Syrian people on a wide scale and where they adopt arbitrary measures to silence critics in the name of safeguarding national security.”<sup>2738</sup> In addition, while the Syrian Constitution provides for an independent judiciary, human rights organizations have long criticized the justice sector, contending that Syria's courts operate in “shadowy” exceptions to general judicial

procedure.<sup>2739</sup> This situation has only deteriorated since the onset of conflict: the UN Commission of Inquiry has concluded that it is very unlikely that independent, credible prosecutions that meet minimum international standards could be carried out in Syria in the near term.<sup>2740</sup> This conclusion was based on what it assessed as a “lack of willingness on the part of the Syrian authorities and the likely inability of the system to carry out such prosecutions.”<sup>2741</sup> Human Rights Watch has drawn similar conclusions.<sup>2742</sup>

Armed groups operating on Syrian territory in areas outside of government control have established ad hoc court systems. Courts established by ISIS, for instance, claim to operate under Islamic laws.<sup>2743</sup> In a 2017 ruling, a Swedish court examining a case related to courts established by armed groups in Syria held that such courts are permitted in principle, but only under certain conditions, including respect of fair trial rights under human rights and humanitarian law.<sup>2744</sup>

## **Existing Civil Society Capacity**

Throughout the conflict, Syrian civil society groups have operated in an extraordinarily challenging environment and faced enormous security risks.<sup>2745</sup> Several organizations operating both inside and outside of Syria are focused on documenting and reporting on human rights violations.<sup>2746</sup> A partial list of Syrian organizations engaged on accountability issues includes the Violations Documentation Center, the Syrian Human Rights Network, the Syria Justice Accountability Center, the Syrian Center for Media and Freedom of Expression, and the Syrian Archive. An international NGO, the Commission for International Justice and Accountability has also engaged in extensive documentation work.

International NGOs have supported national prosecutions in mostly European courts related to grave crimes in Syria.<sup>2747</sup> These groups include the International Federation for Human Rights, the European Center for Constitutional and Human Rights, Guernica 37, the Center for Justice and Accountability, and the Open Society Justice Initiative.

## **Creation**

A number of international commissions preceded the creation of the International, Impartial and Independent Mechanism on Syria (IIIM). In August 2011, the

UN Human Rights Council (HRC) established the Independent International Commission of Inquiry on the Syrian Arab Republic. The HRC mandated the commission to “investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic, to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable.”<sup>2748</sup> The UN also established another investigative entity in relation to increasing reports of the use of chemical weapons in Syria. In 2015, the United Nations Security Council adopted Resolution 2235 to create the UN-OPCW Joint Investigative Mechanism to hold chemical weapons users in the Syria civil war accountable.<sup>2749</sup>

Efforts in the UN Security Council to refer the Syrian situation to the International Criminal Court repeatedly failed due to opposition from veto-wielding members Russia and China.<sup>2750</sup> On December 21, 2016, the UN General Assembly voted to establish the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011.<sup>2751</sup> The UN Secretary-General presented the IIIM’s terms of reference in January 2017. In a *note verbale* to the Secretary-General, Russia summarized a number of complaints objecting to the IIIM’s creation. These include the objection that the IIIM is actually a prosecutorial body, which the General Assembly has no legal power to create. In Russia’s view, this mechanism therefore violates Article 2(7) of the UN Charter and Article 12, which limits the power of the General Assembly to deal with matters already being considered by the Security Council.<sup>2752</sup> Supporters of the IIIM assert that the General Assembly’s authority to create it derives from the inaction of the Security Council to address the sustained perpetration of grave crimes in Syria.

## **Legal Framework and Mandate**

The IIIM’s terms of reference mandate it to “collect, consolidate, preserve and analyze evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law.”<sup>2753</sup>

The IIIM's subject matter jurisdiction includes "crimes under international law, in particular the crime of genocide, crimes against humanity and war crimes, as defined in relevant sources of international law," while its temporal jurisdiction extends back to March 2011.<sup>2754</sup> The terms of reference make clear that the IIIM is complementary to the Independent International Commission of Inquiry. While the commission focuses on "directly collecting information, publicly reporting recent broad patterns of violations, abuses and emblematic incidents and making recommendations," the IIIM "primarily builds on the information collected by others, in particular the Commission, by collecting, consolidating, preserving and analyzing evidence and prepares files to facilitate and expedite fair and independent criminal proceedings in national, regional or international courts or tribunals."<sup>2755</sup>

The IIIM has a mandate to collect information and evidence from all parties to the conflict, the commission, the UN-OPCW Joint Mission, civil society groups, and states.<sup>2756</sup> It is also mandated to collect such information through witness testimonies, interviews, and forensic materials.<sup>2757</sup> The IIIM "shall seek to establish the connection between crime-based evidence and persons responsible, directly or indirectly, for alleged crimes falling within its jurisdiction, focusing in particular on linkage evidence."<sup>2758</sup> Information and evidence collected are to be analyzed and consolidated in a way that maximizes their use in "future criminal investigations and prosecutions."<sup>2759</sup>

The terms of reference task the IIIM with focusing on persons most responsible for violations. Resulting files shall include "relevant information, documentation and evidence in the Mechanism's possession, both inculpatory and exculpatory, pertaining to the imputable crimes and to the mode or modes of criminal liability recognized under international law, including command or superior responsibility."<sup>2760</sup>

The IIIM's primary purpose is to facilitate prosecutions and trials in other jurisdictions through sharing information "with national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law, in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards."<sup>2761</sup> The IIIM also has the authority to share information at the request of those courts or on its own initiative. The IIIM will not share such information with jurisdictions that do not respect international human rights law, including fair trial protections and nonapplication of the death penalty.<sup>2762</sup>

