

IRAQ POST-CONFLICT JUSTICE: A PROPOSED COMPREHENSIVE PLAN*

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IRAQ POST-CONFLICT JUSTICE

I. Premises

The Iraqi Ba'ath regime in power since 1968 has been responsible for numerous crimes.¹ They include war crimes in Iran² and Kuwait,³ and against the Kurds.⁴ Moreover, the regime's followers have committed an estimated 100,000 (or more) extra-judicial killings, and tortured and raped tens of thousands of Iraqi civilians. Such a policy of widespread and systematic violations targeting regime opponents, and specific segments of the civilian population, Kurds and Shi'ā, makes these violations "crimes against humanity." Other numerous violations of fundamental human rights include large-scale arbitrary arrests and detentions, forced displacement of civilian populations, and unlawful seizure of property. The Iraqi people, as well as the international community, expect post-conflict justice.⁵

Post-conflict justice in Iraq requires:

- International and national credibility
- A comprehensive national strategy with international support
- International support for long-term capacity-building of the justice system

The expected outcomes are:

- Avoid individual acts of vengeance and bring some closure to victims.
- Support the establishment of a democratic form of government based on the rule of law.⁶
- Restore an independent judiciary in Iraq.
- Sustain the democratic future, territorial integrity and stability of Iraq.

II. Basic Considerations for Post-Conflict Justice

- 1) Iraq is a country with a long-standing and well-established legal system and judiciary. Its laws, except for domestic relations, have all been secularized and made part of well-crafted codes. They include the Criminal Code (1969) and the Code of Criminal Procedure (1971). Both are modeled after their Egyptian and Syrian counterparts, which in turn, derive from French codifications. This is relevant to the proposed Plan.

¹ Saddam Hussein was Vice-President and became President in 1973. Between 1968-73, he was the regime's strongman.

² Use of chemical weapons and POW-related violations.

³ Holding of POWs since 1991, crimes against civilians, looting, and environmental crimes under Protocol I.

⁴ Deemed a conflict of a non-international character, during which attacks upon civilians were committed, POWs tortured and killed, and poisonous gas was used. These acts also constitute "crimes against humanity."

⁵ If the Iraqi people do not feel that there is satisfactory post-conflict justice they will turn to street vengeance, and the hope of rebuilding Iraq on the basis of a rule of law-oriented democracy will be eluded.

⁶ It should also be noted that for the future stability of Iraq, it will be important to establish a system of de-Ba'athification, through which Ba'ath Party members are to be vetted by a Commission, and that laws should be passed to prevent their re-organization of a neo-Ba'ath Party that would wait in the wings to seize power once again. This is not, however, included in the proposed Plan contained herein.

- 2) The Criminal Code of 1969 is divided into a “general part” and a “special part,” with penalties attached to each crime. The Criminal Code contains the equivalent crimes of murder, voluntary manslaughter, involuntary manslaughter, aggravated battery, battery, assault and rape. They also contain provisions on robbery, burglary, theft, embezzlement and abuse of trust. These crimes are found in most penal codes of the world. Crimes punishable by less than five years do not require mandatory prosecution, and may be subject to forgiveness or reconciliation by the victims. Reconciliation can be subject to conditions such as apology, compensation or restitution. Reconciliation agreements are legally enforceable. This is the premise for the Forgiveness, Truth and Reconciliation aspect of the proposed Plan.
- 3) The Criminal Code is based on the “principles of legality.” This is a fundamental principle of constitutional standing.⁷ The “principles of legality” require that there can be no crime without a specific law and no penalty without a specific law. Furthermore, no criminal law or criminal penalty can be retroactive in its application or effect. This strict positivist approach and relevant international legal norms will therefore limit some of the options of post-conflict justice, even if established by the United Nations.
- 4) The Code of Criminal Procedure reflects the inquisitorial French approach. Investigations of crimes are conducted by an investigative judge, or judge of instruction (*juge d’instruction*), whose obligation is to discover the truth. He has the power of mandating witnesses to appear before him and to interrogate them, including persons accused or suspected of crimes. This type of interrogation does not require a testimonial oath. Consequently a witness may lie, though at the risk of having such a lie being used against him. There is no privilege against self-incrimination that can be invoked, but a witness may refuse to answer questions, also at the risk of having such refusal interpreted against him. Upon completion of the investigating judge’s investigation, the case is turned over to a prosecutor who presents it in court. Judicial proceedings thereafter do not require the testimony of witnesses previously heard by the investigating judge. Proceedings are essentially based on the documents and testimony obtained in the course of the proceedings conducted by the investigative judge.

The “principles of legality,” do not however extend to procedural and evidentiary norms, and that is also relevant to the post-conflict justice Plan.
- 5) The judiciary is organized in accordance with a law establishing a distinction between the ordinary judiciary and the administrative judiciary. It also separates the careers of prosecutors and judges, but allows prosecutors to move to the judiciary. The judges are divided into three levels, trial courts, appellate courts and Supreme Court (equivalent to the *Cour de Cassation* of France). The trial court is divided into chambers (Dawa’er) and, for crimes involving more than five years imprisonment, each chamber consists of three judges. The appellate court is divided into chambers of five judges, as is the Supreme

⁷ This is also a principle of international law. International Covenant on Civil and Political Rights, Dec. 19, 1966, 993 U.N.T.S. 3 (*entered into force* Jan. 3, 1976); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 218 U.N.T.S. 221, E.T.S. No. 5; American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, O.A.S.T.S. 36.

Court. The Supreme Court can also sit *en banc*. It does not rule on the constitutionality or validity of laws. It does not review any facts or evidence. Its role is limited to determining the proper interpretation of the law and its proper application at the trial and appellate levels. This is relevant to the judicial structure of the proposed Plan.

- 6) In accordance with the law of judicial organization, a Superior Council of Judges decides on questions of appointments, promotions, transfers and discipline of judges. The Council may appoint qualified judges and prosecutors from other Arab countries, as needed, to any level position in the Iraqi prosecutorial and judicial systems. This tradition has long existed and is also practiced extensively throughout Saudi Arabia and the Gulf States. These countries, as well as Iraq, have traditionally appointed for specific periods of time judges and prosecutors from Egypt, as well as judges from other Arab countries, such as Syria and Lebanon. Theoretically, it should be possible for the Superior Council of Judges to recall retired Iraqi judges and prosecutors, but this has not been the practice. This factor is important with respect to the use of Arab judges and Iraqi retired judges in the post-conflict justice proposed Plan.
- 7) Since the 1968 Ba'ath revolution and particularly since 1973 when Saddam Hussein became President, a number of laws were passed to amend the Criminal Code, the Code of Criminal Procedure and the Law on Judicial Organization. In addition, the Revolutionary Command Council passed a number of decrees which have the force of law. Among these are the establishment of exceptional courts⁸ within the intelligence (Mukhabarat), the special police (al-Amn al-Khass) and military courts other than ordinary courts martial, organized in accordance with the law on military justice (al-Ahkam al-Askariya). These exceptional tribunals have been operated by officers of these services and have not been subject to the guarantees and protections included in the 1971 Code of Criminal Procedure, even as subsequently amended.⁹
- 8) Of particular note is the fact that the Revolutionary Command Council passed a decree providing immunity for all of its members whether for their public or private acts. This blanket immunity for members of the Revolutionary Command Council's personal acts is contrary to general principles of law recognized in Iraq, in accordance with the 1969 Criminal Code.
- 9) The special immunity mentioned above, as well as the establishment of exceptional tribunals, are contrary to the Constitution of 1924 which was abrogated by the Ba'ath Constitution of 1973, the latter being the product of imposition by the new revolutionary regime.
- 10) Iraq ratified the Four Geneva Conventions of 1949 and the two Additional Protocols of 1977, as well as the 1948 Genocide Convention and the 1984 Torture Convention. It has not, however, adopted national implementing legislation. Legal doctrine and practice in Iraq deems that a treaty, even if ratified, must be subject to the adoption of national implementing legislation before it can be considered domestically applicable. Iraqi

⁸ In violation of the ICCPR, *supra* note 9.

⁹ *Id.*

doctrine on international law does not, however, address the direct applicability in domestic law of peremptory norms of international law. Thus, it can be argued that since Iraq has ratified the above-mentioned conventions, that they are applicable domestically, even without the adoption of national implementing legislation.¹⁰ This is particularly relevant to the proposed Plan.

- 11) The Iraqi judiciary is hierarchical and has a high *esprit de corps*. It is, however, known for rigid interpretation and application of the law. Innovative legal education has been stifled since 1968. All Iraqi judges and prosecutors had to be approved by the Ba'ath Party, and many have since 1973 been dismissed for being independent. Post-conflict justice and the restructuring of the Iraqi judicial system and legal education must take these factors into consideration.

III. The Proposed Comprehensive Post-Conflict Justice Plan

- 1) Irrespective of the legal authority establishing post-conflict justice, the same questions will arise:
 - who will be prosecuted (major offenders, minor offenders and how many) – the number of offenders will determine the costs, personnel and duration of the proceedings;
 - what substantive and procedural law will apply (international criminal law, Iraqi law, or both);
 - what penalties will be applicable (will it include the death penalty?);
 - what will happen to the numerous lesser perpetrators of crimes who will not be criminally tried;
 - will victims be compensated.
- 2) Another question is how to rid the country of the Ba'ath party influence and prevent its resurgence. Will there be a de-Ba'athification process as in the de-Nazification process of Germany, or will there be a general lustration law as in the case of some former Eastern-bloc countries, to purge official ranks from former Ba'ath Party members? By whom and how will this process be carried out? If the process is too rigorous, who will be left to meet the country's personnel needs? If the process is too lenient, former Ba'ath officials will still remain in control.
- 3) The proposed Plan is based on the Basic Considerations described above in section II, taking into account four basic factors, namely:
 - Legitimacy of the post-conflict justice mechanism proposed.
 - The effectiveness of these mechanisms.
 - Cost effectiveness.
 - Impartiality and fairness.

¹⁰ It should be noted that some of the provisions of the 1949 Geneva Conventions, namely the grave breaches, have been included in the law on military justice (al-Ahkam al-Askarya), but these provisions apply only to the military.

In keeping with these factors the proposed Plan relies on:

- Iraqi law.
 - The use of the Arabic language as the only official language of legal proceedings.
 - Iraqi judges and prosecutors to be vetted to insure against their allegiance to the Ba'ath regime and to insure their impartiality and fairness towards the eventual accused.
 - Judges from Arab states and from other countries (if they are familiar with Arab legal systems and are fluent in Arabic), as well as prosecutors and investigators, to supplement Iraqi judges.
 - Retired Iraqi judges and prosecutors may also be reappointed (subject to the same vetting process).
 - Restoring the Iraqi Criminal Code of 1969 and the Iraqi Code of Criminal Procedure (1971) to its status prior to amendments made by the Ba'ath Parliament and by the Revolutionary Command Council.
 - Abrogation of the Revolutionary Command Council Decree providing for personal immunity for its members.
 - Obtaining international support in expert personnel, logistics and funding.
- 4) The Plan has two judicial components described below. It is to be approved by the Interim Government, followed by the enactment of a decree-law which:
- Sets up the three mechanisms described below,
 - Abrogates the laws enacted by the Ba'ath regime since 1973,
 - Re-establishes the applicability of the unamended 1969 Iraqi Criminal Code and 1971 Code of Criminal Procedure,
 - Determines the domestic applicability of the international conventions that Iraq has ratified,¹¹
 - Organizes the judicial structure and judicial composition of the two-track judicial aspects of the Plan,
 - Establishes the Forgiveness, Truth and Reconciliation Commission, and
 - Funds the Victim Compensation Scheme of the Commission.

The Post-Conflict Justice Mechanisms

The proposed post-conflict justice mechanisms are:

1. "Major offenders" prosecutions (approximately 50-100) by Iraqi criminal proceedings with judges from Iraq, Arab states and from other nationalities (expatriate Arabs) who have legal competence in Arab criminal law and procedure.

The applicable substantive law is a mixture of Iraqi law based on the Criminal Code of 1969 and those international law conventions ratified by Iraq (i.e. Geneva Conventions, Genocide Conventions and Torture Convention). The procedure is to be based on the Iraqi

¹¹ Iraq ratified the Geneva Conventions of 1949, the two Protocols of 1977, the Genocide Convention of 1948, the Torture Convention of 1984, and a number of Human Rights Conventions, including the ICCPR, *supra* note 9.

Code of Criminal Procedure of 1971. The penalties are those contained in the Iraqi Criminal Code of 1969, including the death penalty.

2. "Other offenders," to be prosecuted before Iraqi criminal courts based on the Iraqi Criminal Code of 1969 and the Iraqi Code of Criminal Procedure of 1971. The penalties are those of the 1969 Criminal Code.
3. A "Forgiveness, Truth and Reconciliation Commission" to be established by the "interim government."

A. The judicial process

The judicial process would have two tracks.

- (a) The first judicial track is a "Special Tribunal for Major Offenders,"¹² estimated at between 50-100, and believed to have committed crimes against humanity, war crimes, and perhaps genocide, as defined in international law. Since Iraq ratified the Geneva Conventions and the Genocide Convention, this poses no significant legal problems, except for "crimes against humanity." This category of crimes could be applied if the "Special Court for Major Offenders" recognizes that *jus cogens* crimes are applicable domestically without the need for national legislation, or by applying the norms of the Iraqi Criminal Code which contains the specific crimes encompassed with "crimes against humanity."

This "Special Tribunal for Major Offenders" will require five chambers of three judges each, and an appellate chamber of five judges, with seven supplemental judges, for a total of twenty-seven of which fourteen would be Iraqi, and thirteen would be from Arab and other countries. Consequently, it would not be difficult to staff this Court, subject to the vetting of Iraqi judges.

- (b) The second judicial track would be for all other offenders. It would be trial level before certain reorganized chambers of the Iraqi criminal courts, relying the 1969 Criminal Code and the 1971 Code of Criminal Procedure (minus the special laws enacted by the revolutionary council and the abrogation of all exceptional tribunals). These chambers will deal only with crimes punishable by five years imprisonment or more, and crimes that could result in the imposition of the death penalty. As stated above, these crimes include: murder, manslaughter, rape, battery (including torture), and robbery. This will require an estimated seventy judges, whose Arab component will depend on how many Iraqi judges can be vetted for this task.

B. A Forgiveness, Truth and Reconciliation Commission

The Commission will deal with all other cases through multiple panels of three, presided over by a jurist, with two lay participants. They are expected to handle as many as several thousand cases (in view of the large scale violations committed). The

¹² It should be noted that the term tribunal as used herein does not mean an "exceptional tribunal," but chambers of the regular court system. See Appendix A, the Iraqi Governing Council Decree of 10 December 2003.

panels would receive individual complaints as well as voluntary pleas from perpetrators who apply to it. In that respect, it would have some of the features of the South African Truth and Reconciliation Commission. The panels would seek to reconcile the parties after the perpetrator's admission of guilt and acceptance of responsibility, and could provide restitution and/or compensation from the perpetrator, or compensation from a general fund that needs to be established and funded. The panels would have the power to refer cases to prosecution whenever a crime falls within the jurisdiction of the "Special Tribunal for Major Offenders," or for crimes within the jurisdiction of the chambers of the criminal court referred to above.

In rural areas the panels can rely on the tribal processes and tribal leadership, but this may present problems of impartiality and fairness.

[See Appendix D, Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.]

C. Administering the Plan

This is a complex operation, which requires a large administrative support staff, adequate facilities, extensive record-keeping capabilities, logistical support and international experts. More specifically, it will need investigative, criminalistics, and forensic support, as well as evidence gathering capabilities. It cannot be expected to be operational immediately, and it will require several months to be fully in place.¹³

An administrator will be needed, with responsibility for management, finances and coordination. The administrator could also be a committee of three, chaired by an Iraqi jurist, with the participation of two Arab jurists, or only one Arab and another expert from elsewhere. Funding for the Plan should be independent from the general budget of the interim governing authority to eliminate bureaucratic and financial delays.

Immediately needed is:

- Appointment of a responsible person to oversee administrative matters,
- Establishment of an evidence-gathering and database process,¹⁴
- The training of prospective judges, prosecutors, and investigators,
- Establishment of a body to prepare Rules of Procedure and Evidence for the Special Tribunal,
- Preparation of the basic law for the Forgiveness, Truth and Reconciliation Commission,
- The marshalling of international support for the Special Tribunal,
- The development of a budget and personnel structure, including job descriptions for recruitment.

¹³ In the meantime, a mechanism should be established to detain known offenders to prevent their escape and to give the people of Iraq a feeling that justice will follow.

¹⁴ Over the past year, significant evidence has been lost due to the coalition forces failure to secure Iraqi ministries and other public offices from looting and destruction. This caused the loss of invaluable documents. Also during this period, several mass graves have been opened by grieving families who removed remains and thus damaged the evidence that could have been collected from these mass graves. These events highlighted the urgent need to preserve and collect the evidence which is indispensable to effective criminal prosecution.

D. Recording History and Strengthening the Rule of Law

The proposed Plan should also compile a historic record of what the Saddam regime did, and thus serve as a historical reminder of what dictatorships do. The judicial proceedings should be taped, and documentaries made of them for public dissemination. This will also serve as closure for the victims. Other mechanisms to preserve recollection should also be considered.

IV. APPENDICES

A. IRAQ GOVERNING COUNCIL DECREE OF 10 DECEMBER 2003, ESTABLISHING A SPECIAL TRIBUNAL

The Statute of the Iraqi Special Tribunal

SECTION ONE

The Establishment, Organization and Competence of the Tribunal

PART ONE

Establishment and Competence of the Tribunal

Article 1.

a) A Tribunal is hereby established and shall be known as the “Iraqi Special Tribunal” (the “Tribunal”). The jurisdiction and functioning of the Tribunal and its associated bodies as defined in Article 3(b) below shall be governed by the provisions of this Statute. The Tribunal shall be an independent entity and not associated with any Iraqi government departments.

b) The Tribunal shall have jurisdiction over any Iraqi national or resident of Iraq accused of the crimes listed in Articles 11 to 14 below, committed since July 17, 1968 and up until and including May 1, 2003, in the territory of the Republic of Iraq or elsewhere, including crimes committed in connection with Iraq’s wars against the Islamic Republic of Iran and the State of Kuwait. This includes jurisdiction over crimes listed in Articles 12 and 13 committed against the people of Iraq (including its Arabs, Kurds, Turcomans, Assyrians and other ethnic groups, and its Shi’ites and Sunnis) whether or not committed in armed conflict.

c) The Tribunal shall only have jurisdiction over natural persons.

Article 2.

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

PART TWO

Organization of the Tribunal

Article 3.

a) The Tribunal’s judiciary shall consist of the following:

1. one or more Trial Chambers;
2. an Appeals Chamber, which shall have the power to review the decisions of the Trial Chambers referred to above; and
3. the Tribunal Investigative Judges.

b) The Tribunal will also have a Prosecutions Department.

c). The Tribunal will also have an Administration Department, which shall provide administrative services to the Tribunal's judiciary and the Prosecutions Department.

PART THREE

The Trial Chambers and the Appeals Chamber

Article 4.

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

PART FOUR

Qualification and Selection of the Judges

Article 5.

- a) The permanent and reserve judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required for appointment to the highest judicial offices. In the overall composition of the Chambers and Articles of the Trial Chambers, due account shall be taken of the experience of the judges in criminal law and trial procedures.
- b) Iraqi candidates for permanent and reserve judges in the Trial Chambers need not be serving judges, and could be lawyers and jurists (who should also have the necessary experience and qualifications). Judges in the Appeals Chamber must be serving or former judges.
- c) Judges are to be nominated and appointed by the Governing Council, after consultation with the Judicial Council.
- d) The permanent judges of each Trial Chamber shall elect a Presiding Judge from amongst their number, who shall oversee the work of the Trial Chamber as a whole.
- e) The permanent and reserve judges shall be appointed for a term of five years. The terms and conditions of service shall be those of the judges of the Iraqi judicial system as set out in the Law Number 160 of 1979 (Judicial Organization Law), save that matters of compensation shall be set by the Governing Council in light of the increased risks associated with the position.
- f) (1) A judge shall be disqualified for any of the following reasons:

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

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

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

PART FIVE

The Presidency of the Tribunal

Article 6.

a) The President shall:

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

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

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

PART SIX

Tribunal Investigative Judges

Article 7.

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

- b) Tribunal Investigative Judges are to be nominated and appointed by the Governing Council, after consultation with the Judicial Council.
- c) There shall be up to twenty permanent Tribunal Investigative Judges, and up to ten reserve investigative judges.
- d) The permanent and reserve investigative judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required for appointment to the highest judicial offices. In the selection of investigative judges, due account shall be taken of the experience of the judges in criminal law and trial procedures.
- e) The Tribunal Investigative Judges shall be headed by a Chief Tribunal Investigative Judge, who shall be chosen by the Tribunal Investigative Judges from among them.
- f) The Chief Tribunal Investigative Judge shall assign cases to individual tribunal investigative judges.
- g) Each Office of the Tribunal Investigative Judge shall be composed of the Tribunal Investigative Judge and such other qualified staff as may be required.
- h) In accordance with Iraqi criminal procedure, each Tribunal Investigative Judge shall have the power to issue subpoenas, arrest warrants and indictments with respect to individuals that they are investigating.
- i) Each Tribunal Investigative Judge may gather evidence from whatever source he considers suitable.
- j) Each Tribunal Investigative Judge shall act independently as a separate organ of the Tribunal. He or she shall not seek or receive instructions from any Governmental Department, or from any other source, including the Governing Council.
- k) The decisions or orders of the Tribunal Investigative Judge can be appealed to the Appeals Chamber within fifteen days of the notification or deemed notification of the decision.
- l) Each Tribunal Investigative Judge shall be appointed for a term of three years. The terms and conditions of service shall be those of the investigative judges of the Iraqi judicial system as set out in Law Number 160 of 1979 (Judicial Organization Law), save that matters of compensation shall be set by the Governing Council in light of the increased risks associated with the position.
- m) (1) Any Tribunal Investigative Judge shall be disqualified for any of the following reasons:
- i) He or she has a criminal record including a felony unless the felony is a political or false charge made by the Ba'ath Party regime;
 - ii) He or she has made a material misrepresentation; or
 - iii) He or she fails to carry out his or her duties without good reason.
- (2) The decision to disqualify a Tribunal Investigative Judge shall be taken by the majority of permanent judges of the Tribunal, after conducting appropriate investigations.

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

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

SECTION TWO

Other Departments of the Tribunal

PART ONE

The Prosecutions Department

Article 8.

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

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

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

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

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

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

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

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

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

h) The Chief Prosecutor shall assign individual cases to a Prosecutor. Such Prosecutor shall have the right to be involved in the investigative stages of a case and shall be the individual who prosecutes

such case, consistent with the powers granted to prosecutors pursuant to Law Number 23 of 1971 (Iraqi Criminal Procedure Law).

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

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

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

PART TWO

The Administration Department

Article 9.

a) The Administration Department shall consist of a Director of the Administration Department and such other staff as may be required.

b) The Administration Department shall be responsible for the administration and servicing of the Tribunal and the Prosecutions Department.

c) The Director of the Administration Department shall initially be appointed by the Governing Council. He or she shall serve for a three year term and be eligible for reappointment. The terms and conditions of service of the Director of the Administration Department shall be those of a General Director in an Iraqi government department .

d) The staff of the Administration Department shall be appointed by the Director of the Administration Department.

e) The Director of the Administration Department shall appoint a public relations expert to the position of spokesman of the Tribunal. Such spokesman shall give regular briefings to the press and the public at large with respect to the developments relating to the Tribunal.

SECTION THREE

Jurisdiction and Crimes

PART ONE

Jurisdiction of the Tribunal

Article 10.

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

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

PART TWO

The Crime of Genocide

Article 11.

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

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

b) The following acts shall be punishable:

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

PART THREE

Crimes Against Humanity

Article 12.

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

- 1. Murder;
- 2. Extermination;
- 3. Enslavement;
- 4. Deportation or forcible transfer of population;
- 5. Imprisonment or other severe deprivation of physical liberty in violation of fundamental norms of international law;

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

b) For the purposes of paragraph a):

1. "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in the above paragraph against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack;
2. "Extermination" includes the intentional infliction of conditions of life, such as the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
3. "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
4. "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
5. "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to lawful sanctions;
6. "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity; and
7. "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, the State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

PART FOUR

War Crimes

Article 13.

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

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

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

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

1. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
2. Intentionally directing attacks against civilians objects, that is, objects which are not military objectives;
3. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a peacekeeping mission in accordance with the Charter of the United Nations or in a humanitarian assistance mission, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
4. Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
5. Intentionally launching an attack in the knowledge that such attack will cause widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
6. Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
7. Killing or wounding a combatant who, having laid down his arms or having no longer means of defense, has surrendered at discretion;
8. Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
9. The transfer, directly or indirectly, by the Government of Iraq or any of its instrumentalities (including by an instrumentality of the Arab Socialist Ba'ath

Party), of parts of its own civilian population into any territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

10. Intentionally directing attacks against buildings that are dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

11. Subjecting persons of another nation to physical mutilation or to medical or scientific experiments of any kind that are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

12. Killing or wounding treacherously individuals belonging to the hostile nation or army;

13. Declaring that no quarter will be given;

14. Destroying or seizing the property of an adverse party unless such destruction or seizure be imperatively demanded by the necessities of war;

15. Declaring abolished, suspended or inadmissible in a court of law, or otherwise depriving, the rights and actions of the nationals of the adverse party;

16. Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

17. Pillaging a town or place, even when taken by assault;

18. Employing poison or poisoned weapons;

19. Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

20. Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

21. Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

22. Committing rape, sexual slavery, enforced prostitution, forced pregnancy, or any other form of sexual violence of comparable gravity;

23. Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

24. Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

25. Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under international law; and

26. Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

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

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

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

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

PART FIVE
Violations of Stipulated Iraqi Laws

Article 14.

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

- a) For those outside the judiciary, the attempt to manipulate the judiciary or involvement in the functions of the judiciary, in violation, *inter alia*, of the Iraqi interim constitution of 1970, as amended;
- b) The wastage of national resources and the squandering of public assets and funds, pursuant to, *inter alia*, Article 2(g) of Law Number 7 of 1958, as amended; and
- c) The abuse of position and the pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country, in accordance with Article 1 of Law Number 7 of 1958, as amended.

SECTION FOUR
Individual Criminal Responsibility

Article 15.

- a) A person who commits a crime within the jurisdiction of this Tribunal shall be individually responsible and liable for punishment in accordance with this Statute.
- b) In accordance with this Statute, and the provisions of Iraqi criminal law, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Tribunal if that person:
 1. Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
 2. Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
 3. For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
 4. In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - i. Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Tribunal; or
 - ii. Be made in the knowledge of the intention of the group to commit the crime;
 5. In respect of the crime of genocide, directly and publicly incites others to commit genocide;
 6. Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to

commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

- c) The official position of any accused person, whether as president, prime minister, member of the cabinet, chairman or a member of the Revolutionary Command Council, a member of the Arab Socialist Ba'ath Party Regional Command or Government (or an instrumentality of either) or as a responsible Iraqi Government official or member of the Ba'ath Party or in any other capacity, shall not relieve such person of criminal responsibility nor mitigate punishment. No person is entitled to any immunity with respect to any of the crimes stipulated in Articles 11 to 14.
- d) The fact that any of the acts referred to in Articles 11 to 14 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to submit the matter to the competent authorities for investigation and prosecution.
- e) The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

SECTION FIVE

Rules of Procedure and Evidence

Article 16.

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

SECTION SIX

General Principles of Criminal Law

Article 17.

- a) Subject to the provisions of this Statute and the rules made thereunder, the general principles of criminal law applicable in connection with the prosecution and trial of any accused person shall be those contained: (i) in Iraqi criminal law as at July 17, 1968 (as embodied in The Baghdadi Criminal Code of 1919) for those offenses committed between July 17, 1968 and December 14, 1969; (ii) in Law Number 111 of 1969 (the Iraqi Criminal Code), as it was as of December 15, 1969, without regard to any amendments made thereafter, for those offenses committed between December 15, 1969 and May 1, 2003; and (iii) and in Law Number 23 of 1971 (the Iraqi Criminal Procedure Law).
- b) In interpreting Articles 11 to 13, the Trial Chambers and the Appellate Chamber may resort to the relevant decisions of international courts or tribunals as persuasive authority for their decisions.

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

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

SECTION SEVEN

Investigation and Indictments

Article 18.

a) The Tribunal Investigative Judge shall initiate investigations *ex-officio* or on the basis of information obtained from any source, particularly from the police, and governmental and non-governmental organizations. The Tribunal Investigative Judge shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

b) The Tribunal Investigative Judge shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Tribunal Investigative Judge may, as appropriate, request the assistance of the relevant governmental authorities concerned, who shall be required to provide full co-operation with the request.

c) If questioned by a Tribunal Investigative Judge, the suspect shall be entitled to be assisted by counsel of his or her own choice, including the right to have legal assistance assigned to him or her without payment by him or her in any such case if he or she does not have sufficient means to pay for it. The suspect is entitled to have non-Iraqi legal representation, so long as the principal lawyer of such suspect is Iraqi.

d) Upon a determination that a *prima facie* case exists, the Tribunal Investigative Judge shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute.

PART ONE

Review of the Indictment

Article 19.

a) If the Chief Tribunal Investigative Judge is satisfied that a *prima facie* case has been established by the Tribunal Investigative Judge, then he/she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed without prejudice.

b) Upon confirmation of an indictment, the Tribunal Investigative Judge may, at the request of the Chief Tribunal Investigative Judge, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

PART TWO

Rights of the Accused

Article 20.

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

SECTION EIGHT

Trial Proceedings

Article 21.

- a) A person against whom an indictment has been issued shall, pursuant to an order or an arrest warrant of the Tribunal Investigative Judge, be taken into custody, immediately informed of the charges against him and transferred to the Tribunal.
- b) The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with this Statute and the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
- c) The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea.

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

Article 22.

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

Article 23.

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

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

Article 24.

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

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

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

d) A person convicted of:

1. An offence involving murder or rape as defined under Iraqi law; or

2. An offence ancillary to such offence of murder or rape,

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

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

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

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

SECTION NINE

Appeals and Review Proceedings

PART ONE

Appellate Proceedings

Article 25.

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

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

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

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

PART TWO

Review Proceedings

Article 26.

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

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

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

SECTION TEN

Enforcement of Sentences

Article 27.

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

SECTION ELEVEN

General Principles and Other Matters

Article 28.

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

Article 29.

- a) The Tribunal and the national courts of Iraq shall have concurrent jurisdiction to prosecute persons for those offences prescribed in Article 14 that fall within the jurisdiction of the Tribunal.
- b) The Tribunal shall have primacy over all other Iraqi courts with respect to the crimes stipulated in Articles 11 to 13.
- c) At any stage of the procedure, the Tribunal may demand of any other Iraqi court to transfer any case being tried by it involving any crimes stipulated in Articles 11 to 14 to the Tribunal, and such court shall be required to transfer such case.

Article 30.

- a) No person shall be tried before any other Iraqi court for acts for which he or she has already been tried by the Tribunal, in accordance with Articles 300 and 301 of the Iraqi Criminal Procedure Code.
- b) A person who has been tried by any Iraqi court for acts constituting crimes within the jurisdiction of the Tribunal may be subsequently tried by the Tribunal only if the Tribunal determines that the previous court proceedings were not impartial or independent, were designed to shield the accused from international or Iraqi criminal responsibility, or the case was not diligently prosecuted, provided that the requirements of Article 303 of the Iraqi Criminal Procedure Code are met or one of the conditions contained in Article 196 of the Iraqi Civil Procedure Code apply.
- c) In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Tribunal shall take into account the extent to which any penalty imposed by an Iraqi court on the same person for the same act has already been served.

Article 31.

- a) The Tribunal, the judges, the Tribunal Investigative Judges, the Prosecutors, the Director of the Administration Department and their staffs shall have immunity from civil suits for their official acts.
- b) Other persons, including the accused, required at the seat of the Tribunal shall be accorded such treatment as is necessary for the proper functioning of the Tribunal.

Article 32.

For purposes of this statute, the “Governing Council” shall mean the Governing Council of Iraq established on July 13, 2003. The powers conferred on the Governing Council in this Statute shall be

transferred to the executive authority in any future government (the “Successor Government”) established following the disbanding of the Governing Council.

Article 33.

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

Article 34.

Arabic shall be the official language of the Tribunal.

Article 35.

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

Article 36.

The President of the Tribunal shall submit an annual report of the Tribunal and its associated bodies to the Governing Council (and subsequently to the executive authority of the Successor Government).

Article 37.

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

Article 38.

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

بسم الله الرحمن الرحيم

رقم (1) لسنة 2003

قانون

المحكمة الجنائية العراقية المختصة

بالجرائم ضد الإنسانية

الفصل الأول

تأسيس المحكمة وهيكلها التنظيمي واختصاصاتها

الفرع الأول

التأسيس

المادة-1- أولاً:- تؤسس بموجب هذا القانون محكمة تسمى (المحكمة الجنائية العراقية المختصة بالجرائم ضد الإنسانية) وتعرف فيما بعد بـ (المحكمة). وتكون اختصاصات المحكمة واختصاصات الأجهزة المكلفة لعملها وفقاً لأحكام هذا القانون. وتتمتع المحكمة بالاستقلال التام ولا ترتبط بأي جهة كانت.

ثانياً:- تسري ولاية المحكمة على الجرائم التي ارتكبتها عراقيون أو مقيمون في العراق ضمن الجمهورية العراقية أو خارجها خلال الفترة الممتدة بين تاريخي 1968/7/17 ولغاية 2003/5/1 المنصوص عليها في المواد (11) و(12) و(13) و(14) من هذا القانون بما في ذلك الجرائم المرتبطة بالحرب ضد جمهورية إيران الإسلامية أو دولة الكويت، وتشمل كذلك الجرائم المرتكبة بحق الشعب العراقي بعربيه وكرده وتركمانيه واشورييه وباقي القوميات وشيعته وسنته سواء ارتكبت في نزاعات مسلحة أو غير ذلك.

ثالثاً:- تسري ولاية المحكمة على الشخص الطبيعي.