## Location

The UN's Office of the High Commissioner for Human Rights announced in February 2017 that a start-up team for the IIIM had already begun its work, based in Geneva, Switzerland.<sup>2763</sup>

## Structure and Composition

The IIIM is headed by a senior judge or prosecutor with extensive experience in criminal investigations and prosecutions, and a deputy with extensive experience in international criminal justice and an in-depth knowledge of international criminal law, international human rights law, and international humanitarian law.<sup>2764</sup> On July 3, 2017, the UN Secretary-General announced the appointment of Catherine Marchi-Uhel of France as the first head of the IIIM.<sup>2765</sup> Her term is for an initial period of two years, which is renewable.<sup>2766</sup> In November 2017, Michelle Jarvis was named as her deputy. The IIIM also includes a Secretariat with expertise in the following areas: international criminal law, human rights law, international humanitarian law, criminal investigation and prosecution, the military, forensic matters (including in particular digital forensics, forensic pathology and forensic imagery), witness and victim protection, sexual and gender-based crimes and violence, children's rights, and crimes against children.<sup>2767</sup>

In appointing the members of the Secretariat, "due consideration shall be given to the representation of different legal traditions and gender balance and to appointing staff with the necessary language skills and regional expertise."<sup>2768</sup> According to diplomats, the UN is aiming to recruit between 40 and 60 experts in investigations, prosecutions, the military, and forensics.<sup>2769</sup>

## Prosecutions

The IIIM is not mandated to conduct prosecutions on its own, but will build on information collected to support efforts by other prosecutorial entities.<sup>2770</sup> To that end, it has been described as a "prosecutor without a tribunal," meaning that "it can build cases, but it does not have a dock for trying defendants."<sup>2771</sup> At the national level, several European countries have already started to investigate, prosecute, and try Syrians for war crimes on the basis of universal jurisdiction. In Germany, the federal public prosecutor opened investigations of international crimes in

Syria soon after the outbreak of the conflict.<sup>2772</sup> And in July 2016, a German court concluded its first war crimes trial in relation to atrocities committed in Syria.<sup>2773</sup> A criminal court in France has also opened an investigation and appointed an investigative judge to probe charges of “torture,” “crimes against humanity,” and “forced disappearances.” The victims in the case claimed to have been disappeared by Syrian Air Force Intelligence.<sup>2774</sup>

The necessary reliance on national courts to try perpetrators on the basis of their status within the country—in the absence of an ICC referral or establishment of an ad hoc or hybrid tribunal dedicated to Syrian crimes—means that most proceedings are likely to be directed against lower-ranking, non-regime perpetrators, or powerful perpetrators who still reside in Syria.<sup>2775</sup> As an institution for the long-term, the IIIM can support these efforts and preserve and prepare evidence for more comprehensive accountability solutions, if they are ever created.

## **Legacy**

In late 2017, the IIIM was still in the process of establishment. Many commentators remarked upon the novelty of creating such a mechanism via a General Assembly resolution, noting that it might enhance future prospects for using international investigative mechanisms to press for accountability in national jurisdictions.<sup>2776</sup> The legacy of the IIIM may ultimately be measured by its ability to encourage and support prosecutions in jurisdictions around the world.

## **Financing**

The IIIM will initially be funded from voluntary contributions, although this arrangement is to be revisited by the UN General Assembly.<sup>2777</sup> The UN announced that early contributions had been received from the Netherlands and Liechtenstein, with oral pledges from Qatar, Belgium, Luxembourg, and Hungary. In February 2017, the UN High Commissioner for Human Rights stated that “immediate funding requirements are at 4 to 6 million USD and while a precise budget is in development, annual operating needs are expected to be in the region of 13 million USD.”<sup>2778</sup>

## Oversight and Accountability

The IIIM's terms of reference do not detail internal oversight mechanisms; furthermore, its personnel, records, archives, property, and assets are protected by the Convention on the Privileges and Immunities of the United Nations.<sup>2779</sup> The head of the IIIM must submit a report to the General Assembly twice a year on the implementation of the IIIM's mandate and set out its funding requirements, as appropriate, while preserving the confidential nature of its substantive work.<sup>2780</sup>

## Notes

2573. For background on Iraq's history, see Adeed Dawisha, *Iraq: A Political History* (Princeton, NJ: Princeton University Press, 2009).
2574. For a history of the Iran-Iraq War, see Dilip Hiro, *The Longest War: The Iran-Iraq Military Conflict* (London, Routledge, 1991).
2575. Human Rights Watch, *Genocide in Iraq: The Anfal Campaign against the Kurds*, July 1993, available at: [hrw.org/report/2006/08/14/genocide-iraq-anfal-campaign-against-kurds/report-summary](http://hrw.org/report/2006/08/14/genocide-iraq-anfal-campaign-against-kurds/report-summary).
2576. The U.S.-led coalition acted under UN Security Council Resolution 678 (1990), which invoked Chapter VII of the UN Charter to allow "all necessary means" to enforce previous resolutions demanding Iraqi withdrawal. See *UNSC Resolution 678 (1990)*, November 29, 1990, available at: [documents-dds-ny.un.org/doc/RESOLUTION/GEN/NRO/575/28/IMG/NRO57528.pdf?OpenElement](http://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NRO/575/28/IMG/NRO57528.pdf?OpenElement). Whether the language of the resolution was sufficient to authorize the use of military force remained a matter of dispute. See John Quigley, "The United States and the United Nations in the Persian Gulf War: New Order or Disorder," *Cornell International Law Journal* 25, no 1. (1992): Article 1, available at: [scholarship.law.cornell.edu/cilj/vol25/iss1/1](http://scholarship.law.cornell.edu/cilj/vol25/iss1/1).
2577. The largest of the strikes during this period was "Operation Desert Fox," a four-day bombing campaign in December 1998.
2578. The UK government conducted an extensive inquiry into the manipulation of intelligence leading to the Second Gulf War, resulting in the so-called "Chilcot Report" (after the inquiry's chairperson, John Chilcot). See *The Report of the Iraq Inquiry*, July 6, 2016, available at: [iraqinquiry.org.uk/the-report](http://iraqinquiry.org.uk/the-report). See also Thomas E. Ricks, *Fiasco: The American Military Adventure in Iraq* (London, Penguin, 2006), 46–67.
2579. Radio address by President George W. Bush, March 22, 2003, available at: [georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030322.html](http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030322.html).
2580. For an overview of divergent legal opinions on the war, see "Was the War Legal? Leading Lawyers Give Their Verdict," *The Guardian*, March 2, 2004, available at: [theguardian.com/politics/2004/mar/02/uk.internationaleducationnews](http://theguardian.com/politics/2004/mar/02/uk.internationaleducationnews). The Netherlands politically supported the invasion, but a subsequent Commission of Inquiry determined that it had been illegal. See "Report of the Dutch Commission of Inquiry on the War in Iraq," chapter 8, printed in English in the *Netherlands International Law Review* 57, no. 1 (March 2010): 81–137, available at: [doi.org/10.1017/S0165070X10100059](https://doi.org/10.1017/S0165070X10100059).