المادة-2- مقرر المحكمة في مدينة بغداد، ولها عقد جلساتها في أية محافظة من محافظات العراق بقرار من مجلس الحكم بناءً على اقتراح رئيس المحكمة.

الفرع الثاني

الهيكل التنظيمي للمحكمة

المادة-3- أولاً:- تتألف المحكمة من:-

أ- محكمة جنايات واحدة أو أكثر

ب- هيئة تمييزية تختص بالنظر في الأحكام والقرارات الصادرة من محاكم الجنايات المنصوص عليها في الفقرة (أ) من هذا البند.

ج- قضاة التحقيق.

ثانياً:- هيئة الادعاء العام.
ثالثاً:- قسم إدارة يتولى تقديم الخدمات الإدارية والمالية للمحكمة والادعاء العام.

الفرع الثالث

محكمة الجنايات والهيئة التمييزية

المادة-4- أولاً:- تشكل المحكمة من قضاة دائمين وقضاة احتياط.

ثانياً:- تشكل كل محكمة جنايات من خمسة قضاة دائمين.

ثالثاً:- أ- تتألف الهيئة التمييزية من تسعة قضاة يتم اختيار رئيسها فيما بينهم. ولا يجوز للعضو في محكمة الجنايات أن يكون عضواً في الهيئة التمييزية.

ب- يكون رئيس الهيئة التمييزية هو الرئيس الأعلى للمحكمة الجنائية العراقية المختصة ويشرف على شؤونها الادارية والمالية.

رابعاً:- يجوز لمجلس الحكم او الحكومة الوارثة عند الضرورة تعيين قضاة من غير العراقيين ممن لهم خبرة في مجال المحاكمات في الجرائم المنصوص عليها بهذا القانون وممن يتحلون بقدر عالٍ من السمو الاخلاقي والاستقامة والنزاهة.

الفرع الرابع

مؤهلات اختيار القضاة

المادة-5- أولاً:- يشترط أن يتحلى القضاة الدائمون والاحتياط بقدر عالٍ من السمو الأخلاقي والنزاهة، والاستقامة، وأن يكونوا حائزين على المؤهلات المطلوبة للتعيين في الدرجات القضائية العالية. وأن تتوفر في قضاة محاكم الجنايات والهيئة التمييزية الخبرة في القانون الجنائي والإجراءات الجنائية

ثانياً:- لا يستلزم أن يكون المرشحون لشغل وظائف القضاة الدائمين والاحتياط في محاكم الجنايات من القضاة المستمرين في الخدمة، ويجوز أن يرشح لها محامون أو حقوقيون عراقيون يتمتعون بالكفاءة والخبرة العالية. ويجب أن يكون القضاة في الهيئة التمييزية من القضاة المستمرين في الخدمة أو قضاة سابقين.

ثالثاً:- يرشح مجلس الحكم او الحكومة الوارثة القضاة ويعينهم بعد استشارة مجلس القضاء.

رابعاً:- ينتخب القضاة الدائمون في كل محكمة جنايات رئيساً لهم من بينهم يشرف على اعمالها.

خامساً:- مدة خدمة القضاة الدائمين والاحتياط خمس سنوات. وتكون شروط الخدمة هي شروط خدمة القضاة وفقاً لقانون التنظيم القضائي رقم(160) لسنة 1979، عدا ما يتعلق بالمكافأة التي سيحددها مجلس الحكم او الحكومة الوارثة في ضوء المخاطر المحتمل تعرضهم لها بسبب المنصب.

سادساً:- أ- تنتهى خدمة القاضي لاحد الاسباب الاتية:-

1- إذا أدين بارتكاب جناية ما لم تكن جنائية سياسية أو تهمة لفقها نظام البعث السابق.

- 2- إذا قدم معلومات كاذبة أو مزيفة.
- 3- إذا اخفق في تأدية واجباته دون سبب مشروع.
- ب- تنهى خدمة القاضي بعد إجراء التحقيق الأصولي بقرار يصدر بأغلبية أصوات القضاة الدائمين للمحكمة.
- ج- تنهى خدمة رئيس المحكمة بعد إجراء التحقيق الأصولي بقرار من مجلس الحكم أو الحكومة الوارثة.

الفرع الخامس

رئاسة المحكمة

المادة-6- أولاً: يتولى رئيس المحكمة القيام بالمهام الآتية:-

- أ- ترؤس جلسات الهيئة التمييزية.
- ب- تنسيب قضاة محاكم الجنايات.
- ج- تنسيب أي من القضاة الاحتياط لمحكمة الجنايات.
- د- انجاز الأعمال الإدارية في المحكمة.
- ثانياً:- على رئيس المحكمة أن يعين أشخاصاً من غير العراقيين بوصفهم خبراء ومراقبين في محاكم الجنايات والهيئة التمييزية لتقديم المساعدة في مجال القانون الدولي وفي حقل التجارب المماثلة سواء كانت دولية أو غير ذلك ومراقبة مراعاة المحكمة لأصول الإجراءات المعتمدة وفقاً للمعايير القانونية. ويجوز لرئيس المحكمة تعيين هؤلاء الخبراء والمراقبين بمساعدة المجتمع الدولي بما في ذلك الأمم المتحدة.
- ثالثاً: يجب أن يتحلى الخبراء غير العراقيين المنصوص عليهم في البند (ثانياً) من هذه المادة بقدر عال من السمو الأخلاقي والاستقامة والنزاهة. ويفضل الخبير غير العراقي ان يكون متمتعاً بأحد الخبرتين الآتيتين:-
- أ- العمل في وظائف القضاء أو الادعاء العام في بلده.
- ب- الخبرة في محاكمات أو محاكم جرائم الحرب الدولية.

الفرع السادس

قضاة التحقيق في المحكمة

- المادة-7-** أولاً: يعين قضاة التحقيق في المحكمة للتحقيق مع الأفراد عن ارتكاب الجرائم المنصوص عليها في المواد (11) و (12) و (13) و (14) من هذا القانون.
- ثانياً: يرشح مجلس الحكم أو الحكومة الوارثة قضاة التحقيق ويتولى تعيينهم بعد استشارة مجلس القضاء.
- ثالثاً: لا يزيد عدد قضاة التحقيق في المحكمة على عشرين قاضياً دائماً وعشرة قضاة احتياط.
- رابعاً: يشترط في قضاة التحقيق الدائمين والاحتياط التحلي بقدر عال من السمو الأخلاقي والنزاهة والاستقامة والكفاءة اللازمة لإشغال المناصب القضائية العالية. وان تكون لهم الخبرة في مجالي القانون الجنائي والإجراءات الجنائية.

- خامساً: يختار قضاة التحقيق رئيساً لهم من بينهم.
- سادساً: يحيل الرئيس القضايا التحقيقية إلى قضاة التحقيق كلاً على انفراد.
- سابعاً: يتكون كل مكتب من مكاتب قضاة التحقيق من قاضٍ للتحقيق وملاك مؤهل يكون لازماً لعمل قاضي التحقيق.
- ثامناً: يملك قاضي التحقيق سلطة إصدار مذكرات الاستدعاء (الاستقدام) ومذكرات الاعتقال (القبض) استناداً إلى قانون أصول المحاكمات الجزائية رقم (23) لسنة 1971.
- تاسعاً: يحق لقاضي التحقيق جمع أدلة الإثبات من أي مصدر يراه مناسباً.
- عاشرأ: يتصرف قاضي التحقيق في المحكمة باستقلالية تامة باعتباره جهازاً منفصلاً عن المحكمة ولا يخضع أو يستجيب لأي طلبات أو أوامر صادرة من أية جهة من الجهات الحكومية بما في ذلك مجلس الحكم أو الحكومة الوارثة أو أية جهة أخرى.
- حادي عشر: تكون قرارات قاضي التحقيق قابلة للطعن تمييزاً أمام الهيئة التمييزية خلال خمسة عشر يوماً من تاريخ التبليغ به أو اعتباره مبلغاً.
- ثاني عشر: مدة خدمة قضاة التحقيق في المحكمة ثلاث سنوات. وتكون شروط الخدمة هي شروط خدمة قضاة التحقيق وفقاً لقانون التنظيم القضائي رقم (160) لسنة 1979، عدا ما يتعلق بالمكافأة التي سيحددها مجلس الحكم أو الحكومة الوارثة في ضوء المخاطر المحتمل تعرضهم لها بسبب المنصب.
- ثالث عشر: أ- تنتهي خدمة قاضي التحقيق في المحكمة لاحد الأسباب الآتية :-
- 1- إذا أدين بارتكاب جناية ما لم تكن جنائية سياسية أو تهمة لفقها نظام البعث السابق.
 - 2- إذا قدم معلومات كاذبة أو مزيفة.
 - 3- إذا اخفق في تأدية واجباته دون سبب مشروع.
- ب- تنتهي خدمة قاضي التحقيق بقرار يصدر بأغلبية أصوات القضاة الدائمين للمحكمة. بعد اجراء التحقيق الاصولي لقضاة التحقيق.
- ثالث عشر: على رئيس قضاة التحقيق أن يعين أشخاصاً من غير العراقيين خبراء ومراقبين لتقديم المساعدة لقضاة التحقيق في مجالي التحقيق والادعاء عن القضايا المشمولة بهذا القانون سواء كانت دولية أو غير ذلك وكذلك مراقبة مراعاة قضاة التحقيق لأصول الاجراءات المعتمدة وفقاً للمعايير القانونية. ويجوز لرئيس قضاة التحقيق تعيين هؤلاء الخبراء والمراقبين بمساعدة المجتمع الدولي بما في ذلك الأمم المتحدة.
- رابع عشر: يشترط أن يتحلى الخبراء والمراقبون غير العراقيين المذكورون في البند (ثالث عشر) من هذه المادة بقدر عال من السمو الأخلاقي والاستقامة والنزاهة. ويفضل في الخبر والمراقب غير العراقي ان يكون متمتعاً باحدى الخبرتين الآتيتين:-
- ا- العمل في وظائف القضاء أو الادعاء العام في بلده.
 - ب- الخبرة في محاكمة أو محاكم جرائم الحرب الدولية.

الفصل الثاني

الهيئات الأخرى

الفرع الاول

هيئة الادعاء العام

المادة-8- اولاً: تكون هيئة الادعاء العام مسؤولة عن الادعاء ضد الأشخاص المسؤولين عن ارتكاب الجرائم ضمن اختصاص المحكمة .

ثانياً: يتصرف كل مدع عام باستقلالية تامة باعتباره جهازاً منفصلاً عن المحكمة ولا يخضع أو يستجيب لأي طلبات أو أوامر صادرة من أية جهة من الجهات الحكومية بما في ذلك مجلس الحكم او الحكومة الوارثة أو أية جهة أخرى.

ثالثاً: لا يزيد عدد المدعين العامين على عشرين مدعياً عاماً.

رابعاً: يرشح مجلس الحكم او الحكومة الوارثة المدعين العامين ويتولى تعيينهم بعد استشارة مجلس القضاء.

خامساً: يختار المدعون العامون رئيساً لهم من بينهم.

سادساً: أ- تنهي خدمة المدعي العام في المحكمة عند تحقق احد الأسباب الآتية:-

1. إذا أدين بارتكاب جناية ما لم تكن جنائية سياسية أو تهمة لفقها نظام البعث السابق
2. إذا قدم معلومات كاذبة أو مزيفة.

3. إذا اخفق في تأدية واجباته دون سبب مشروع.

ب-تنتهي خدمة أي من المدعين العامين بقرار يصدر من رئيس هيئة الادعاء العام بعد اجراء التحقيق الاصولي.

سابعاً: يتألف كل مكتب من مكاتب الادعاء العام من مدع عام وملاك مؤهل يكون لازماً لعمل المدعي العام.

ثامناً: يوكل رئيس هيئة الادعاء العام إلى مدع عام القضية المطلوب التحقيق فيها والترافع في مرحلة المحاكمة استناداً للصلاحيات الممنوحة للمدعين العامين وفقاً للقانون. تاسعاً: مدة خدمة المدعي العام ثلاث سنوات، وتكون شروط الخدمة هي شروط خدمة المدعين العامين وفقاً لقانون الادعاء العام رقم(159) لسنة 1979، عدا الأمور المتعلقة بالمكافأة التي يحددها مجلس الحكم او الحكومة الوارثة.

عاشراً: على رئيس هيئة الادعاء العام أن يعين أشخاصاً من غير العراقيين بصفة خبراء أو مراقبين للادعاء العام لتقديم المساعدة للمدعين العامين فيما يتعلق بالتحقيق والادعاء عن القضايا المشمولة بهذا القانون في المجال الدولي أو غيره ومراقبة عمل المدعين العامين. ولرئيس هيئة الادعاء العام تعيين هؤلاء الخبراء والمراقبين بمساعدة المجتمع الدولي بما في ذلك الأمم المتحدة.

حادي عشر: يشترط أن يتحلى غير العراقيين المذكورون في البند(عاشراً) من هذه المادة بقدر عالٍ من السمو الأخلاقي والاستقامة والنزاهة. ويفضل في الخبير او المراقب غير العراقي ان يكون متمتعاً باحدى الخبرتين الآتيتين:-

أ- العمل في وظائف الادعاء العام في بلده.

ب- الخبرة في محاكمة أو محاكم جرائم الحرب الدولية.

الفرع الثاني الدائرة الإدارية

المادة-9- اولاً: تتولى الدائرة الإدارية مسؤولية الشؤون الإدارية والمالية والخدمية للمحكمة وهيئة الادعاء العام.

ثانياً: تتألف الدائرة الإدارية من مدير عام الدائرة الإدارية وملاك مؤهل يكون لازماً لعمل الدائرة.

ثالثاً: يعين مجلس الحكم او الحكومة الوارثة مدير عام الدائرة الإدارية لمدة ثلاث سنوات بالتنسيق مع رئيس المحكمة. وتكون شروط خدمة مدير الدائرة الإدارية هي شروط خدمة المدير العام في دوائر الدولة.

رابعاً: يعين مدير عام الدائرة الإدارية مديراً للعلاقات العامة للقيام بمنصب الناطق الرسمي للمحكمة، لتقديم إيجازات بشكل منتظم لأجهزة الأعلام والجمهور فيما يخص التطورات الخاصة بالمحكمة.

الفصل الثالث اختصاصات المحكمة الفرع الاول ولاية المحكمة

المادة-10- تسري ولاية المحكمة على كل مواطن عراقي أو غير عراقي مقيم في العراق ومتهم بارتكاب الجرائم المنصوص عليها في المواد(11)و(12)و(13)و(14) من هذا القانون والمرتبكة من تاريخ 1968 /7/7 ولغاية 2003/5/1 في جمهورية العراق أو أي مكان آخر. وتشمل الجرائم الآتية:

اولاً: جريمة الإبادة الجماعية.

ثانياً: الجرائم ضد الإنسانية.

ثالثاً: جرائم الحرب .

رابعاً: انتهاكات القوانين العراقية المنصوص عليها في المادة(14) من هذا القانون

الفرع الثاني

جريمة الإبادة الجماعية

المادة-11- اولاً: لأغراض هذا القانون وطبقاً للاتفاقية الدولية الخاصة بمنع جريمة الإبادة الجماعية المعاقب عليها المؤرخة في 9 كانون الأول/ ديسمبر 1948 المصادق عليها من العراق في 20 كانون الثاني/ يناير 1959، فإن "الإبادة الجماعية" تعني الأفعال المدرجة أدناه المرتكبة بقصد إهلاك جماعة قومية أو إثنية أو عرقية أو دينية، بصفتها هذه، إهلاكاً كلياً أو جزئياً:

أ- قتل أفراد من الجماعة.

ب- إلحاق ضرر جسدي أو عقلي جسيم بأفراد من الجماعة.

ج- إخضاع الجماعة عمداً لأحوال معيشية يقصد بها إهلاكها الفعلي كلياً أو جزئياً.

د- فرض تدابير تستهدف منع الإنجاب داخل الجماعة.

هـ- نقل أطفال من الجماعة عنوةً إلى جماعةٍ أخرى.

ثانياً: تكون الأعمال الآتية معاقباً عليها:

أ- الإبادة الجماعية

ب- التآمر لارتكاب الإبادة الجماعية

ج- التحريض المباشر والعلني على ارتكاب الإبادة الجماعية.

د- محاولة ارتكاب الإبادة الجماعية،

هـ- الاشتراك في الإبادة الجماعية.

الفرع الثالث

الجرائم ضد الإنسانية

المادة-12- أولاً: "الجرائم ضد الإنسانية" تعني لأغراض هذا القانون، أي من الأفعال المدرجة أدناه متى ارتكبت في إطار هجوم واسع النطاق أو منهجي موجه ضد أية مجموعة من السكان المدنيين، وعن علم بهذا الهجوم:

أ- القتل

ب- الإبادة.

العمد .

ج- الاسترقاق.

د- إبعاد السكان أو النقل القسري للسكان.

هـ- السجن أو الحرمان الشديد على أي نحو آخر من الحرية البدنية بما يخالف القواعد الأساسية للقانون الدولي

و- التعذيب

ز- الاغتصاب، الاستعباد الجنسي، الإكراه على البغاء، الحمل القسري، أو أي شكل آخر

من أشكال العنف الجنسي على مثل هذه الدرجة من الخطورة.

ح- اضطهاد أية جماعة محددة أو مجموع محدد من السكان لأسباب سياسية أو عرقية

أو قومية أو إثنية أو ثقافية أو دينية، أو متعلقة بنوع الجنس، أو لأسباب أخرى لا

يجيزها القانون الدولي، وذلك فيما يتصل بأي فعل مشار إليه من أشكال العنف الجنسي على مثل هذه

الدرجة من الخطورة.

ط- الاختفاء القسري للأشخاص.

ي- الأفعال اللاإنسانية الأخرى ذات الطابع المماثل التي تتسبب عمداً في معاناة شديدة في

أذى خطير يلحق بالجسم أو بالصحة العقلية أو البدنية.

ثانياً: لأغراض تطبيق أحكام البند (أولاً) من هذه المادة تعني المصطلحات المدرجة

أدناه المعاني المبينة إزاءها:

- أ- "هجوم موجه ضد أي مجموعة من السكان المدنيين" تعني نهجاً سلوكياً تضمن الارتكاب المتكرر للأفعال المنصوص عليها في البند (أولاً) من هذه المادة ضد أية مجموعة من السكان المدنيين، عملاً بسياسة دولة منظمة تقضي بإرتكاب مثل هذا الهجوم، أو تعزيزاً لهذه السياسة.
- ب- "الإبادة" تشمل تعمد فرض أحوال معيشية، كالحرمان من الحصول على الطعام والدواء، بقصد إهلاك جزء من السكان.
- ج- "الاسترقاق" يعني ممارسة أي من أو جميع السلطات المترتبة على حق الملكية، على شخص ما، بما في ذلك ممارسة هذه السلطات في سبيل الاتجار بالأشخاص، ولا سيما النساء والأطفال.
- د- "إبعاد السكان أو النقل القسري للسكان" تعني نقل الأشخاص المعنيين قسراً من المنطقة التي يوجدون فيها بصفة مشروعة، بالطرد أو بأي فعل قسري آخر، دون مبررات يسمح بها القانون الدولي.
- هـ- "التعذيب" يعني التعمد في تسبب الألم الشديد والمعاناة، سواء كان ذلك بدنياً أو فكرياً على شخص قيد الاحتجاز أو تحت سيطرة المتهمة. على أن التعذيب لا يشمل الألم أو المعاناة الناجمة عن العقوبات القانونية أو ذات علاقة بها.
- و- "الاضطهاد" يعني الحرمان المتعمد والشديد من الحقوق الأساسية بما يتناقض والقانون الدولي بسبب هوية الجماعة أو المجموعة.
- ز- "الاخفاء القسري للأشخاص" يعني إلقاء القبض على أشخاص أو احتجازهم أو اختطافهم من قبل الدولة أو منظمة سياسية، أو بإذن أو دعم منها لهذا الفعل أو بسكوتها عليه. ثم رفضها الإقرار بحرمان هؤلاء الأشخاص من حريتهم أو إعطاء معلومات عن مصيرهم أو عن أماكن وجودهم، بهدف حرمانهم من حماية القانون لفترة زمنية طويلة.

الفرع الرابع

جرائم الحرب

المادة-13- تعني "جرائم الحرب" لهذا القانون ما يأتي:

- أولاً: خروقات جسيمة لاتفاقيات جنيف المؤرخة في 12 آب 1949. وبالتحديد أي من الأعمال المدرجة أدناه المرتكبة ضد الأشخاص أو الممتلكات المحمية بموجب أحكام إتفاقية جنيف ذات العلاقة:
- أ- القتل العمد.
- ب- التعذيب أو المعاملة اللاإنسانية، بما في ذلك إجراء تجارب بيولوجية.
- ج- تعمد إحداث معاناة شديدة أو إلحاق أذى خطير بالجسم أو بالصحة.

د- إلحاق تدمير واسع النطاق بالممتلكات والاستيلاء عليها دون أن تكون هناك ضرورة عسكرية تبرر ذلك وبشكل مخالف للقانون وبطريقة عابثة. ه- ارغام أسير حرب أو شخص محمي على الخدمة في قوات سلطة معادية و- تعمد حرمان أي أسير حرب أو شخص محمي من حقه في أن يحاكم محاكمة عادلة ونظامية.

ز- الحجز غير القانوني.

ح- الإبعاد أو النقل غير القانوني.

ط- أخذ

رهائن.

ثانياً: الانتهاكات الخطيرة الأخرى للقوانين والأعراف الواجبة التطبيق على المنازعات الدولية المسلحة، في النطاق الثابت للقانون الدولي، وبالتحديد أي فعل من الأفعال الآتية: أ- تعمد توجيه هجمات ضد السكان المدنيين بصفتهم هذه أو ضد أفراد مدنيين لا يشاركون مباشرة في الأعمال الحربية.

ب- تعمد توجيه هجمات ضد أهداف مدنية، بضمنها مواقع لا تشكل أهدافاً عسكرية.

ج- تعمد شن هجمات ضد مستخدمين منشآت مواد وحدات أو مركبات مستخدم في مهام المساعدة الإنسانية أو حفظ السلام طبقاً لميثاق الأمم المتحدة. طالما كانت مثل هذه المهام تستحق الحماية الممنوحة للمدنيين أو الأهداف المدنية بموجب القانون الدولي للنزاعات المسلحة.

د- تعمد شن هجوم مع العلم بكون هذا الهجوم سيسفر عن خسائر تبعية في الأرواح أو عن إصابات بين المدنيين أو عن إلحاق أضرار مدنية يكون إفراطها واضحاً بالقياس إلى مجمل المكاسب العسكرية المتوقعة الملموسة والمباشرة. ه- تعمد شن هجوم مع العلم بكون هذا الهجوم سيسفر عن أحداث ضرر واسع النطاق وطويل الأمد وشديد للبيئة الطبيعية يكون إفراطاً واضحاً بالقياس إلى مجمل المكاسب العسكرية المتوقعة الملموسة والمباشرة.

و- مهاجمة أو قصف باية وسيلة كانت المدن أو القرى أو المساكن أو المباني التي لا توجد لها دفاعات وهي ليست أهدافاً عسكرية.

ز- قتل أو جرح مقاتل كان قد تخلى عن سلاحه أو أنه لم يعد يمتلك وسائل الدفاع عن نفسه و استسلم بشكل واضح.

ح- إساءة استعمال علم الهدنة أو علم العدو أو شارته العسكرية وزيه العسكري أو علم الأمم المتحدة أو شاراتها وأزيائها العسكرية، وكذلك الشعارات المميزة لاتفاقيات جنيف مما يسفر عن موت الأفراد أو إلحاق إصابات بالغة بهم.

ط- قيام حكومة العراق أو أي من أجهزتها (وتشمل على سبيل التوضيح أي أجهزة لحزب البعث العربي الاشتراكي)، على نحو مباشر أو غير مباشر، بنقل أجزاء من السكان المدنيين إلى أي أرض تحتلها، أو إبعاد أو نقل كل أو بعض سكان الأرض المحتلة ضمن هذه الأرض أو خارجها.

- ي- تعمد توجيه هجمات ضد مبان لا تشكل اهدافا عسكرية ومخصصة لأغراض دينية , تعليمية , فنية , علمية أو خيرية، اوضد اثار تاريخية، مستشفيات وأماكن تجمع المرضى والجرحى
- ك- إخضاع الأشخاص التابعين لأي دولة للتشويه البدني أو لأي نوع من التجارب الطبية أو العلمية التي لا تبررها المعالجة الطبية أو معالجة الاسنان أو المعالجة في المستشفى للشخص المعنى و لا ايضا تجرى لصالحه متسببة في وفاة ذلك الشخص أو الأشخاص أو تعريض صحتهم لخطر شديد.
- ل- قتل أو جرح أي من أفراد دولة معادية أو جيش معاد بطريقة غادرة.
- م- إعلان أنه لن يبقى أحد على قيد الحياة.
- ن- تدمير أو الإستيلاء على الممتلكات المدنية للطرف المعادي ما لم يكن التدمير أو الاستيلاء امرأ أُلزمت به ضرورات الحرب.
- س- إعلان إلغاء أو تعليق أو منع اللجوء الى القضاء بقصد حرمان مواطني الطرف المعادي من المطالبة بحقوقهم.
- ع- اكره رعايا الطرف المعادي على المساهمة في عمليات حربية موجهة ضد دولتهم، حتى وأن كانوا في خدمة الدولة المتحاربة قبل اندلاع الحرب.
- ف- نهب أي بلدة أو مكان حتى وإن تم الاستيلاء عليه عنوة
- ص- إستخدام السموم أو الاسلحة السامة.
- ق- إستخدام الغازات الخانقة أو السامة أو اية غازات اخرى وكذلك اية سوائل أو مواد أو معدات اخرى مشابهة.
- ر- استخدام الرصاصات التي تتمدد او تتسطح بسهولة في الجسم البشري مثل الرصاصات ذات الاغلفة الصلبة التي لا تغطي كامل جسم الرصاصة أو الرصاصات المحززة الغلاف.
- ش- الاعتداء على كرامة الشخص، وبخاصة المعاملة المهينة والحاطة بالكرامة. ت- الاغتصاب أو الإستعباد الجنسي أو البغاء القسري أو الحمل القسري أو أي شكل آخر من أشكال العنف الجنسي على مثل هذه الدرجة من الخطورة. ث- استغلال وجود اشخاص مدنيين أو أشخاص آخرين محميين لجعل بعض النقاط أو المناطق أو القوات العسكرية محصنة من العمليات العسكرية .
- ذ- تعمد توجيه هجمات ضد مبان , مواد , وحدات طبية، وسائط نقل وأشخاص يستعملون الشعارات المميزة لاتفاقيات جنيف طبقا للقانون الدولي. ص- تعمد تجويع المدنيين كأسلوب من أساليب الحرب بحرمانهم من المواد التي لا غنى عنها لبقائهم، بما في ذلك تعمد عرقلة إمدادات الإغاثة وكما هو منصوص عليه بموجب القانون الدولي.
- ض- تجنيد أو تسجيل أطفال دون الخامسة عشرة من العمر في قوات الجيش الوطني أو استخدامهم للاشتراك بفاعلية في الأعمال العدائية.

ثالثاً: في حالة وقوع نزاع مسلح من أي نوع , اي من الأفعال التالية المرتكبة ضد أشخاص غير مشتركين اشتراكاً فعلياً في الأعمال الحربية، بما في ذلك أفراد القوات المسلحة الذين ألقوا سلاحهم وأولئك الذين أصبحوا عاجزين عن القتال بسبب المرض أو الإصابة أو الاحتجاز أو لأي سبب آخر

أ- استعمال العنف ضد الحياة والأشخاص، وبخاصة القتل بجميع أنواعه، والتشويه، والمعاملة القاسية، والتعذيب.

ب- الاعتداء على كرامة الشخص، وبخاصة المعاملة المهينة والحاطة بالكرامة.

ج- أخذ الرهائن.

د- إصدار أحكام وتنفيذ إعدامات دون وجود حكم سابق صادر عن محكمة مشككة تشكيلاً

نظامياً تكفل جميع الضمانات القضائية المعترف بها عموماً بأنه لا غنى عنها.

رابعاً: الانتهاكات الخطيرة الأخرى للقوانين والأعراف الواجبة التطبيق على المنازعات المسلحة غير الدولية، في النطاق الثابت للقانون الدولي، وبالتحديد أي فعل من الأفعال الآتية:-

أ- تعمد توجيه هجمات ضد السكان المدنيين بصفتهن هذه أو ضد أفراد مدنيين لا يشاركون مباشرة في الأعمال الحربية.

ب- تعمد توجيه هجمات ضد مبان، مواد، وحدات ووسائل نقل طبية وأفراد من مستخدمي للشعارات المميزة لاتفاقيات جنيف طبقاً للقانون الدولي.

ج- تعمد شن هجمات ضد مستخدمي، منشآت، مواد، وحدات أو مركبات مستخدمة في مهام المساعدة الإنسانية أو حفظ السلام طبقاً لميثاق الأمم المتحدة طالما كانت مثل هذه المهام تستحق الحماية الممنوحة للمدنيين أو الأهداف المدنية بموجب القانون الدولي للمنازعات المسلحة.

د- تعمد توجيه هجمات ضد مبان مخصصة لأغراض دينية، تعليمية، فنية، علمية أو خيرية أو ضد آثار تاريخية، ومستشفيات، وأماكن تجمع المرضى والجرحى، شريطة ألا تكون أهدافاً عسكرية.

هـ- نهب أي بلدة أو مكان حتى وإن تم الاستيلاء عليه عنوة.

و-

الاغتصاب، الاستعباد الجنسي، البغاء القسري، الحمل القسري أو أي شكل آخر من أشكال العنف الجنسي على مثل هذه الدرجة من الخطورة.

ز- تجنيد أو تسجيل أطفال دون الخامسة عشرة من العمر في قوات أو جماعات مسلحة أو استخدامهم للمشاركة فعلياً في الأعمال الحربية.

ح- إصدار أوامر بترحيل السكان المدنيين لأسباب تتصل بالنزاع، ما لم يكن ذلك من أجل أمن المدنيين المعنيين أو لأسباب عسكرية ملحة.

ط- قتل أو إصابة أحد مقاتلي الطرف المعادي غداً.

ي- إعلان أنه لن يبقى أحد على قيد الحياة.

ك- إخضاع الأشخاص الخاضعين لسلطة الطرف الآخر في النزاع للتشويه البدني أو لأي نوع من التجارب الطبية أو العلمية التي لا تبررها المعالجة الطبية أو معالجة الأسنان أو المعالجة في المستشفى للشخص المعنى و لا أيضا تجرى لصالحه متسببا في وفاة ذلك الشخص أو الأشخاص أو في تعريض صحتهم لخطر شديد. ل- تدمير أو الاستيلاء على ممتلكات الطرف المعادي ما لم يكن التدمير أو الاستيلاء أمرا ألزمته ضرورات الحرب.

الفرع الخامس

انتهاكات القوانين العراقية

المادة-14- تسري الولاية القضائية للمحكمة على مرتكبي الجرائم الآتية:-
أولاً: التدخل في شؤون القضاء أو محاولة التأثير في أعماله فيما يعد انتهاكاً لنصوص الدستور العراقي لسنة 1970 المؤقت والقوانين الأخرى.
ثانياً: هدر الثروة الوطنية وتبديدها استناداً إلى احكام الفقرة (ز) من المادة الثانية من قانون معاقبة المتآمرين على سلامة الوطن ومفسدي نظام الحكم رقم 7 لسنة 1958.
ثالثاً: سوء استخدام المنصب والسعي وراء السياسات التي كادت ان تؤدي إلى التهديد بالحرب أو استخدام القوات المسلحة العراقية ضد دولة عربية وفقاً للمادة الأولى من القانون رقم (7) لعام 1958.

الفصل الرابع

المسؤولية الجنائية الفردية

المادة-15- اولاً: يعد الشخص الذي يرتكب جريمة تدخل ضمن ولاية المحكمة مسؤولاً عنها بصفته الفردية وعرضة للعقاب وفقاً لاحكام هذا القانون.
ثانياً: طبقاً لاحكام هذا القانون ولأحكام قانون العقوبات، يعتبر الشخص مسؤولاً جنائياً وعرضة للعقاب عن أي جريمة تدخل ضمن ولاية المحكمة إذا قام:-
أ- بارتكاب هذه الجريمة، شخصياً أو بالاشتراك مع آخر أو بواسطة شخص آخر بغض النظر عما إذا كان هذا الشخص مسؤولاً أو غير مسؤول جنائياً.
ب- بالأمر على ارتكاب جريمة وقعت بالفعل أو شرع فيها أو الاغراء أو الحث على ارتكابها.
ج- بتقديم العون أو التحريض أو المساعدة بأي شكل آخر لغرض تيسير ارتكاب هذه الجريمة أو الشروع في ارتكابها، بما في ذلك توفير وسائل ارتكابها.
د- بالاسهام بأية طريقة أخرى في قيام جماعة من الأشخاص يعملون بقصد مشترك، بارتكاب هذه الجريمة أو الشروع في ارتكابها، على ان تكون هذه المساهمة متعمدة وان تقدم:
1- إما بهدف تعزيز النشاط الإجرامي أو الغرض الإجرامي للجماعة، إذا كان هذا النشاط أو الغرض منظوياً على ارتكاب جريمة تدخل ضمن ولاية المحكمة.

2- مع العلم بنية ارتكاب الجريمة لدى هذه الجماعة.
بالتحريض المباشر والعني على ارتكاب هذه الجريمة فيما يتعلق بجريمة الإبادة الجماعية. هـ -

و- بالشروع في ارتكاب الجريمة من خلال البدء بتنفيذ فعل بقصد ارتكابها، لكن الجريمة لم تقع لأسباب لا دخل لإرادة الفاعل فيها. ومع ذلك يعتبر عذراً معفياً من العقاب إذا بذل الفاعل نشاطاً يحول دون ارتكاب الجريمة أو إتمامها. ولا يعاقب على الشروع بموجب هذا القانون إذا تخلل لفاعل تماماً وبمحض إرادته عن مشروعه الإجرامي.