2581. Ricks, *Fiasco: The American Military Adventure in Iraq*, 149–297.
2582. Miranda Sissons and Abdulrazzaq Al-Saiedi, *A Bitter Legacy: Lessons of De-Baathification in Iraq*, International Center for Transitional Justice, March 2013, available at: [ictj.org/sites/default/files/ICTJ-Report-Iraq-De-Baathification-2013-ENG.pdf](http://ictj.org/sites/default/files/ICTJ-Report-Iraq-De-Baathification-2013-ENG.pdf).
2583. Human Rights Watch, *The Road to Abu Ghraib*, June 8, 2004, available at: [hrw.org/report/2004/06/08/road-abu-ghraib](http://hrw.org/report/2004/06/08/road-abu-ghraib).
2584. UN and World Bank, *United Nations/World Bank Joint Iraq Needs Assessment*, October 2003, para. 3.141, available at: [siteresources.worldbank.org/IRFFI/Resources/Joint+Needs+Assessment.pdf](http://siteresources.worldbank.org/IRFFI/Resources/Joint+Needs+Assessment.pdf).
2585. John. C. Williamson, “Establishing Rule of Law in Post-War Iraq: Rebuilding the Justice System,” *Ga. J. Int’l & Comp. L.* 33 230.
2586. UN and World Bank, *United Nations/World Bank Joint Iraq Needs Assessment*, para. 3.141.
2587. Williamson, “Establishing Rule of Law in Post-War Iraq: Rebuilding the Justice System,” 231.
2588. *Ibid.*, 232.
2589. *Ibid.*
2590. Andrew Rathmell, Olga Oliker, Terrence K. Kelly, David Brannan, and Keith Crane, “Developing Iraq’s Security Sector, The Coalition Provisional Authority’s Experience,” RAND, 2005, 57, available at: [rand.org/content/dam/rand/pubs/monographs/2005/RAND\\_MG365.pdf](http://rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG365.pdf).
2591. CPA Order 35, *Re-Establishment of the Council of Judges*, September 15, 2003.
2592. CPA Order 13, *The Central Criminal Court of Iraq* (Amended), April 22, 2004.
2593. Rathmell et al., “Developing Iraq’s Security Sector,” 60.
2594. “Committee Signs Iraq’s Draft Constitution,” *CNN*, August 28, 2005, available at: [cnn.com/2005/WORLD/meast/08/28/iraq.constitution/](http://cnn.com/2005/WORLD/meast/08/28/iraq.constitution/).
2595. Iraq Constitution 2005, Article 88.
2596. Article 90.
2597. Amnesty International, *Iraq 2016/2017*, available at: [amnesty.org/en/countries/middle-east-and-north-africa/iraq/report-iraq/](http://amnesty.org/en/countries/middle-east-and-north-africa/iraq/report-iraq/).
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2602. UN and World Bank, *United Nations/World Bank Joint Iraq Needs Assessment*, para. 3.143.
2603. ICNL, *Civic Freedom Monitor, Iraq*.
2604. NGO Coordination Committee for Iraq, *Iraq Civil Society in Perspective*, 17.
2605. USAID, *Iraq Civil Society Assessment*, February 2012, 8, available at: [pdf.usaid.gov/pdf\\_docs/pnadzi188.pdf](http://pdf.usaid.gov/pdf_docs/pnadzi188.pdf).