ثالثاً: لا تعد الصفة الرسمية التي يحملها المتهم سبباً معفياً من العقاب أو مخففاً للعقوبة، سواء كان المتهم رئيساً للدولة أو رئيساً أو عضواً في مجلس قيادة الثورة أو رئيساً أو عضواً في مجلس الوزراء أو عضواً في قيادة حزب البعث، ولا يجوز الاحتجاج بالحصانة للتخلص من المسؤولية عن الجرائم المذكورة في المواد (11) و(12) و(13) و(14) من هذا القانون.

رابعاً: لا يعفى الرئيس الأعلى من المسؤولية الجنائية عن الجرائم التي يرتكبها الأشخاص الذين يعملون بامرته، إذا كان الرئيس قد علم أو كانت لديه من الأسباب ما تقيد العلم بأن مرؤوسه قد ارتكب هذه الأفعال أو كان على وشك ارتكابها ولم يتخذ الرئيس الإجراءات الضرورية والمناسبة لمنع وقوع هذه الأفعال أو أن يرفع الحالة إلى السلطات المختصة بغية إجراء التحقيق والمحاكمة. خامساً: في حالة قيام أي شخص متهم بارتكاب فعل تنفيذياً لأمر صادر من الحكومة أو من رئيسه فإن ذلك لن يعفيه من المسؤولية الجنائية، ويجوز إن يراعى ذلك في تخفيف العقوبة إذا رأت المحكمة أن تحقيق العدالة يتطلب ذلك.

الفصل الخامس

قواعد الإجراءات وجمع الأدلة

المادة-16- يتولى رئيس المحكمة إعداد قواعد للإجراءات ولجمع الأدلة لغرض ترتيب إجراءات ما قبل المحاكمة، والمحاكمات، والتمييز، وقبول الأدلة وحماية الشهود والضحايا والأمور الأخرى ذات الصلة ومنها قواعد إنهاء خدمة القضاة والمدعين العامين، حيثما وجد أن القانون النافذ بما في ذلك هذا القانون لا يعالج هذه المسائل الخاصة بشكل أساسي. وعليه الاسترشاد بنصوص قانون أصول المحاكمات الجزائية. ويتم اعتماد هذه القواعد بقرار يصدر بأغلبية أصوات القضاة الدائمين في المحكمة.

الفصل السادس

المبادئ العامة للقانون الجنائي

المادة-17- أولاً: في حالة وجود فراغ قانوني في نصوص هذا القانون والقواعد الصادرة بموجبه، فإن المبادئ العامة للقانون الجنائي القابلة للتطبيق على اتهام ومحاكمة الأشخاص المتهمين هي المبادئ المنصوص عليها في القوانين الآتية:-

- ا- للفترة من 1968/7/17 لغاية 1969/12/14 قانون العقوبات البغدادي لسنة 1919 ب- للفترة من 1969/12/15 لغاية 2003/5/1 قانون العقوبات رقم (111) لسنة 1969 دون مراعاة أي تعديل جرى عليه.
- ج- قانون أصول المحاكمات الجزائية رقم (23) لسنة 1971.
- ثانياً: للمحكمة وللهيئة التمييزية الاستعانة بأحكام المحاكم الجنائية الدولية عند تفسيرها لأحكام المواد (11) و (12) و (13) من هذا القانون.
- ثالثاً: عند تطبيق الأحكام الخاصة بالإعفاء من المسؤولية الجنائية تطبق احكام قانون العقوبات بما لا يتعارض مع احكام هذا القانون ومع الالتزامات القانونية الدولية المتعلقة بالجرائم الداخلة في ولاية المحكمة.
- رابعاً: لا تخضع الجرائم المنصوص عليها في المواد (11) و (12) و (13) و (14) من هذا القانون للتقدم المسقط للدعوى الجزائية وللعقوبة.

الفصل السابع التحقيق والإحالة

- المادة-18- اولاً:** يشرع قاضي التحقيق في التحقيق أما بمبادرة منه أو استناداً إلى معلومات تصله من أي مصدر، خصوصاً المعلومات الواردة من الشرطة أو من أية جهة حكومية أو غير حكومية. ويتولى قاضي التحقيق تقييم المعلومات الواردة إليه ليقرر ما إذا كانت الأدلة كافية للبدء في التحقيق.
- ثانياً: لقاضي التحقيق سلطة استجواب المتهمين والضحايا والشهود من اجل جمع الأدلة وأجراء التحقيقات الميدانية. وللقاضي من اجل تنفيذ مهمته ان يطلب المساعدة من السلطات الحكومية ذات العلاقة كلما اقتضت الحاجة ذلك، وعلى الجهات الحكومية ذات العلاقة التعاون التام وتلبية الطلبات.
- ثالثاً: يحق للمتهم عند استجوابه أمام قاضي التحقيق الاستعانة بملاء ارادته بمحام، وله الحق بطلب المساعدة القضائية لدفع أجور المحامي في حالة عدم قدرته على الدفع. وللمتهم الاستعانة بمحام غير عراقي، طالما ان المحامي الرئيس عراقي.
- رابعاً: عند اتخاذ القاضي قراره بكفاية الأدلة لتكوين قضية، فعليه أن يعد قرار الإحالة ويحتوي أعلاماً موجزاً عن الوقائع والجريمة المنسوبة للمتهم والمادة القانونية وفقاً لهذا القانون.

الفرع الاول مراجعة قرار الاحالة

- المادة-19- اولاً:** لرئيس قضاة التحقيق المصادقة على قرار الإحالة إذا اقتنع بكفاية الأدلة الواردة فيها لتكوين قضية. وله رد القرار إذا لم يقتنع بذلك مع عدم الإخلال بحق قاضي التحقيق في إعادة التحقيق في القضية.
- ثانياً: عند المصادقة على قرار الإحالة يصدر قاضي التحقيق أوامر ومذكرات استقدام او قبض أو توقيف أو تسليم أو نقل الأشخاص أو أية أوامر أخرى يتطلبها سير المحاكمة.

الفرع الثاني ضمانات المتهم

المادة-20- أولاً: جميع الأشخاص متساوون أمام المحكمة.
ثانياً: المتهم بريء حتى تثبت أدانته أمام المحكمة وفقاً للقانون.
ثالثاً: لكل متهم الحق في محاكمة علنية استناداً إلى أحكام هذا القانون والقواعد الصادرة بموجبه.
رابعاً: عند توجيه أي تهمة ضد المتهم طبقاً لهذا القانون، فللمتهم الحق في محاكمة عادلة ونزيهة وفق الضمانات التالية كحد أدنى:-

- أ- ان يعلم فوراً بمضمون التهمة الموجهة إليه وبتفاصيلها وطبيعتها وسببها.
- ب- ان يتاح للمتهم الوقت ويمنح التسهيلات الكافية لتمكينه من إعداد دفاعه، وان تتاح له الحرية في الاتصال بمحام يختاره بملء ارادته ويجتمع به على انفراد. ويحق للمتهم ان يستعين بمحام غير عراقي، طالما ان المحامي الرئيس عراقي.
- ج- ان تجري محاكمته دون تأخير غير مبرر.
- د- ان يحاكم حضورياً وان يدافع عن نفسه شخصياً أو بالاستعانة بمحام يختاره بملء ارادته، وأعلامه بأن له الحق في طلب المساعدة القضائية إذا لم تتوفر لديه المقدرة المالية، وله الحق في اقتضاء هذه المساعدة التي تتيح له توكيل محام دون ان يتحمل أجور المحامي
- هـ- له الحق في استدعاء شهود الدفاع وله الحق في مناقشة هؤلاء الشهود وشهود الإثبات وفي تقديم أي دليل يعزز دفاعه استناداً إلى احكام هذا القانون والقانون العراقي.
- و- لا يجوز إرغامه على الاعتراف وله الحق في الصمت وعدم الإدلاء بإفادة دون ان يفسر هذا الصمت دليلاً على الإدانة أو البراءة.

الفصل الثامن المحاكمة

المادة-21- أولاً: يجب إيداع الشخص الذي يصدر بحقه الاتهام في التوقيف استناداً إلى أمر أو مذكرة قبض صادرة من قاضي التحقيق ويجب اعلامه فوراً بالتهمة المسندة إليه ونقله إلى المحكمة.

ثانياً: على محكمة الجنايات ضمان إجراء محاكمة عادلة وسريعة وفقاً لأحكام هذا القانون وقواعد الإجراءات والأدلة المنصوص عليها في المادة(16) من هذا القانون مع ضمان حقوق المتهم والاعتبارات المطلوبة لحماية الضحايا والشهود.

ثالثاً: على محكمة الجنايات تلاوة قرار الاحالة وان تقتنع بنفسها باحترام حقوق المتهم وكفالتها، وعليها التأكد من ان المتهم على دراية وإدراك بالتهمة أو التهم المسندة إليه وعليها ان توجه السؤال للمتهم كونه مذنباً أم بريئاً.

رابعاً: تكون جلسات المحاكمة علنية إلا إذا قررت المحكمة جعلها سرية وفقاً لقواعد الإجراءات والأدلة المنصوص عليها في المادة(16) من هذا القانون ولا يجوز اتخاذ القرار بسرية الجلسة إلا لأسباب محدودة جداً.

المادة- 22- على محكمة الجنايات ان تؤمن الحماية للضحايا وللشهود وفقاً لما يرد في قواعد الإجراءات والأدلة المنصوص عليها في المادة(16) من هذا القانون، بما في ذلك تأمين السرية لهوية الضحايا والشهود.

المادة- 23- اولاً: على محكمة الجنايات إعلان وفرض الأحكام والعقوبات على المتهمين المدانين عن جرائم تدخل ضمن ولاية المحكمة.
ثانياً: تصدر محكمة الجنايات احكامها بالأغلبية، وتنطبق بها علناً. ولا يصدر الحكم إلا بناء على قرار إدانة يمكن ان تلحق به رأي القاضي المخالف.

المادة- 24- اولاً: العقوبات التي تنطبق بها المحكمة هي العقوبات المقررة في قانون العقوبات رقم(111) لسنة 1969، عدا عقوبة السجن المؤبد التي تمتد مدى حياة المحكوم.
ثانياً: تكون العقوبات المطبقة على الجرائم المنصوص عليها في المادة(14) من هذا القانون هي نفسها المقررة في القانون العراقي.
ثالثاً: مع مراعاة البنود (رابعاً و خامساً) من هذه المادة تتولى محكمة الجنايات تحديد العقوبات الخاصة بالجرائم المنصوص عليها في المواد(11)و(12)و(13) من هذا القانون.

رابعاً: يعاقب الشخص المدان بالعقوبات المنصوص عليها في قانون العقوبات اذا:-
أ- ارتكب جرائم القتل أو الاغتصاب بموجب قانون العقوبات العراقي.
ب- او ساهم في ارتكاب جرائم القتل أو الاغتصاب.

خامساً: عند تحديد المحكمة لعقوبة أية جريمة واردة في المواد(11)و(12)و(13) من هذا القانون التي لا يوجد لها نظير في القانون العراقي، فان المحكمة تأخذ بنظر الاعتبار عوامل معينة مثل خطورة الجريمة والظروف الشخصية للمدان استرشاداً بالتجارب والخبرة والقوانين الدولية في هذا المجال.

سادساً: لمحكمة الجنايات ان تأمر بمصادرة أي أصول أو ممتلكات أو عائدات متحصلة مباشرة أو بصورة غير مباشرة من جريمة دون الاضرار بالأطراف الثالثة حسني النية.
سابعاً: لمحكمة الجنايات مصادرة أي مادة أو بضاعة يجرمها القانون بصرف النظر عما إذا كانت القضية أو الدعوى قد أغلقت لأي سبب قانوني وفقاً لاحكام المادة(307) من قانون اصول المحاكمات الجزائية.

الفصل التاسع

طرق الطعن

الفرع الاول

التمييز

المادة-25- اولاً: يكون الطعن لدى الهيئة التمييزية من الأشخاص المدانين او الادعاء العام لاي من الأسباب الآتية:-

أ- وقوع الحكم في خطأ قانوني من شأنه ان يعرض الحكم للنقض.
ب- خطأ في الإجراءات.

ج- خطأ جوهري في الوقائع يؤدي إلى إخفاق في العدالة.

ثانياً: للهيئة التمييزية تصديق حكم محكمة الجنايات او نقضه او تعديله.

ثالثاً: عند اصدار الهيئة التمييزية حكمها بنقض الحكم الصادر بالبراءة من محكمة الجنايات, فلها ان تعيد الدعوى الى محكمة الجنايات لاعادة محاكمة المتهم.

الفرع الثاني

أعادة المحاكمة

المادة-26- اولاً: عند اكتشاف وقائع او حقائق جديدة لم تكن معروفة وقت اجراء المحاكمة امام محكمة الجنايات او وقت نظر الدعوى امام الهيئة التمييزية التي يمكن ان تكون عاملاً حاسماً في التوصل الى القرار، فيحق للشخص المدان وللادعاء العام التقدم الى المحكمة بطلب اعادة المحاكمة.

ثانياً: على المحكمة رفض الطلب اذا وجدته يفتقر الى الاسس القانونية المسوغة، اما اذا وجدت المحكمة ان الطلب يستند الى اسباب مقنعة فللمحكمة بهدف التوصل الى تعديل قرار الحكم بعد الاستماع الى اطراف الدعوى :-

أ- ان تعيد الدعوى الى محكمة الجنايات التي أصدرت الحكم.

ب- او ان تعيد الدعوى الى محكمة جنايات اخرى.

ج- او ان تتولى الهيئة التمييزية نظر الدعوى .

الفصل العاشر

تنفيذ الأحكام

المادة-27- تنفذ الأحكام وفقاً للنظام القانوني العراقي واستناداً إلى القوانين الصادرة بموجبه.

الفصل الحادي عشر

احكام عامة وختامية

المادة-28- يكون قضاة المحكمة وقضاة التحقيق واعضاء هيئة الادعاء العام والمدير العام للدائرة الادارية من العراقيين مع مراعاة احكام المادة(4/ رابعاً) من هذا القانون.

المادة-29- أولاً: للمحكمة وللحاكم الوطنية ولاية مشتركة لمحاكمة الاشخاص المتهمين عن الجرائم المنصوص عليها في المادة(14) من هذا القانون.
ثانياً: للمحكمة اولوية التقدم على جميع المحاكم العراقية فيما يتعلق بولايتها على الجرائم المنصوص عليها في المواد(11)و(12)و(13) من هذا القانون.
ثالثاً: للمحكمة في أي مرحلة ان تطلب من أي من المحاكم العراقية ان تنقل اليها أي قضية منظورة امامها تخص أي من الجرائم المنصوص عليها في المواد(11)و(12)و(13)و(14) من هذا القانون وعلى المحكمة ارسال القضية حال الطلب.

المادة-30- أولاً: لا يجوز محاكمة أي شخص امام اية محكمة عراقية اخرى عن جرائم تمت محاكمته عنها سابقاً امام المحكمة استناداً الى احكام المادتين (300)و(301) من قانون اصول المحاكمات الجزائية.

ثانياً: في حالة محاكمة الشخص امام اية محكمة عراقية عن جريمة او جرائم تدخل في ولاية المحكمة، فلا يحق للمحكمة اعادة محاكمته عن ذات الجريمة او الجرائم الا اذا قررت ان اجراءات المحاكمة لم تكن نزيهة ومحايذة، او ان تلك الاجراءات كانت معدة لحماية المتهم من المسؤولية الجنائية، وعند اتخاذ القرارات باعادة المحاكمة ينبغي ان تتوفر احدى الحالات الواردة في المادة(196) من قانون المرافعات المدنية والمادة303 من قانون اصول المحاكمات الجزائية.
ثالثاً: عند تحديد العقوبة التي ستفرض على شخص مدان بجريمة وفق هذا القانون، فعلى المحكمة ان تأخذ بنظر الاعتبار المدة المنقضية من أية عقوبة فرضتها محكمة عراقية على ذات الشخص لذات الجريمة.

المادة-31- أولاً: يتمتع رئيس المحكمة وقضااتها وقضاة التحقيق والمدعون العامون ومدير عام الدائرة الادارية والعاملون في المحكمة بالحصانة ضد الدعاوى المدنية فيما يتعلق بواجباتهم الرسمية.
ثانياً: يجب ان تعامل المحكمة الاشخاص الاخرين بمن فيهم المتهم المعاملة الضرورية لضمان اداء المحكمة لوظائفها.

المادة-32- لأغراض هذا القانون يعني مصطلح(مجلس الحكم) مجلس الحكم العراقي الذي اسس في 13/تموز/2003، وتنتقل الصلاحيات الممنوحة لمجلس الحكم المنصوص عليها في هذا القانون الى السلطة التنفيذية في أية حكومة مقبلة تؤسس بعد حل مجلس الحكم.

المادة-33- لا يحق لأي شخص منتمي الى حزب البعث ان يكون قاضياً او قاضياً للتحقيق او مدعياً عاماً او موظفاً او أياً من العاملين في المحكمة.

المادة-34- تكون اللغة العربية هي اللغة الرسمية في المحكمة.

المادة-35- تتحمل الموازنة العامة للدولة نفقات المحكمة.

المادة-36- يتولى رئيس المحكمة اعداد تقرير سنوي عن اعمال المحكمة ويقدم الى مجلس الحكم او الحكومة الوارثة.

المادة-37- لمجلس الحكم او الحكومة الوارثة اصدار قواعد لتسهيل احكام هذا القانون.