2606. U.S. Department of State, *2016 Iraq Human Rights Report*, 34, available at: [state.gov/documents/organization/265710.pdf](http://state.gov/documents/organization/265710.pdf); Iraq Human Rights Report 2016, p. 48; Human Rights Watch, *Kurdistan Region of Iraq: 32 Arrested at Peaceful Protest*, available at: [hrw.org/news/2017/03/16/kurdistan-region-iraq-32-arrested-peaceful-protest](http://hrw.org/news/2017/03/16/kurdistan-region-iraq-32-arrested-peaceful-protest).
2607. Article 1 of the Statute for the Iraq Special Tribunal provides for the establishment of a tribunal known as the Iraq Special Tribunal. Statute available at: [loc.gov/law/help/hussein/docs/20031210\\_CPAORD\\_48\\_IST\\_and\\_Appendix\\_A.pdf](http://loc.gov/law/help/hussein/docs/20031210_CPAORD_48_IST_and_Appendix_A.pdf). Originally named the “Iraqi Special Tribunal,” in the CPA order and as translated in the 2005 law, the tribunal decided to call itself the “Iraqi High Tribunal” when its name was translated into English, although not all commentators used this nomenclature.
2608. See M. Cherif Bassiouni, “Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal,” *Cornell Int’l L.J.* 38 (2005): 327. Previous initiatives included a 1991 Arab League proposal following the first Gulf War and 1994–1997 consultations between the Clinton administration and the UNSC to create a war crimes investigation commission.
2609. A “Working Group on Transitional Justice” was convened under the Department of State’s “Future of Iraq” project, consisting of 40 Iraqi expatriate jurists and prominent U.S. experts, including M. Cherif Bassiouni. The group met in mid-2002 and released its plan at the U.S. Institute of Peace on May 21, 2003. Bassiouni, “Post-Conflict Justice in Iraq,” 327; see also *Letter from Human Rights Watch to the U.S. Regarding the Creation of a Criminal Tribunal for Iraq*, April 15, 2003, available at: [hrw.org/press/2003/04/iraqtribunal041503ltr.htm](http://hrw.org/press/2003/04/iraqtribunal041503ltr.htm); Open Society Institute and the United Nations Foundation, *Iraq in Transition, Post-Conflict Challenges and Opportunities*, 2004, 85–87; International Center for Transitional Justice, “Creation and First Trials of the Supreme Iraqi Criminal Tribunal,” Briefing Paper, October 2005.
2610. CPA Order 48, December 10, 2003, also containing the IHT statute, available at: [loc.gov/law/help/hussein/docs/20031210\\_CPAORD\\_48\\_IST\\_and\\_Appendix\\_A.pdf](http://loc.gov/law/help/hussein/docs/20031210_CPAORD_48_IST_and_Appendix_A.pdf).
2611. *Ibid.*, Section 2.
2612. Iraq Governing Council Decree of 10 December 2003, Establishing a Special Tribunal, appended in English and Arabic, in M. Cherif Bassiouni, *Iraq Post-Conflict Justice: A Proposed Comprehensive Plan*, Rev. January 2, 2004, available at: [law.depaul.edu/about/centers-and-institutes/international-human-rights-law-institute/publications/Documents/Iraq\\_Proposal\\_04.pdf](http://law.depaul.edu/about/centers-and-institutes/international-human-rights-law-institute/publications/Documents/Iraq_Proposal_04.pdf).
2613. Supreme Iraqi Criminal Tribunal Law No. 10 of 2005, *al-Waqa’ia al-Iraqiyya* (the official gazette of the Republic of Iraq), no. 4006, October 18, 2005.
2614. Michel A. Newton, “The Iraqi High Criminal Court: Controversy and Contributions,” *IRRC*, 88, no. 862 (June 2006): 401.
2615. Constitution of the Republic of Iraq (2005), Article 134: “The Iraqi High Tribunal shall continue its duties as an independent judicial body, in examining the crimes of the defunct dictatorial regime and its symbols. The Council of Representatives shall have the right to dissolve it by law after the completion of its work.”
2616. In its annual human rights reports for 2011 and 2012, the U.S. State Department reported that the IHT was dissolved in July 2011. See U.S. State Department, *Country Reports on Human Rights Practices for 2011: Iraq*, 13, available at: [state.gov/documents/organization/186638.pdf](http://state.gov/documents/organization/186638.pdf), and *Country Reports on Human Rights Practices for 2012: Iraq*, 16, available at: [state.gov/documents/organization/204572.pdf](http://state.gov/documents/organization/204572.pdf). However, a United Nations report states, “The operation of the [IHT] was suspended by order of the Council of Ministers in April 2012.” United Nations Assistance Mission in Iraq and the

- UN Office of the High Commissioner for Human Rights, *Report on the Death Penalty in Iraq*, October 2014, 8, available at: [ohchr.org/Documents/Countries/IQ/UNAMI\\_HRO\\_DP\\_1Oct2014.pdf](http://ohchr.org/Documents/Countries/IQ/UNAMI_HRO_DP_1Oct2014.pdf).
2617. Other crimes included judicial manipulation, wastage of national resources and funds, and pursuing policies that lead to the threat of war. Iraq ratified the Genocide Convention in 1956 and acceded to the Convention on the Prevention and Punishment of the Crime of Genocide in 1959.
2618. Territorial jurisdiction expressly referred to crimes committed in the Iraq-Iran war and the invasion and occupation of Kuwait. Some inconsistencies in personal jurisdiction in the initial statute included a conflict between IHT Article 1 (not including foreign coalition forces), IHT Article 10 (expressly including non-Iraqi citizens), and CPA Order 17 (granting immunity to coalition forces).
2619. The Iraqi legal system is inquisitorial, blending elements of French and Egyptian law. American officials also used “negotiated pleas,” which are not recognized in Iraqi criminal law. The arraignment and entering of pleas procedures used by the IHT in the Saddam trial were foreign to Iraqi law. See Bassiouni, “Post-Conflict Justice in Iraq,” 327: “The proceedings were choreographed as an American hearing where an investigative judge read an indictment and asked the defendant to plead guilty or not guilty, and was thus more American than Iraqi. There is no such procedure in the Iraqi criminal justice system. The investigative judge, sitting behind a table facing Saddam, was obviously uncomfortable. On the table where he sat facing Saddam Hussein was a copy of the 1971 Iraqi Code of Criminal Procedure, which does not provide for such an American style arraignment procedure.”
2620. Order No. 7, IRRC, 422.
2621. Rules of Procedure and Gathering of Evidence with Regard to the Supreme Iraqi Criminal Tribunal, *Official Gazette of the Republic of Iraq*, October 18, 2005, available at: [ictj.org/static/MENA/Iraq/IraqTribRules.eng.pdf](http://ictj.org/static/MENA/Iraq/IraqTribRules.eng.pdf). See also International Center for Transitional Justice, “Dujail: Trial and Error?” Briefing Paper, November 2006.
2622. The code does not envision litigation involving multiple victims, rather than individual cases, and may not recognize command responsibility as a mode of liability. In addition, the national criminal code contains strict evidentiary requirements. Translation errors in a widely circulated version of the Iraqi Criminal Procedural Code created confusion over which standard of proof the tribunal would use; it appears that the court used the language of “beyond a reasonable doubt.” See Miranda Sissons and Ari S. Bassin, “Was the Dujail Trial Fair?” *J. Intl. Crim. J.* 5 (2007): 285.
2623. Miranda Sissons, “And Now from the Green Zone ... Reflections on the Iraq Tribunal’s Dujail Trial,” *Ethics & International Affairs* 20, no. 4 (2006): “Original attempts to impose international rules of procedure and evidence have been trumped by a strong practical reliance on the Iraqi criminal procedural code.”
2624. IHT Statute, Article 2.
2625. He was removed in September 2004, but by then the IHT’s administrative affairs had fallen into disarray. See Human Rights Watch, *Judging Dujail, The First Trial before the Iraqi High Tribunal*, November 2006, 13.
2626. Rules of Procedure and Evidence of the Iraqi High Tribunal, 2005, Rule 68, available at: [gipi.org/wp-content/uploads/iht-rules-of-procedure-eng.pdf](http://gipi.org/wp-content/uploads/iht-rules-of-procedure-eng.pdf).
2627. 2005 IHT Statute, Article 4(d), 7(n), 8(j), respectively.
2628. 2005 IHT Statute, Article 6(b).

2629. Bassiouni, "Post-Conflict Justice in Iraq," 347.
2630. International Center for Transitional Justice, *Dujail: Trial and Error?* Briefing Paper, November 2006.
2631. Sonya Sceats, "The Iraqi High Tribunal Post-U.S. Involvement," *The World Today* (Chatham House), reprinted in *Opinio Juris*, April 30, 2008, available at: [opiniojuris.org/2008/04/30/the-iraqi-high-tribunal-post-us-involvement](http://opiniojuris.org/2008/04/30/the-iraqi-high-tribunal-post-us-involvement).
2632. Barzan Ibrahim al-Hassan, Awad Hamad al-Bandar, and Taha Yassin Ramadan (executed in March 2007).
2633. Abdullah al-Mashaikh, Mizher al-Mashaikh, and Muhammad Azzawi (acquitted at the request of the prosecution).
2634. International Center for Transitional Justice, *The Anfal Trial and Iraqi High Tribunal and Update Number One: The Complainant Phase of the Anfal Trial*, available at: [ictj.org/static/MENA/IRAQ/AnfalUpdateOne.eng.pdf](http://ictj.org/static/MENA/IRAQ/AnfalUpdateOne.eng.pdf). For a less critical account of the Anfal Trial, see Michael A. Newton and Michael P. Scharf, *Enemy of the State: The Trial and Execution of Saddam Hussein*, (London, St. Martin's Press, 2008).
2635. Sissons and Bassin, "Was the Dujail Trial Fair?" 284, noting that the court did not consider "contextual evidence to show how the various institutions implicated usually functioned as part of Saddam Hussein's regime."
2636. The defendants were Saddam Hussein, Ali Hassan al-Majid al Tikriti, Sultan Hashem Ahmed al-Ta'I, Tahir Tawfiq al-'Aani, Sabird Abd al Aziz al-Douri, Farhan Mutlaq al-Jaburi, and Hussein Rashid al-Tikriti. See Jennifer Trahan, "A Critical Guide to the Iraqi High Tribunal's Anfal Judgment: Genocide Against the Kurds," *Mich. J. Int'l. Law* 30 (2009): 305.
2637. Charges against al-'Aani were dismissed for lack of evidence. Two defendants, Barzan Ibrahim al-hassan and Awad Hamad al-Bandar were executed on January 15, 2007, and Tahan Yassin Ramadan was executed on March 20, 2007. See ICTJ, *The Anfal Trial and the Iraqi High Tribunal, Update Number Three: The Defense Phase and Closing Stages of the Anfal Trial*.
2638. Trahan, "A Critical Guide to the Iraqi High Tribunal's Anfal Judgment," 405.
2639. For an unofficial English summary of the case by IHT Judge Ra'id Juhi, see *Summary of the Merchants' Execution Case Verdict*, March 11, 2008, available at: [law.case.edu/grotian-moment-blog/documents/IHT\\_Merchants\\_Case.pdf](http://law.case.edu/grotian-moment-blog/documents/IHT_Merchants_Case.pdf). The convicted were Wetban Abraham Al Hassan, Sabayi Abraham Al Hasan, Mizban Khider Hadi, Abd Hamed Mahmood, Tariq Aziz Isa, and Ali Hassan Al Majeed. Charges were dismissed against Ahmed Hussein Khudair and Isam Rasheed Hweish due to lack of evidence.
2640. Kevin Jon Heller, "The Iraqi High Tribunal Post-U.S. Involvement," *Opinio Juris*, April 30, 2008, available at: [opiniojuris.org/2008/04/30/the-iraqi-high-tribunal-post-us-involvement/](http://opiniojuris.org/2008/04/30/the-iraqi-high-tribunal-post-us-involvement/).
2641. The tally is not entirely clear, as some individuals faced multiple criminal counts or were listed as defendants in multiple trials. See U.S. State Department, *Country Reports on Human Rights Practices for 2011: Iraq*, 13, available at: [state.gov/documents/organization/186638.pdf](http://state.gov/documents/organization/186638.pdf).
2642. Heller, "The Iraqi High Tribunal Post-U.S. Involvement," note 90.
2643. "UN Human Rights Expert Deplores Saddam's Trial and Execution: Calls for Legal Overhaul," *UN News Centre*, January 4, 2007, available at: [un.org/apps/news/story.asp?NewsID=21155&](http://un.org/apps/news/story.asp?NewsID=21155&).