المادة-38- ينشر هذا القانون في الجريدة الرسمية وينفذ من تاريخ 2003/12/10.

**C. COMMENTARY ON THE SPECIAL TRIBUNAL BY M. CHERIF BASSIOUNI, CHICAGO TRIBUNE, 21
DECEMBER 2003**

The capture of Saddam Hussein and the establishment of an Iraqi special tribunal to try major criminals of the Baath regime within the same week might have been just happy coincidence, but the State Department was ready nonetheless.

Since 2002, post-conflict justice has been part of the Department of State's Future of Iraq project. The Transitional Justice Working Group prepared a comprehensive plan in January, which was modified in April after consultations with governmental and non-governmental organizations. It became the basis of the Governing Council's Dec. 10 decree. Between January and April of this year, three options were pursued: a Security Council-established tribunal as in the cases of Yugoslavia and Rwanda, a mixed international/national model as in the case of Sierra Leone, and a national model with some international support.

Each option has its advantages and disadvantages.

The Security Council model would have had the greatest international legitimacy, yet it would have had few chances of being adopted by the Iraqi Governing Council because the UN had no function in administering Iraq. It also would be slow to rev up, be very costly (so far the Yugoslavia and Rwanda tribunals have cost almost \$1 billion), and would not include the death penalty that most Iraqis expect because it has been part of their criminal law since the 1920s.

The mixed model, which would have a strong international and local flavor, requires the existence of a provisional government to enter into an agreement with the UN, and so far there is no such government. The death penalty would, again, be an issue.

The national model with international support is the most viable one.

First, it symbolizes that the people of Iraq are assuming responsibility for their past and for their future. Second, it can be a strong foundation for a system of government based on the rule of law, and that is indispensable for democracy. Third, it would send a powerful message to Arab and Muslim leaders, and to their people, that impunity for repressive leaders is no longer guaranteed. Fourth, the priority right of the Iraqi people to try those who committed so many crimes against them would be respected.

But even with this system, some questions remain, and they fall into two categories. The first is whether the special tribunal can offer due process and guarantee fairness to the accused. The second is whether it has the capacity to effectively handle these types of prosecutions.

A fair trial is necessary not only for the accused but also for the legitimacy of the entire enterprise, particularly to obtain the desired outcomes of democracy and the rule of law.

The first set of questions is the easier one to answer.

The statute of the special tribunal provides for due process guarantees in addition to what the 1971 Iraqi Code of Criminal Procedure offers. Much, however, will depend on the choice of judges. There are many Iraqi and Arab jurists who are competent and impartial. The argument made by some that judges from other parts of the world are needed is unconvincing. Arab judges are as good as others.

The choice of judges, however, must avoid those with Baathist influence, as well as those with anti-Baath prejudices. Judges must also have the appropriate judicial temperament and needed competence. These requirements are indispensable, and this is not satisfactorily addressed in the current decree. A better formula for selection and appointment should be found.

The other concern is with the effectiveness of investigation, gathering of evidence and preparation of trials. The Iraqi justice system does not have the expertise and capability to handle

cases involving a massive amount of evidence. That was never developed under Hussein. But training can solve that problem, provided there is enough external support.

The U.S. already has agreed to provide \$75 million for the tribunal. It also has several databases of Iraqi documents and substantial analyses of events, which it can make available to the Iraqi prosecutors.

Expert personnel from outside Iraq can be hired to supplement Iraqi investigators and prosecutors.

The disadvantage of having the U.S. heavily involved in this process is that it would overshadow the national character of the tribunal and taint its independence.

This is probably the most valid argument for providing the tribunal with an international character, and that still can be accomplished.

There are ways to address these problems.

Do not put the tribunal into effect until the provisional government is established in June. The new government will have legitimacy, and it can make changes in the present statute. This includes giving the tribunal more international characteristics.

A new mechanism for the appointment of judges is needed. The current one, whereby the Governing Council appoints the judges, has political overtones and detracts from the independence of the judiciary.

The new provisional government should delegate that function to the Superior Council of Judges, which historically administered judicial matters, after its reconstitution.

In the meantime, the Governing Council and the Coalition Provisional Authority should institute an intensive training program for prosecutors and investigators to prepare the staff and establish an evidence-collection center.

The evidence must be secured, perhaps by contracting with an international organization, or with a consortium of non-governmental organizations. Witnesses need to be protected.

Whatever mechanism is selected, it must be closely monitored. The rules of the tribunal also must be established before it goes into operation.

Post-conflict justice is indispensable in Iraq, and the Iraqi people must be directly involved in it. It is they who first of all must feel that justice has been achieved. But that requires two additional mechanisms to prosecutions.

There has to be compensation for the victims, and there has to be a truth commission to record history. Trials are not the best way to do that, and whenever it has been attempted, the trials became politicized. A truth commission will also allow the trial of the major offenders to focus on specifics and move quickly, avoiding the political grandstanding of the accused.

The decree establishing the special tribunal is an important first step.

The Iraqis and the international community can reflect on it until June, and the provisional government can improve it.

In the meantime, much can be done, but we need a positive spirit of cooperation among Iraqis, the U.S. and the international community. This is too great an opportunity for the entire region to waste.

**D. COMMENTARY ON THE SPECIAL TRIBUNAL BY FEISAL AMIN ISTRABADI, GLOBE AND MAIL, 30
DECEMBER 2003**

Iraqis must try Saddam

The capture of Saddam Hussein raised the hopes of Iraqis the world over that tyranny was truly behind them, but it also raised the ire of the international human-rights legal community. While Iraqis celebrated, human-rights pundits wrung their hands that Iraqis dared to aspire to try Saddam in an Iraqi national court. Undaunted by the failures of such efforts in the past, the punditocracy insisted that only a court constituted by the UN Security Council should try the former despot. For their part, while debating many vital issues, Iraqis agreed on one thing: Saddam must be tried by an Iraqi national court.

It is unnecessary to tarry long to establish that Iraqis have the right to prosecute their deposed leader. The families of the two million Iraqis killed by Saddam and his henchmen cry out for justice. As Saddam's first and most devastated victims, Iraqis' thirst for justice for their tormentors is no less than that of the world's Jews for the Nazis. Few, if any, of the internationalists dispute that Israeli courts have the right to try the perpetrators of the Holocaust; they do not make technical arguments about whether Israeli courts have jurisdiction over defendants.

But in the case of Iraq, they argue that the Iraqi Governing Council (IGC) is not fully sovereign, thus Iraq cannot try Saddam, as its courts are not fully legitimate. They ignore the fact that Security Council Resolution 1511 recognizes that the IGC "embodies the sovereignty of Iraq." They also ignore that the Security Council, the highest international law-making body, devolved a broad range of powers to the Coalition Provisional Authority (CPA); surely including the right to establish a modern, independent judicial system run by Iraqis. In any event, within six months, as the CPA and IGC have announced, Iraq will have a fully sovereign provisional government, recognized under international law. Since it is unlikely that any trial will have commenced before then, this reason for the need for an international court will be moot.

Some argue that an Iraqi tribunal would not be seen as legitimate by Iraqis. They assume that, because the United States is an occupying power, any court that has its blessing could not possibly be regarded as legitimate by Iraqis, and only a UN-sanctioned court would have such legitimacy. Here, the internationalists betray their own prejudices, transferring them to their idealized Iraqis. These experts, as a class, opposed the U.S. intervention. Now they simply carry this opposition to a different forum: the United States and Iraq must be deprived of the fruits of the intervention, and must be deprived of the right to intervene to mete out justice.

They fail to take into account the reality that the UN as a body has greatly diminished credibility within Iraq. Iraqis know that the UN -- along with the United States -- imposed a cruelly punishing regime of sanctions aimed directly at the civilian population, and that the UN diligently enforced those sanctions for 12 gruelling years. After that history, many Iraqis speak with open contempt of the UN. Moreover, when it comes to their torture at the hands of Saddam, Iraqis know one thing: They stood alone for 35 years, suffering in silent agony, while foreign corporations from every nation of the world did business with Saddam and his cronies. Iraqis will need the sanction of no international body to feel justified in dispensing justice.

The internationalists fail to take into account the *raison d'être* for the two international courts they cite as exemplars for Iraq. In the case of the Yugoslav court, there was no will on the part of Serbs to bring their leadership to account for its crimes. Thus, the major carrot that prompted Slobodan Milosevic's extradition to The Hague was the promise to lift sanctions against Serbia. By

contrast, Iraqis eagerly anticipate holding their former leader to account. Rwanda, after the wholesale slaughter of more than half a million people, with hundreds of thousands of perpetrators, lacked the manpower or physical ability to deal with those horrendous crimes, so the court was established in Tanzania. Again, that is not the case in Iraq. Moreover, these two international courts have a dismal record, having been in operation for 10 years each, with a cost of \$100-million (U.S.) each. Yet, they have barely 30 indictments between them. These models are hardly worthy of emulation in Iraq. The final reason articulated for not using an Iraqi court is that the Iraqi judicial system has been so tainted by 35 years of corruption that it is incapable of running a fair process. As proof, two studies that came to this conclusion are usually cited -- one done for the CPA and one done for the UN. Though it contained some very bright people, the CPA study team did not contain a single person who was conversant in Arabic. How it was able to evaluate the capabilities of Iraqi jurists under these circumstances is truly a mystery. As for the UN team, one can only trust that it was peopled with the same internationalists predisposed to an international tribunal. Their conclusion about the abilities of Iraqi jurists must surely have been foregone.

But the real fallacy in this argument is that no one advocates the reconstitution of the Saddamite judicial system. What the Iraqis have proposed is the creation of a special tribunal, composed of untainted, highly competent judges and prosecutors. Less than 30 trial and appellate judges will likely be needed for these trials, and there is no doubt that enough Iraqi judges exist with reputations for incorruptibility and high competence, including expatriate judges and those who never left. In Iraqi Kurdistan, the judicial system has been operating free of Saddam's control for 12 years, and there is a wealth of juridical talent to be mined there. Iraqis do recognize that they will need the help of international experts, and the statute establishing a national court provides for such judges and prosecutors (as well as other forensic experts) to be appointed as needed. That Saddam's justice system cannot handle the cases is, therefore, a non sequitur.

It is ironic that the international human-rights legal community so bitterly opposes an Iraqi tribunal. Under Saddam's rule, it was impossible to conceive that Iraq would take international legal norms seriously enough to establish a process for holding its own leaders accountable. Rather than trying to scuttle Iraqis' efforts, the international community should encourage and participate in this effort. What a resounding message will be sent to every single government in the Middle East and beyond: The people in whose name you commit atrocities will hold you individually accountable for the horrors you perpetrate. How inexplicable that those who have championed humanitarian and human-rights law now turn their backs on the people of Iraq as they take their first steps towards enforcing these laws.

E. Draft Statute for an International Criminal Tribunal prepared by M. Cherif Bassiouni in April 2003*

Article 1

**Establishment of the International Criminal Tribunal for Iraq
[hereinafter referred to as Tribunal]**

The Tribunal is established by the Iraqi Governing Council.

Article 2

Competence of the Tribunal

The Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the Republic of Iraq, or elsewhere, by members of the Iraqi Armed Forces, police forces, security services, and officials of the Ba'ath Party from July 16, 1979, to March 17, 2003, in accordance with the provisions of the present Statute.

Article 3

Temporal and territorial jurisdiction

The temporal jurisdiction of the Tribunal shall extend to a period beginning on 16 July 1979 to the time when the hostilities involving the Ba'ath regime governing Iraq have ended and all military or paramilitary resistance by forces loyal to that regime have ended, irrespective of where these acts are committed.

Article 4

Crimes within the jurisdiction of the Tribunal

The crimes within the jurisdiction of the Tribunal are: grave breaches of the Geneva Conventions, violations of the laws and customs of war, crimes against humanity, and genocide. These crimes are contained in conventional international law and are embodied in customary international law. They are deemed *jus cogens* international crimes, and are therefore part of peremptory norms of international law. Furthermore, the Republic of Iraq has ratified the Four Geneva Conventions of August 12, 1949 and the two Additional Protocols of 1977, as well as the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, and is specifically bound by these Conventions in its domestic law. Moreover, the contents of crimes against humanity are contained in the Iraqi Criminal Code of 1969, prior to any amendments thereto.

* This draft statute was prepared by M. Cherif Bassiouni as part of the April, 2003 version of this Plan, and has been relied upon by the Governing Council in its Decree of 10 December 2003 [See Appendix A].

4-1 Grave breaches of the Geneva Conventions

The Tribunal shall have the power to prosecute persons who willfully, knowingly, or intentionally commit, order to be committed, or fail to prevent, “grave breaches” of the Geneva Conventions of 12 August 1949 and its Additional Protocol I of 1977, namely, the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (a) willful killing;
- (b) torture or inhuman treatment, including medical or biological experiments;
- (c) willfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity, and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of civilians;
- (h) taking civilians as hostages;
- (i) using civilians as human shields;
- (i) destruction of protected targets and objects;
- (k) perfidious use of the Red Cross/Red Crescent emblems and of the flag of truce.

4-2 Violations of the laws and customs of war

4-2-1 Serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

- (a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (b) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- (c) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (d) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- (e) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- (f) Killing or wounding a combatant who, having laid down his arms or having no longer means of defense, has surrendered at discretion;

- (g) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- (h) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (i) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (j) Killing or wounding treacherously individuals belonging to the hostile nation or army;
- (k) Declaring that no quarter will be given;
- (l) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- (m) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (n) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- (o) Pillaging a town or place, even when taken by assault;
- (p) Employing poison or poisoned weapons;
- (q) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (r) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- (s) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition;
- (t) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (u) Committing rape or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- (v) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

- (w) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- (x) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions;
- (y) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

4-2-2 In the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949 and Protocol II, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:

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

4-2-3 Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

- (a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (b) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- (c) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (d) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (e) Pillaging a town or place, even when taken by assault;

- (f) Committing rape and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
- (g) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
- (h) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
- (i) Killing or wounding treacherously a combatant adversary;
- (j) Declaring that no quarter will be given;
- (k) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (l) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.

4-3 Crimes against humanity

The Tribunal shall have the power to prosecute persons responsible for crimes against humanity as defined in customary international law when the following acts are committed in armed conflict, whether international or internal in character, and in other context, whenever such acts described below are directed against any civilian population, and such acts are committed in a widespread or systematic manner, evidencing the existence of a policy to engage in such acts against a given civilian population. The specific acts are:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation or forcible transfer of population;
- (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) torture, as defined in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984;
- (g) rape, or any other form of sexual violence of comparable gravity;
- (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, or gender grounds;
- (i) enforced disappearance of persons, including extra-judicial executions;
- (j) other inhumane acts of a similar character as those listed above causing great suffering or serious injury to body or to physical or mental health.

4-4 Genocide

4-4-1 The Tribunal shall have the power to prosecute persons who intentionally commit genocide as defined in the 1948 United Nations Convention on the Prevention and Punishment of the International Crime of Genocide, and more particularly as defined in paragraph 4-4-2 and if the conduct in question results in genocide, or constitutes:

- (a) attempt to commit genocide;
- (b) complicity in genocide;
- (c) direct and public incitement to commit genocide;
- (d) conspiracy to commit genocide.

4-4-2 Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

Article 5

Personal jurisdiction

The Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 6

Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in article 4 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in article 4 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

5. Responsibility of commanders and other civilian superiors who may be government officials, Baath party members, or other civilians in positions of authority shall include their direct criminal responsibility for the acts constituting crimes within the jurisdiction of the Tribunal that any such person ordered or commanded or for acts which were committed by reason of such a person's failure to exercise proper control over his/her subordinates when the person in command or control either knew or, owing to the circumstances at the time, should have known that his/her subordinates committed any of the crimes within the jurisdiction of the Tribunal, and such person fails to take all necessary and reasonable measures in his/her power to prevent the commission of such crimes, to investigate the commission of such crimes or, where appropriate, to punish those subordinates who committed such crimes.

5. The fact that a national law or decree issued by the Revolutionary Command Council aimed at providing immunity for the crimes enumerated in article 4, shall not constitute a defense.

Article 7

General Principles of Criminal Law

1. The general principles of criminal law applicable in connection with the prosecution and trial of any accused person shall be those contained in the Iraqi Criminal Code, as it was as of July 16, 1968, without regard to any amendments made thereto by the Revolutionary Command Council thereafter.

2. Whenever the provisions of the said Iraqi Criminal Code are insufficient or unclear as to the elements of criminal responsibility and general principles of criminal responsibility, subject to the provisions of the Statute, the Trial Chambers and the Appellate Chamber may resort to "general principles" of criminal law recognized by the world's major legal systems, as well as other sources of international law as described in Article 38 of the Statute of the International Court of Justice, which is part of the Charter of the United Nations.

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

4. In accordance with conventional and customary international law, the crimes within the jurisdiction of the Tribunal shall not be subject to any statute of limitations.

Article 8

Concurrent jurisdiction

1. The Tribunal and Iraqi national courts shall have concurrent jurisdiction to prosecute persons accused of the crimes contained in Article 4, but the Tribunal shall have primacy over national courts.

2. At any stage of the procedure, the Tribunal may formally request national courts to defer to the competence of the Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the Tribunal to be adopted by the Tribunal.