2644. “UN Rights Group: First Saddam Trial Flawed,” *Voice of America*, October 31, 2009, available at: [voanews.com/a/a-13-2006-11-28-voa22/319171.html](http://voanews.com/a/a-13-2006-11-28-voa22/319171.html).
2645. Human Rights Watch, *The Poisoned Chalice: A Human Rights Watch Briefing Paper on the Decision of the Iraqi Tribunal in the Dujail Case*, June 2007, 4-6, available at: [hrw.org/legacy/backgrounders/ij/iraq0607/iraq0607web.pdf?\\_ga=1.258347658.1616568321.1435024001](http://hrw.org/legacy/backgrounders/ij/iraq0607/iraq0607web.pdf?_ga=1.258347658.1616568321.1435024001). See also Human Rights Watch, *Judging Dujail*, 36-72.
2646. Amnesty International, *Iraq: Flaws in the First Trial Before the Supreme Iraqi Criminal Tribunal Should Not Be Repeated*, August 18, 2006.
2647. Human Rights Watch, *The Poisoned Chalice*, 4.
2648. “Hussein’s Execution Was Botched, Judge Says,” *New York Times*, April 29, 2008, available at: [thelede.blogs.nytimes.com/2008/04/29/husseins-execution-was-botched-judge-says](http://thelede.blogs.nytimes.com/2008/04/29/husseins-execution-was-botched-judge-says).
2649. “Saddam Hussein before Iraqi Justice,” *Aljazeera*, July 5, 2004, available at: [aljazeera.net/programs/al-jazeera-platform/2004/10/3/%D8%B5%D8%AF%D8%A7%D9%85-%D8%AD%D8%B3%D9%8A%D9%86-%D8%A3%D9%85%D8%A7%D9%85-%D8%A7%D9%84%D9%82%D8%B6%D8%A7%D8%A1-%D8%A7%D9%84%D8%B9%D8%B1%D8%A7%D9%82%D9%8A](http://aljazeera.net/programs/al-jazeera-platform/2004/10/3/%D8%B5%D8%AF%D8%A7%D9%85-%D8%AD%D8%B3%D9%8A%D9%86-%D8%A3%D9%85%D8%A7%D9%85-%D8%A7%D9%84%D9%82%D8%B6%D8%A7%D8%A1-%D8%A7%D9%84%D8%B9%D8%B1%D8%A7%D9%82%D9%8A) (Arabic).
2650. “Saddam’s Hanging Came Too Soon for Kurds,” *Washington Post*, February 19, 2007, available at: [washingtonpost.com/wp-dyn/content/article/2007/02/19/AR2007021900483.html](http://washingtonpost.com/wp-dyn/content/article/2007/02/19/AR2007021900483.html). See also International Center for Transitional Justice, *The Anfal Trial and the Iraqi High Tribunal: Update Number Two: The Prosecution Witness and Documentary Evidence Phases of the Anfal Trial*, June 1, 2007, 19, available at: [ictj.org/publication/prosecution-witness-and-documentary-evidence-phases-anfal-trial](http://ictj.org/publication/prosecution-witness-and-documentary-evidence-phases-anfal-trial).
2651. See *CPA Transcripts, Bremer Affirms: Iraq Turns the Page*, April 23, 2004, available at: [iraqcoalition.org/transcripts/20040423\\_page\\_turn.html](http://iraqcoalition.org/transcripts/20040423_page_turn.html).
2652. *2007 Report on Iraq Relief and Reconstruction: Quarterly Update to Congress*, Bureau of Resource Management, 33, available at: [merln.ndu.edu/archivepdf/iraq/State/2207\\_april2006.pdf](http://merln.ndu.edu/archivepdf/iraq/State/2207_april2006.pdf).
2653. “International Tribunal Spotlight: Iraqi High Criminal Tribunal,” available at [www.judicialmonitor.org/archive\\_0306/spotlight.html](http://www.judicialmonitor.org/archive_0306/spotlight.html).
2654. M. A. Newton, “The Iraqi High Criminal Court: Controversy and Contributions,” *International Review of The Red Cross* 88, no. 862 (June 2006): 404n26.
2655. Rules of Procedure and Evidence of the Iraqi High Tribunal, 2005, Rule 7, available at: [gipi.org/wp-content/uploads/iht-rules-of-procedure-eng.pdf](http://gipi.org/wp-content/uploads/iht-rules-of-procedure-eng.pdf).
2656. 2005 IHT Statute, Article 4(4).
2657. Sissons and Bassin, “Was the Dujail Trial Fair?” 278, noting further that “the [national De-Ba’athification Commission] threatened to use de-Ba’athification procedures against four Tribunal judges in October 2006. It told the judges that they would be given the opportunity to apply for transfers rather than face the public humiliation of de-Ba’athification. Not accidentally, this resulted in the substitution of a member of the *Dujail* trial bench during the trial chamber’s final deliberation. A member of the cassation chamber was likewise replaced. Other judges appear to have modified their behavior or refused positions of prominence for fear of attracting the Commission’s attention.”
2658. Sonya Sceats, “The Iraqi High Tribunal Post-U.S. Involvement.”