Article 9
Ne bis in idem

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the Tribunal.
2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the Tribunal when the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.
3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10
Organization of the Tribunal

The Tribunal shall consist of the following organs:

- (a) the Chambers, comprising three Trial Chambers and an Appeals Chamber;
- (b) the Prosecutor; and
- (c) a Registry, servicing both the Chambers and the Prosecutor, as well as providing a unit for the defense, and a unit for the protection of witnesses.

Article 11
Composition of the Tribunal

1. The Tribunal shall consist of eighteen judges who may be Iraqi nationals and nationals of other states possessed of the qualifications stated below in article 12.
2. The judges shall elect a President and a Vice President at the first session of the Tribunal upon its establishment.
3. The Tribunal shall consist of three Trial Chambers of three judges each, one of whom shall be the Presiding judge, nominated by the President of the Tribunal; and an Appellate Chamber consisting of five judges among whom shall be the President of the Tribunal who shall act as President of the Appellate Chamber.
4. The judges appointed to each of the three Trial Chambers and the Appellate Chamber may not be assigned to other chambers.
5. Four judges shall be assigned as alternate judges to each of the three Trial Chambers and to the Appellate Chamber. The alternate judges shall sit with the other judges of the three Trial Chambers

and the Appellate Chamber so that in the event any judge is unable to complete a given trial for any reason he/she may be substituted by an alternate judge.

6. The decisions of each of the three Trial Chambers and the Appellate Chamber shall be by simple majority.

7. Appointment of *ad litem* judges.

- (a) In the event that the Tribunal shall deem it necessary to establish additional trial chambers, *ad litem* judges shall be elected by the Security Council as provided for in article 12.
- (b) The *ad litem* judges shall serve in connection with one or more cases, as determined by the President of the Tribunal.
- (c) Chambers consisting of *ad litem* judges shall function in the same way as the three Trial Chambers established in the Statute, and in accordance with the same rules.

Article 12

Appointment and Qualifications of judges

1. The permanent and *ad litem* judges shall be elected by the Security Council on the basis of a list of judges submitted to it by the Secretary General.

2. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or persons whose high qualifications deemed equivalent to those qualifying for appointment to the highest judicial offices of their respective countries.

3. In the overall composition of the Tribunal, due account shall be taken of the experience of the appointed judges in criminal law, international law, including international humanitarian law and human rights law.

4. The Secretary-General shall invite nominations for judges of the Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters.

5. Nominations for judges to the Secretary-General shall be made within a period of thirty days from the date of invitation of the Secretary-General to submit nominations in accordance with the qualifications set forth in this article of the Statute.

6. The Secretary-General shall forward the nominations received to the Security Council within five days of the date of closing of the nominations.

7. In the event of a vacancy in the Trial Chambers and the Appellate Chamber amongst the permanent and alternate judges appointed in accordance with this article, and after consultation with the Presidents of the Security Council, the Secretary-General shall appoint a person meeting the qualifications of this article for the remainder of the term of office concerned.

8. The permanent and alternate judges elected in accordance with this article shall be elected for a term of three years. The terms and conditions of service shall be those of the judges of the International Court of Justice. They shall be eligible for re-election.

Article 13

Status of *ad litem* judges

1. During the period in which they are appointed to serve in the Tribunal, *ad litem* judges shall:
 - (a) benefit from the same terms and conditions of service *mutatis mutandis* as the permanent judges of the Tribunal;
 - (b) enjoy the same powers as the permanent judges of the Tribunal;
 - (c) enjoy the privileges and immunities, exemptions and facilities of a judge of the Tribunal.
2. During the period in which they are appointed to serve in the Tribunal, *ad litem* judges shall not:
 - (a) be eligible for election as or to vote in the election of the President of the Tribunal;
 - (b) have power:
 - (i) to adopt rules of procedure and evidence pursuant to article 15 of the Statute. They shall, however, be consulted before the adoption of those rules;
 - (ii) to review an indictment pursuant to article 18 of the Statute;
 - (iii) to consult with the President in relation to the assignment of judges pursuant to article 11 of the Statute or in relation to a pardon or commutation of sentence pursuant to article 27 of the Statute;
 - (iv) to adjudicate in pre-trial proceedings.

Article 14

Officers and members of the Chambers

1. The permanent and alternate judges of the Tribunal shall elect a President from amongst their number.
2. The President of the Tribunal shall be a member of the Appellate Chamber and shall preside over its proceedings.
3. After consultation with the permanent and alternate judges of the Tribunal, the President shall assign four of the permanent judges and an alternate judge to the Appellate Chamber and nine permanent judges and three alternate judges to the Trial Chambers.

4. After consultation with the permanent and alternate judges of the Tribunal, the President shall appoint the presiding judges of the Trial Chambers.
5. After consultation with the permanent judges of the Tribunal, the President shall assign such *ad litem* judges as may from time to time be needed to serve in the Tribunal to new Trial Chambers.
6. A judge shall serve only in the Chamber to which he/she was assigned.

Article 15

Rules of procedure and evidence

The permanent and alternate judges of the Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

Article 16

The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for crimes within the jurisdiction of the Tribunal committed as of 16 July 1979.
2. The Prosecutor shall act independently as a separate organ of the Tribunal. He/she shall not seek or receive instructions from any Government or from any other source.
3. The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.
4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General within thirty days from the date of adoption of this Statute by the Security Council. He/she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve for a three-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.
5. The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

Article 17

Investigation and preparation of indictment

1. The Prosecutor shall initiate investigations *ex-officio* or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.
3. If questioned, the suspect shall be entitled to be assisted by counsel of his/her own choice, including the right to have legal assistance assigned to him/her without payment by him/her in any such case if he does not have sufficient means to pay for it, as well as to necessary translation into and from a language he/she speaks and understands.
4. Upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to the President of the Tribunal who shall assign it to a Trial Chamber for review, as specified in Article 18.

Article 18 **Review of the indictment**

1. The Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, it shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.
2. Upon confirmation of an indictment, the Trial Chamber may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Article 19 **Commencement and conduct of trial proceedings**

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the Tribunal.
3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.
4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Article 20 **Rights of the accused**

1. All persons shall be equal before the Tribunal.

2. In the determination of charges against him/her, the accused shall be entitled to a fair and public hearing, subject to the provisions of the Statute.
3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
 - (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;
 - (c) to be tried without undue delay;
 - (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the Tribunal;
 - (g) not to be compelled to testify against himself or to confess guilt.

Article 21

Protection of victims and witnesses

The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the victim's identity.

Article 22

Judgment

1. The Trial Chambers shall pronounce judgments and impose sentences and penalties on persons convicted of crimes within the jurisdiction of the Tribunal.
2. The judgment shall be rendered by a simple majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 23
Penalties

1. In determining the appropriate sentence, the Trial Chambers shall have recourse to the general practice regarding sentences in the courts of the Republic of Iraq.
2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. The Trial Chambers may order the return of any property and proceeds acquired by criminal conduct to their rightful owners.

Article 24
Appellate proceedings

1. The Appellate Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
 - (a) an error on a question of law invalidating the decision; or
 - (b) an error of fact which has occasioned a miscarriage of justice.
2. The Appellate Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

Article 25
Review proceedings

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

Article 26
Enforcement of sentences

1. Sentences shall be carried out by the legal system of Iraq in accordance with its laws.
2. If the Tribunal determines that it is in the best interest of justice to have the sentence carried out elsewhere, imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept the responsibility of carrying out the execution of the sentence of the convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the Tribunal.

Article 27
Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he/she is eligible for pardon or commutation of sentence, the State concerned shall notify the Tribunal

accordingly. The President of the International Tribunal, in consultation with the permanent and alternate judges, shall decide the matter on the basis of the interests of justice and the general principles of law. The Tribunal's decision shall be controlling and binding upon the state having custody of the sentenced person.

Article 28

Co-operation and judicial assistance

1. All member-states shall co-operate with the Tribunal in the investigation and prosecution of persons accused of committing crimes within the jurisdiction of the Tribunal.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
 - (a) the identification and location of persons;
 - (b) the taking of testimony and the production of evidence;
 - (c) the service of documents;
 - (d) the arrest or detention of persons;
 - (e) the surrender or the transfer of the accused to the International Tribunal.

Article 29

The Registry

1. The Registry shall be responsible for the administration and servicing of the Tribunal.
2. The Registry shall consist of a Registrar and such other staff as may be required.
3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the Tribunal. He/she shall serve for a three-year term and be eligible for reappointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.
4. The staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

Article 30

The status, privileges and immunities of the Tribunal

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the Tribunal, the judges, the Prosecutor and his staff, and the Registrar and his staff.
2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.
3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under articles V and VII of the Convention referred to in paragraph 1 of this article.

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

Article 31
Seat of the Tribunal

The Tribunal shall have its seat anywhere in Iraq, and if that is determined impossible by the Secretary-General, the Security Council shall determine the seat of the Tribunal.

Article 32
Expenses of the Tribunal

The expenses of the Tribunal shall be borne by the regular budget of the United Nations in accordance with Article 17 of the Charter of the United Nations.

Article 33
Working language

The working language of the Tribunal shall be Arabic.

Article 34
Annual report

The President of the Tribunal shall submit an annual report of the Tribunal to the Security Council and to the General Assembly.

F. DRAFT BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO A REMEDY AND REPARATION FOR VICTIMS OF GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW (REVISIONS OF 24 OCTOBER 2003, BASED ON THE ORIGINAL REPORT, UNITED NATIONS DOC. E/CN.4/2000/62, 18 JANUARY 2000)

Background

The Sub-Commission on Prevention of Discrimination and Protection of Minorities, in its resolution 1989/13, decided to entrust the Special Rapporteur, Mr. Theo van Boven, with the task of undertaking a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. In 1993, Mr. van Boven submitted the study in his final report to the Sub-Commission (E/CN.4/Sub.2/1993/8). The Commission on Human Rights, in its resolution 1994/35, welcomed the study and regarded the proposed basic principles and guidelines contained in the study of the Special Rapporteur as a useful basis for giving priority to the question of restitution, compensation and rehabilitation. In accordance with the Sub-Commission resolution 1996/28, the Secretary-General transmitted to the Commission the revised draft basic principles and guidelines prepared by Mr. van Boven (E/CN.4/1997/104, annex).

In accordance with Commission resolution 1998/43, Mr. M. Cherif Bassiouni was appointed as independent expert to prepare a revised version of the draft basic principles and guidelines, taking into account the views and comments provided by States, intergovernmental and non-governmental organizations. In its resolution 1999/33, the Commission noted with appreciation the report of the independent expert (E/CN.4/1999/65). In 2000, Mr. Bassiouni submitted the final report containing a revised version of the basic principles and guidelines (E/CN.4/2000/62) to the Commission at its fifty-sixth session. In preparing the revised version of the principles and guidelines, the independent expert benefited from the foundation provided by prior reports as well as comments made by various Member States, intergovernmental and non-governmental organizations. Additionally, Mr. Bassiouni held two consultative meetings in Geneva for all interested Member States, intergovernmental and non-governmental organizations and comments made during those meetings were taken into account in formulating the principles and guidelines.

On the basis of Commission resolutions 2000/41 and 2002/44, the Office of High Commissioner for Human Rights (OHCHR) circulated the text of the principles and guidelines and comments were received from Member States, intergovernmental and non-governmental organizations.

In accordance with Commission resolution 2002/44, OHCHR convened, with the cooperation of the Government of Chile, an international consultation in Geneva for all interested Member States, intergovernmental and non-governmental organizations, with a view to finalizing the principles and guidelines (E/CN.4/2000/62). The consultation was chaired by Mr. Alejandro Salinas (Chile), and benefited from the expert guidance of the mandated authors of the principles and guidelines, Mr. van Boven and Mr. Bassiouni. Following presentations by two experts, the participants at the consultation reviewed the draft principles and guidelines and discussed follow-up to the consultative meeting. The Chairperson-Rapporteur submitted to the Commission at its fifty-ninth session a report on the consultative meeting, inter alia recommending that the Commission on Human Rights establish an appropriate and effective mechanism with the objective of finalizing the elaboration of the set of “Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights and humanitarian law.”

In its resolution 2003/34, the Commission took note of the report of the Chairperson-Rapporteur of the consultative meeting (E/CN.4/2003/63).

In accordance with Commission resolution 2003/34, the Chairperson-Rapporteur of the consultative meeting, in consultation with the independent experts, Mr. van Boven and Mr. Bassiouni, prepared a revised version of the "Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law," taking into account the opinions and commentaries of States and of intergovernmental and non-governmental organizations and the results of the consultative meeting.

In resolution 2003/34, the Commission further requested the OHCHR to hold, with the cooperation of interested Governments, a second consultative meeting for all interested Member States, intergovernmental and non-governmental organizations with a view to finalizing the "Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law" and, if appropriate, to consider options for the adoption of these principles and guidelines. The second consultative meeting should have, as a basis for its work, the comments submitted, the report of the Chairperson-Rapporteur of the first consultative meeting, and the revised version of the principles and guidelines prepared by the Chairperson-Rapporteur of the first consultative meeting in consultation with the independent experts.

On the basis of the above resolution the Chairperson-Rapporteur and the independent experts met in Geneva on 4, 5 and 6 August 2003 to revise the text in accordance with comments and observations received by Governments. The revised text, dated 15 August 2003, was reviewed by Governments, intergovernmental organizations and non-governmental organizations at the second consultative meeting held in Geneva from 20 to 23 October 2003. The comments made during the first two days of meeting, 20 and 21 October 2003, were incorporated by the Chairperson-Rapporteur and the two independent experts into the text which was reviewed further during the last day of the meeting on 23 October 2003.

The following is the revised text of the principles and guidelines, dated 24 October 2003, which also incorporates comments and suggestions made during the last day of the second consultative meeting.

Preamble

The Commission on Human Rights,

Recalling the provisions providing a right to a remedy for victims of violations of international human rights law found in numerous international instruments, in particular the Universal Declaration of Human Rights at article 8, the International Covenant on Civil and Political Rights at article 2, the International Convention on the Elimination of All Forms of Racial Discrimination at article 6, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment at article 14, the Convention on the Rights of the Child at article 39, and of humanitarian law as found in article 3 of the Hague Convention of 18 October 1907 concerning the Laws and Customs of War and Land (Convention No. IV of 1907) and article 91 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I).

Recalling the provisions providing a right to a remedy for victims of violations of international human rights found in regional conventions, in particular the African Charter on Human and Peoples' Rights at article 7, the American Convention on Human Rights at article 25, and the European Convention for the Protection of Human Rights and Fundamental Freedoms at article 13,

Recalling the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power emanating from the deliberations of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and resolution 40/34 of 29 November 1985 by which the General Assembly adopted the text recommended by the Congress,

Reaffirming the principles enunciated in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, including that victims should be treated with compassion and respect for their dignity, have their right to access to justice and redress mechanisms fully respected, and that the establishment, strengthening and expansion of national funds for compensation to victims should be encouraged, together with the expeditious development of appropriate rights and remedies for victims,

Recalling resolution 1989/57 of 24 May 1989 of the Economic and Social Council, entitled "Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power," as well as Council resolution 1990/22 of 24 May 1990, entitled "Victims of crime and abuse of power,"

Noting that in resolution 827 (1993) of 25 May 1993 in which it adopted the Statute of the International Criminal Tribunal for the Former Yugoslavia, the Security Council decided that "the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law,"

Noting also that the Rome Statute of the International Criminal Court requires the establishment of "principles relating to reparation to, or in respect of, victims, including restitution, compensation and rehabilitation" and requires the Assembly of States Parties to establish a trust fund for the benefit of victims of covered crimes within the purview of the Court and of the families of such victims, and mandates the Court "to protect the safety, physical and psychological well-being, dignity and privacy of victims" and to permit the participation of victims at all "stages of the proceedings determined to be appropriate by the Court,"

Considering that the principles and guidelines contained herein are directed at gross violations of civil, political, economic, social and cultural rights, which include the protection of life, physical integrity and other aspects essential to the human person and to human dignity,

Emphasizing that the principles and guidelines do not create new substantive international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms,

Recalling that international law contains the obligation to prosecute perpetrators of certain international crimes in accordance with treaty obligations assumed by States Parties and the requirements of national law or as provided for in the applicable statutes of international judicial organs, and that the duty to prosecute reinforces the international legal obligations to be carried out in accordance with national legal requirements and procedures and supports the concept of complementarity,

Noting that international human rights law and international humanitarian law have developed along separate legal and historic tracks which nevertheless overlap in some respects and provide

complementary protections of victims, though not necessarily in the same manner or using the same terminology,

Noting also that conflicts of a non-international character as well as internal disturbances and tensions that have occurred since the Second World War reveal that a high level of victimization has occurred at the hands of non-State actors and that the victims of violations of international humanitarian law and human rights law require the same protections as other victims, not only on the basis of principles of State responsibility but also on the basis of social and human solidarity,

Noting further that the recognition of the rights of victims and providing for substantive and procedural remedies arise as a consequence of violations of international law irrespective of the specific sources of law applicable to the rights of victims,

Noting that international human rights law and international humanitarian law are complementary, though separate and distinct bodies of international law and that the recognition of the substantive and procedural remedies for victims contained in the present document are not intended to be construed as commingling the two bodies of law and moreover that the recognition of victims' substantive and procedural remedies does not prejudice or affect the norms applicable under these two bodies of international law nor their substantive and procedural content,

Noting also, as established in the Declaration of Basic Principle of Justice for Victims of Crime and Abuse of Power, that victims of serious abuses of political and economic power are entitled to the protection of their rights like other victims,

Noting further that, contemporary forms of victimization, while essentially directed against individuals, may nevertheless also be directed against classes of persons or identifiable groups of persons who are targeted collectively, and who should also be entitled to the protection of their collective rights and to engage in collective legal action to secure the rights of collective groups,

Recognizing that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith and human solidarity with victims, survivors and future human generations, and reaffirms the international legal principles of accountability, justice and the rule of law,

Convinced that, in adopting a victim-oriented perspective, the international community affirms its human solidarity and compassion with victims of violations of international law, including violations of international human rights and humanitarian law, as well as with humanity at large,

Decides to adopt the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of [Gross] Violations of International Human Rights and [Serious] Violations of Humanitarian Law as follows:

I. OBLIGATION TO RESPECT, ENSURE RESPECT FOR AND ENFORCE INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

1. The obligation of each State to respect, ensure respect for and enforce international human rights and humanitarian law applicable to it pertains to norms that are, inter alia:

- (a) Contained in treaties to which a State is a party;
- (b) Found in customary international law; or
- (c) Contained in a State's domestic law.