2659. Chatham House, “The Iraqi Tribunal: The Post-Saddam Cases,” a summary of the Chatham House International Law Discussion Group meeting held on December 4, 2008, 6.
2660. See *Ayyash et al. (STL-11-01): The Victims*, available at: [stl-tsl.org/en/the-cases/stl-11-01/5891-the-victims](http://stl-tsl.org/en/the-cases/stl-11-01/5891-the-victims).
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2666. Human Rights Watch, *World Report Country Summary, Lebanon*, 2012.
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2669. Fact-Finding Mission Report, para. 48.
2670. *Ibid.*, para. 49.
2671. Beyond Reform and Development, *Mapping Civil Society in Lebanon*, 2015, 3.2, available at: [eeas.europa.eu/archives/delegations/lebanon/documents/news/20150416\\_2\\_en.pdf](http://eeas.europa.eu/archives/delegations/lebanon/documents/news/20150416_2_en.pdf).
2672. *Ibid.*, 1.2.
2673. David Shenker, *Lebanon’s [Un]Civil Society*, The Washington Institute, March 2016, 1, available at: [washingtoninstitute.org/uploads/Documents/pubs/BeyondIslamists-Lebanon-4.pdf](http://washingtoninstitute.org/uploads/Documents/pubs/BeyondIslamists-Lebanon-4.pdf).
2674. Are Knudsen and Sari Hanafi, “Special Tribunal for Lebanon (STL): Impartial or Imposed International Justice?” *NJHR* 31, no. 2 (2013): 199–200, available at: [staff.aub.edu.lb/~sh41/dr\\_sarry\\_website/2014\\_online%20publication/2013\\_Are\\_Sari\\_STL.pdf](http://staff.aub.edu.lb/~sh41/dr_sarry_website/2014_online%20publication/2013_Are_Sari_STL.pdf).
2675. UN Security Council Resolution 1595, S/RES 1595, April 7, 2005.
2676. See *Report of the Fact-Finding Mission to Lebanon Inquiry into the Causes, Circumstances and Consequences of the Assassination of Former Prime Minister Rafik Hariri*, S/2005/203, March 24, 2005. The mission was headed by Peter FitzGerald, a deputy commissioner of the Irish Police, and included two police investigators, a legal adviser, a political adviser, and additional experts in explosives, ballistics, DNA, and crime scene examinations.
2677. Previous commissioners of the UNIIC included Detlev Mehlis and Serge Brammertz.
2678. In its first report, the commission found “converging evidence pointing at both Lebanese and Syrian involvement in the terrorist act” and concluded that “there is probable cause to believe that the decision to assassinate Hariri could not have been

taken without the approval of top-ranked Syrian security officials and could not have been further organized without the collusion of their counterparts in the Lebanese security services.” Report of the International Independent *Investigation Commission Established Pursuant to Security Council Resolution 1595*, S/2005/662, October 20, 2005, para 124.

2679. *Letter Dated December 13, 2005, from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations Addressed to the Secretary-General*, S/2005/783, December 13, 2005, available at: [documents-dds-ny.un.org/doc/UNDOC/GEN/NO5/640/51/PDF/NO564051.pdf?OpenElement](http://documents-dds-ny.un.org/doc/UNDOC/GEN/NO5/640/51/PDF/NO564051.pdf?OpenElement).
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2681. *Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon*, S/2006/893, November 15, 2006, available at: [un.org/en/ga/search/view\\_doc.asp?symbol=S/2006/893](http://un.org/en/ga/search/view_doc.asp?symbol=S/2006/893).
2682. The text of the agreement can be found in annex to the Security Council resolution that eventually brought it into force. See UNSC Resolution 1757 (2007), May 30, 2007, available at: [un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1757\(2007\)](http://un.org/en/ga/search/view_doc.asp?symbol=S/RES/1757(2007)).
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2684. UNSC Resolution 1757 (2007), May 30, 2007, available at: [un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1757\(2007\)](http://un.org/en/ga/search/view_doc.asp?symbol=S/RES/1757(2007)). The textual placement of the Chapter VII reference in the resolution has led some legal observers to argue that the Chapter VII powers of the STL only compel cooperation by Lebanon, but not by third-party states. See International Center for Transitional Justice, *Handbook on The Special Tribunal for Lebanon*, April 2008, 31–33, available at: [ictj.org/publication/handbook-special-tribunal-lebanon](http://ictj.org/publication/handbook-special-tribunal-lebanon).
2685. “Ban Extends Mandate of UN-backed Tribunal in Lebanon,” *UN News Center*, February 22, 2012, available at: [un.org/apps/news/story.asp?NewsID=41331#.WfCaq2iPI2w](http://un.org/apps/news/story.asp?NewsID=41331#.WfCaq2iPI2w).
2686. “Mandate of UN-backed Tribunal for Lebanon Extended for Three More Years,” *UN News Center*, January 2, 2015, available at: [un.org/apps/news/story.asp?NewsID=49724#.WfCaK2iPI2w](http://un.org/apps/news/story.asp?NewsID=49724#.WfCaK2iPI2w).
2687. STL Statute, Article 1: “The Special Tribunal shall have jurisdiction over persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons. If the tribunal finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks. This connection includes but is not limited to a combination of the following elements: criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (modus operandi) and the perpetrators.”
2688. STL Statute, Article 4. Upon assuming office, the prosecutor was required to request the national authorities to defer competence to the STL and transfer any suspects in custody.