2. To that end, if they have not already done so, States shall ensure that their domestic law is consistent with their international legal obligations by:

- (a) Incorporating norms of international human rights and humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system;
- (b) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;
- (c) Making available adequate, effective, prompt, and appropriate procedural and substantive remedies, including reparation, as defined below; and
- (d) Ensuring, in the case that there is a difference between a State's national requirements and its international legal obligations, that the requirement or obligation that provides the greatest degree of protection to the victim is applied.

II. SCOPE OF THE OBLIGATION

3. The obligation to respect, ensure respect for and enforce its international human rights and humanitarian law obligations includes, *inter alia*, the duty to:

- (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;
- (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against the alleged perpetrator in accordance with domestic and international law;
- (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and
- (d) Afford effective, prompt and appropriate procedural and substantive remedies to victims, including providing and facilitating reparation to victims, as defined below.

III. GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS AND SERIOUS VIOLATIONS OF HUMANITARIAN LAW THAT CONSTITUTE CRIMES UNDER INTERNATIONAL LAW

4. Those gross violations of international human rights and serious violations of humanitarian law that constitute crimes under international law require the duty to investigate and, if there is sufficient evidence, the duty to prosecute the person alleged to have committed the violations and, if found guilty, the duty to punish the perpetrator. Moreover, in these cases, States shall cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.

5. To that end, where so provided in an applicable treaty or under other international obligation, States shall incorporate and otherwise implement within their domestic law appropriate provisions, consistent with applicable international law, providing for universal jurisdiction. Moreover, where it is so provided for in an applicable treaty or other international legal obligation, States shall facilitate extradition or surrender of offenders to other States and to appropriate international judicial bodies and provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance to and protection of victims and witnesses, consistent with international human rights legal standards and subject to international legal requirements such as those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment.

IV. STATUTES OF LIMITATIONS

6. Where so provided for in an applicable treaty or contained in another international legal obligation, statutes of limitations shall not apply to violations of international human rights and humanitarian law which constitute crimes under international law.

7. Domestic statutes of limitations for other types of violations that do not constitute crimes against international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive, procedurally or in other ways, so as to deprive the victim of pursuing a claim against the perpetrator or any other body or entity. Moreover, statutes of limitations shall not be applied to periods during which no effective remedies exist for gross violations of human rights and serious violations of humanitarian law.

V. VICTIMS OF GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS AND SERIOUS VIOLATIONS OF HUMANITARIAN LAW

8. For purposes of this document, a victim is a person or a collective group of persons who suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of their fundamental legal rights. A “victim” may also be a legal personality, the representative of a victim, a dependant, a member of the immediate family or household of the direct victim, as well as a person who, in intervening to assist a victim or prevent the occurrence of further violations, suffered physical, mental, or economic harm.

9. For the purposes of this document, a victim as defined above is one who suffers harm as a result of acts or omissions that constitute a gross violation of international human rights, or serious violations of humanitarian law.

10. A person’s status as a “victim” should not depend on any relationship that may exist or may have existed between the victim and the perpetrator, or whether the perpetrator of the violation has been identified, apprehended, prosecuted, or convicted.

VI. TREATMENT OF VICTIMS

11. Victims should be treated by the State and, where applicable, by other entities or groups whether public or private, with compassion and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her retraumatization in the course of legal and administrative procedures designed to provide justice and reparation.

VII. VICTIMS’ RIGHT TO SUBSTANTIVE AND PROCEDURAL REMEDIES

12. Remedies for gross violations of international human rights and serious violations of humanitarian law include the victim’s right to the following, whose contents are described below, namely:

- (a) Access to justice;
- (b) Reparation for harm suffered and other appropriate remedy; and

- (c) Access to factual information and other relevant information concerning the violations.

VIII. ACCESS TO JUSTICE

13. A victim of a gross violation of human rights or of a serious violation of humanitarian law shall have effective access to a judicial remedy. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. A victim's right of effective access to justice also extends to international proceedings as provided by international law. Obligations arising under international law to secure the individual or collective right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should:

- (a) Disseminate, through public and private mechanisms, all available remedies for violations of gross international human rights and serious violations of humanitarian law;
- (b) Take measures to minimize the inconvenience to victims and their representatives, protect their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims;
- (c) Facilitate assistance to victims seeking access to justice.
- (d) Make available all appropriate diplomatic and legal means to ensure that victims can exercise their rights to a substantive and procedural remedy for violations of international human rights or humanitarian law.

14. In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present collective claims for reparation and to receive reparation collectively, as appropriate.

15. Adequate, effective and prompt remedy against a gross violation of international human rights or serious violations of humanitarian law should include all available and appropriate international processes in which an individual may have legal standing and should be without prejudice to any other domestic remedies.

IX. REPARATION FOR HARM SUFFERED OR OTHER APPROPRIATE REMEDY

16. Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights or serious violations of humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for its acts or omissions constituting gross violations of international human rights and serious violations of humanitarian law. In cases where a person, a legal personality, or other entity is found liable for reparation to a victim, the party responsible for the violation should provide reparation to the victim, or to the State if the State has already provided reparation to the victim.

17. In the event that the party responsible for the violation is unable or unwilling to meet these obligations, the State should endeavour to provide assistance, including reparations as defined below, to victims who have sustained bodily injury or impairment of physical or mental health as a result of

these violations and to the families, in particular, dependants of persons who have died or become physically or mentally incapacitated as a result of the violation. To that end, States should endeavour to establish national programmes for reparation and other assistance to victims.

18. A State shall enforce its domestic judgements for reparation against individuals or entities responsible for the violations and shall endeavour to enforce valid foreign legal judgements for reparation against individuals or entities responsible for the violations. To that end, States shall provide under their domestic laws effective mechanisms for the enforcement of reparation judgements.

19. In cases where the State or Government under whose authority the violation occurred is no longer in existence, the State or Government successor in title should provide reparation to the victims.

20. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights and serious violations of humanitarian law should be provided, as appropriate and proportional to the violation and the circumstances of each case, with the following forms of reparation: restitution, compensation, rehabilitation and satisfaction and guarantees of non-repetition.

21. Restitution should, whenever possible, restore the victim to the original situation before the violations of international human rights or humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, legal rights, social status, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.

22. Compensation should be provided for any economically assessable damage, as appropriate and proportional to the violation and the circumstances of each case, resulting from gross violations of international human rights and serious violations of humanitarian law, such as:

- (a) Physical or mental harm, including pain, suffering and emotional distress;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Harm to reputation or dignity; and
- (e) Costs required for legal or expert assistance, medicines and medical services, and psychological and social services.

23. Rehabilitation should include, as appropriate, medical and psychological care as well as legal and social services.

24. Satisfaction should include, where applicable and as appropriate, any or all of the following:

- (a) Cessation of continuing violations;
- (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further unnecessary harm or threaten the safety of the victim, witnesses, or others;
- (c) The search for the whereabouts of the disappeared and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the cultural practices of the families and communities;
- (d) An official declaration or a judicial decision restoring the dignity, reputation and legal and social rights of the victim and of persons closely connected with the victim;
- (e) Apology, including public acknowledgement of the facts and acceptance of responsibility;

- (f) Judicial and administrative sanctions against persons responsible for the violations;
- (g) Commemorations and tributes to the victims;
- (h) Inclusion of an accurate account of the violations that occurred in international human rights and humanitarian law training and in educational material at all levels.

25. Within national legal systems, guarantees of non-repetition and prevention should include, where applicable and as appropriate, any or all of the following:

- (a) Ensuring effective civilian control of military and security forces;
- (b) Restricting the jurisdiction of military tribunals only to specifically military offences committed by members of the armed forces and ensuring that all military proceedings abide by international standards of due process, fairness and impartiality;
- (c) Strengthening the independence of the judiciary;
- (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
- (e) Conducting and strengthening, on a priority and continued basis, human rights and humanitarian law training to all sectors of society, including law enforcement officials, as well as military and security forces;
- (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as the staff of economic enterprises;
- (g) Promoting mechanisms for monitoring and preventing inter-social conflicts and their resolution;
- (h) Reviewing and reforming laws contributing to or allowing gross violations of human rights and serious violations of humanitarian law.

X. ACCESS TO FACTUAL INFORMATION AND OTHER RELEVANT INFORMATION CONCERNING THE VIOLATIONS

26. States should develop means of informing the general public and, in particular, victims of violations of international human rights and humanitarian law of the rights and remedies contained within these principles and guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access. Moreover, victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of human rights and serious violations of humanitarian law and to learn the truth in regard to these violations.

XI. NON-DISCRIMINATION AMONG VICTIMS

27. The application and interpretation of these principles and guidelines must be consistent with internationally recognized human rights law and humanitarian law and be without any discrimination of any kind or grounds, without exception.

XII. NON-DEROGATION

28. Nothing in these principles and guidelines shall be construed as restricting or derogating from any rights or obligations arising under international law.

XIII. RIGHTS OF OTHERS

29. Nothing in this document is to be construed as derogating from internationally or nationally protected rights of others, in particular the right of an accused person to benefit from international and national standards of due process.

Explanatory comments

The following explanatory comments are made in response to various comments and questions posed by States, intergovernmental and non-governmental organizations in the course of various consultations, including written comments received by the secretariat. The preamble as well as the principles and guidelines themselves reflect these issues. The following additional commentary on the text is to be read in conjunction with the Chairperson-Rapporteur's report on the discussions that took place during the course of the second consultative meeting.

1. Nature of the principles and guidelines

The principles and guidelines do not create new substantive international or domestic legal obligations. They provide for mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under human rights law and international humanitarian law. At the same time, they seek to rationalize through a consistent approach the means and methods by which victims' rights can be addressed, so as to maximize positive outcomes and minimize the diversity of approaches that may cause uneven implementation. It should be noted that the fact that the rights of victims are articulated with specificity, and their remedies addressed with particularity, does not create new substantive legal obligations.

2. Sources of law and terminological distinctions

International human rights law and international humanitarian law have developed along separate tracks. Their sources are in different international conventions, as well as in separate aspects of customary international law and general principles of law. These multiple sources of law, even when they overlap, utilize different terms in referring to similar protections as well as use different terms with respect to their violation.

Insofar as the principles and guidelines are victim oriented and are essentially predicated on the concept of social and human solidarity and not only on the concept of State responsibility, it would be difficult to link the rights of victims to the source of the conventional or customary law that is at the basis of victims' rights. Consequently, it must be understood that these principles and guidelines are not intended to reflect the legal differences between international human rights law violations and international humanitarian law violations.

It is important, however, to underscore that with respect to international human rights law violations, the principles and guidelines are directed at what is commonly referred to as gross violations of human rights, which involve the protection of life, physical integrity and other matters essential to the human person and to human dignity. This is not intended to minimize the importance

of other violations of human rights law, but merely to distinguish those violations which, for the purposes of these principles and guidelines, require the implementation mechanisms provided herein.

The principles and guidelines also address separately violations of human rights and international humanitarian law that constitute international crimes or that require States to take measures associated with criminal violations such as investigation, prosecution, punishment and international cooperation in connection with the prosecution or punishment of alleged perpetrators. In international humanitarian law, these violations are referred to as grave breaches of the Geneva Conventions of 12 August 1949 and Protocol I thereto, and also as war crimes under the customary law of armed conflict. Violations of common article 3 of the Geneva Conventions and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) are not identified in the textual language of these conventions as either grave breaches or war crimes. Nevertheless, customary international law, particularly after the establishment of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court, has recognized such violations as being equivalent to their counterparts in conflicts of an international character that are referred to as grave breaches and war crimes. Other instruments of international human rights law prescribe the criminalization of certain acts as in the case of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as with respect to different instruments relating to international trafficking of persons for sexual exploitation and for slavery and practices related to slavery.

Considering the range of these terminological distinctions as well as the evolving nature of conventional and customary international law and general principles of law with respect to the protection of the rights of victims, the principles and guidelines have adopted a flexible approach to avoid having to address the distinctions noted above.

3. The duty to prosecute

It is understood that national legal systems have different requirements and procedures for the initiation and conduct of criminal prosecutions. The term “duty to prosecute” is intended to reflect the general international law obligation to proceed under national law or in accordance with the statutes of international judicial organs. Moreover, the concept “duty to prosecute” as used herein is not intended to have any bearing on the concept of complementarity between national and international legal organs, and it also is not intended to have any bearing on theories of criminal jurisdictions that States and international judicial organs may rely upon.

4. Non-State actors

Conflicts of a non-international character, as well as internal conflicts that have occurred since the Second World War, reveal that a significant level of victimization has occurred at the hands of non-State actors. In these cases, the group or groups referred to as non-State actors have transformed themselves into the Governments of States by assuming power. In these cases, there is a continuity between those who had been part of the non-State actor category and those who became the representatives of the State. It would be incongruous in these cases to deny the victims of such non-State actors the rights and remedies available to other victims. Another category of non-State actor consists of groups that assume effective control over certain territory and exercise over that territory and the people on that territory the equivalent control exercised by States. In some instances, these

types of non-State actors receive limited international legal recognition. There is no legal reason why such non-State actors would be excluded either from responsibility for their actions or for the consequences of their policies and practices with respect to victims of these policies and practices. The intention here is not to make States responsible for the policies and practices of non-State actors, but to make these non-State actors responsible for their policies and practices, while at the same time allowing victims to seek redress on the basis of social and human solidarity and not on the basis of State responsibility. The issue of the responsibility of non-State actors is essentially a policy judgement.

Furthermore, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power provides, in paragraph 18, that victims who have suffered “physical, or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights” including, in paragraph 21, “serious abuses of political or economic power,” are entitled to victims’ rights as provided therein.

5. Collective rights

While the principles and guidelines deal essentially with individual rights, they do not exclude the concept of collective rights or the rights of collectivities. The term “collective rights” includes two aspects. The first is well established: it is where violations are committed against a class of persons or an identifiable group, and those who represent that class or group seek to implement or enforce the rights of individuals as members of that class or group. By recognizing collective claims and class actions, States can achieve administrative and judicial economy. In this context, the term “collective rights” provides for a collective modality of enforcing rights already established in a manner that enhances the capacity of States to address these claims in a collective as opposed to an individualized manner.

The second aspect deals with violations that are committed by States in a manner that targets a specific group as a whole. This gives rise to that group’s ability to address procedurally its claims to a State and receive the remedies provided for in these principles and guidelines. Insofar as international law has not reached the level that requires States to provide, procedurally, for the judicial exercise of collective rights, such notions as “class action” are left to the determination of domestic law.

6. Future developments of international law

Nothing in these principles and guidelines precludes the future development of victims’ collective rights under conventional and customary international law.

7. Non-derogation

As specified in principle XII and in principle XIII, a non-derogation clause has been inserted as well as a provision recognizing the rights of others as provided under international standards of due process.

REFERENCES

Human Rights Watch Policy Paper: *Justice For Iraq*. December 2002

Brainstorming Meeting on Transitional Justice Options for Iraq, United Nations Development Programme. Friday, 21 March 2003

Memorandum on the Obligations of an “Occupying Power,” International Human Rights Law Institute, DePaul University College of Law.

United States Institute of Peace Special Report: *Establishing the Rule of Law in Iraq*. April 2003

United States Institute of Peace Peaceworks Report: *The Road Ahead: Lessons in Nation Building from Japan, Germany and Afghanistan for Postwar Iraq*. April 2003

Council on Foreign Relations, *IRAQ: Prosecuting War Criminals* 8 April 2003

Amnesty International Report: Ensuring justice for human rights abuses. 14 April 2003.

Amnesty International Report: Responsibilities of the Occupying Powers. 16 April 2003.

International Center for Transitional Justice Policy Paper: *Transitional Justice in Iraq*. May 2003

Open Society Institute and United Nations Foundation Publication: *Reconstructing Iraq: A Guide to the Issues*. 30 May 2003

Lawyers Committee for Human Rights, *International Criminal Tribunal for Iraq: Lawyers Committee calls for UN to seize the moment*