2689. See *Order Directing the Lebanese Judicial Authority Seized with the Case Concerning the Attack Perpetrated against Mr. Marwan Hamadeh on 1 October 2004 to Defer to the Special Tribunal for Lebanon*, August 18, 2011, available at: [stl-tsl.org/en/the-cases/stl-11-02/main/filings/orders-and-decisions/pre-trial-judge/order-directing-the-lebanese-judicial-authority-seized-with-the-case-concerning-the-attack-perpetrated-against-mr-marwa-hamadeh](http://stl-tsl.org/en/the-cases/stl-11-02/main/filings/orders-and-decisions/pre-trial-judge/order-directing-the-lebanese-judicial-authority-seized-with-the-case-concerning-the-attack-perpetrated-against-mr-marwa-hamadeh); *Order Directing the Lebanese Judicial Authority Seized with the Case Concerning the Attack Perpetrated against Mr Elias El-Murr on 12 July 2005 to Defer to the Special Tribunal for Lebanon*, August 19, 2011, available at: [stl-tsl.org/en/the-cases/stl-11-02/main/filings/orders-and-decisions/pre-trial-judge/711-f0006](http://stl-tsl.org/en/the-cases/stl-11-02/main/filings/orders-and-decisions/pre-trial-judge/711-f0006); and *Order Directing the Lebanese Judicial Authority Seized with the Case Concerning the Attack Perpetrated against Mr George Hawi on 21 June 2005 to Defer to the Special Tribunal for Lebanon*, August 19, 2011, available at: [stl-tsl.org/en/the-cases/stl-11-02/main/filings/orders-and-decisions/pre-trial-judge/710-f0005](http://stl-tsl.org/en/the-cases/stl-11-02/main/filings/orders-and-decisions/pre-trial-judge/710-f0005). For a legal analysis of the STL's early jurisprudence, including the referral orders, see Guenaël Mettraux, "The Internationalization of Domestic Jurisdictions by International Tribunals: The Special Tribunal for Lebanon Renders Its First Decisions," *J. Int'l Crim. Just.* 7 (2009): 911.
2690. STL Statute, Article 2: "(a) The provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy; and (b) Articles 6 and 7 of the Lebanese law of 11 January 1958 on 'increasing the penalties for sedition, civil war and interfaith struggle.'"
2691. STL Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/1, February 16, 2011, available at: [stl-tsl.org](http://stl-tsl.org) (hereinafter: Interlocutory Decision).
2692. Michael P. Scharf, "Special Tribunal for Lebanon Issues Landmark Ruling on Definition of Terrorism and Modes of Participation," *ASIL Insights*, 15, no. 6 (March 4, 2011), internal cites to Appeal Chamber Ruling, February 16, 2011.
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2694. Scharf, "Special Tribunal for Lebanon Issues Landmark Ruling."
2695. *Ibid.*
2696. Interlocutory Decision; see also Scharf, "Special Tribunal for Lebanon Issues Landmark Ruling," internal cites to Appeal Chamber Ruling, February 16, 2011.
2697. The Rules of Procedure and Evidence have been amended several times. Article 28 provides that judges "shall be guided, as appropriate, by the Lebanese Code of Criminal Procedure, as well as by other reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial." STL Statute, Article 28.2.
2698. *Ibid.*, Article 6.
2699. *Ibid.*, Article 19: "Evidence collected ... prior to the establishment of the Tribunal, by the national authorities of Lebanon or by the [UNIIC] ... shall be received by the Tribunal. Its admissibility shall be decided by the Chambers pursuant to international standards on collection of evidence. The weight to be given to any such evidence shall be determined by the Chambers."
2700. *Ibid.*, Article 22.

2701. Ibid., Articles 22(2), 22(3). Trials in absentia are also permissible in certain circumstances under Lebanese law.
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2705. STL Statute, Article 2.5(d). The selection panel is composed of two judges who are “sitting or retired from an international tribunal” and a representative of the Secretary-General.
2706. The judicial appointment procedures are laid out in Articles 2 and 3 of the agreement; the STL Statute refers back to the agreement. Ibid., Articles 9, 10, 11.
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2708. STL Statute, Article 4.1.
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2711. STL Bulletin, August 2017, 7, available at: [stl-tsl.org/en/media/stl-bulletin/5984-stl-bulletin-august-2017](http://stl-tsl.org/en/media/stl-bulletin/5984-stl-bulletin-august-2017).
2712. See STL, *Ayyash et al.* (STL-11-01), available at: [stl-tsl.org/en/the-cases/stl-11-01](http://stl-tsl.org/en/the-cases/stl-11-01). Arrest warrants for Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, and Assad Hassan Sabra were transmitted to Lebanese authorities on June 30, 2011. Badreddine subsequently died, and in February 2014, judges ordered the merger of the Ayyash case and that of Hassan Habib Merhi.
2713. See STL, *Connected Cases, Hamadeh, Hawi and El-Murr* (STL-11-02), available at: [stl-tsl.org/en/the-cases/stl-11-02](http://stl-tsl.org/en/the-cases/stl-11-02).
2714. Jamil el Sayed was detained by Lebanese authorities between 2005 and 2009 at the recommendation of the UNIIIC commissioner. In 2009, the STL seized the matter, and the prosecutor requested the pretrial judge to release El Sayed and three other detained individuals in the case. Mr. Sayed has brought proceedings at the STL seeking the release of documents relating to his detention, in order to pursue claims before national courts for unlawful detention. Interlocutory rulings held that correspondence between UNIIIC and the Lebanese authorities were protected under the STL Rules. In October 2011, the Appeals Chamber ordered certain documents be disclosed by the prosecutor and returned the matter to the Trial Chamber in regards to other witness statements and documents. See Appeals Chamber, *In the Matter of El Sayed, Order Allowing in Part and Dismissing in Part the Appeal by the Prosecutor Against the Pre-trial Judge’s Decision of 2 September 2011 and Ordering the Disclosure of Documents*, October 7, 2011, CH/AC//2011/02, available at: [www.stl-tsl.org/en/the-cases/in-the-matter-of-el-sayed/](http://www.stl-tsl.org/en/the-cases/in-the-matter-of-el-sayed/). In a second, similar case, the pretrial chamber determined that a general previously detained in Lebanon had no standing to request materials from the *Ayyash et al.* case. See STL, *In the Matter of El Hajj*, available at: [stl-tsl.org/en/the-cases/other-matters/in-the-matter-of-el-hajj](http://stl-tsl.org/en/the-cases/other-matters/in-the-matter-of-el-hajj).
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