# The Iraqi High Criminal Court: Judicial Lessons and Necessary Steps

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**Abstract**

**The Coalition Provisional Authority authorized the Iraqi Governing Council in 2003 to establish a specific criminal tribunal to prosecute the grave crimes of the Ba'athist Regime from 1968 to 2003. The Iraqi Governing Council established the body based on the structural and statutory model of the international and hybrid courts and named it the Iraqi Special Tribunal; however, after the elections of 2005, the statute of the tribunal was revised and the name of the tribunal was changed to the Iraqi High Criminal Court. The Court was initially intended to be internationalized but its practice remained within the domestic characteristics and never acted hybrid. The Court was a distinctive judicial experience for Iraq in terms of nature, legitimacy, composition, applicable law, eligibility of its judicial and administrative staff, fair trial and due process rights and capital punishment. Therefore, it is a necessity for Iraq to reconsider the theoretical and practical framework of the Court as judicial lessons in its criminal justice reform and make them bases to strengthen its future judicial power. The author argues that Iraq should, on such an experience, initiate criminal justice reform through accession to the international instruments and international criminal institutions or the issuance of its own criminal legislation for a much effective punitive authority of its national courts to prevent or limit the threat of the perpetration of grave crimes.**

**Keywords: Coalition Provisional Authority, Iraqi High Criminal Court, Ba'athist Regime, grave crimes, judicial reform, national court, International Criminal Court.**

**Introduction**

**In August 1933, the Kingdom of Iraq launched a military campaign against the Assyrians to suppress the so-called Assyrian separatists in the northern Mosul and Duhok governorates. As the result of the campaign, hundreds of Assyrian civilians were massacred in sixty three villages and areas of Duhok and Mosul. Most of the victims were the residents of the town of Simel in Duhok and therefore the massacre is known as Simel Massacre in history.[1]**

**In the same year, the Legal Counsil of the League of Nations organized an international conference on the international criminal law in Madrid, Spain. One of the participants of the conference was a Polish Jewish lawyer named Rafael Lamkin who made a presentation on the crimes of Ottomans against Armenians and the crimes of the Kingdom of Iraq against Assyrians. In his presentation, Lamkin used the term 'acts of barbarity' for Armenian and Simel genocides and called for a comprehensive multilateral treaty to recognize such a crime as an international crime.[2] The Lamkin's remarks were not warmly welcomed at the conference but eleven years later in 1944, Lamkin redefined the crime in his book: Axis Rule in Occupied Europe and used the term 'genocide'.[3] The term quickly spread around the world and received universal recognition as such that after only two years, the United Nations (UN) Secretary-General entrusted Lamkin and several others to draft the International Convention on the Prevention and Punishment of the Crime of Genocide known as the Genocide Convention.[4]**

**The political regimes and administrations might have changed in Iraq before and after the Saddam's reign to some extent but the oppressive political mentality of mass**

[1] James J. Martin, *The Man Who Invented Genocide* (California: Institute for Historical Review, 1984), pp. 251- 253.

[2] Adam Redzik, *Rafal Lemkin (1900-1959) Co-Creator of International Criminal Law* (Warshaw: 2017), pp. 27-29.

[3] Raphael Lemkin, *Axis Rule in Occupied Europe* (Washington: Carnegie Endowment for International Peace, 1944), p. 79.

[4] See the Convention on the Prevention and Punishment of the Crime of Genocide (The Genocide Convention) (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

**governance has remained as such. The establishment of the Iraqi High Criminal Court (IHCC) was within a comprehensive agenda of transitional justice in the country to initiate a new historical stage which was the stage of ending criminal impunity, restoring peace and stability to the country and building democratic governance.[1]**

**The IHCC was established as a special tribunal under the authority of the International Coalition on 10 December 2003 to prosecute the crimes of the high responsible officials of the Ba'athist Regime, especially during the presidency of Saddam Hussein in Iraq or elsewhere, [2] which were the crime of genocide, crimes against humanity, war crimes and crimes related to abuse of power in Iraq[3] but the Court faced many challenges as to its nature, legal ground, political interference, the participation of international judges, the application of international law, the denominational and ethnic identity of its judges, the implementation of fair trial and due process rights, capital punishment and above all the *ad hoc* nature and operation of the Court.[4]**

**The establishment of the Court was still considered a landmark step in the history of Iraq because it played an alternative role to national courts and International Criminal Court (the ICC).[5] The Court ended impunity as to the officials of one of the most ever oppressive regimes and faced them with criminal responsibility. The establishment of the IHCC marked the first ever criminal model in the Arabic world**

[1] Ali Bakht, Saad Sultan *et al, Transitional Justice in Iraq: Memories and Future Prospects* (Amman: Friedrich-Ebert-Stiftung, 2021), pp. 81-96.

[2] The Statute of the Iraqi Special Tribunal (IST Statute) (adopted 10 December 2003), Art. 1 (b).

[3] The Iraqi High Criminal Court Law (The IHCC Law) (The revised IST Statute 11 August 2005), Art. 1 (2).

[4] The IST Statute, *supra* n 6, Arts. 4, 6, 7 (n), 8 (j); The IHCC Law, *supra* n 7, Arts. 3 (5), 7 (2), 8 (9), 9 (7), 16, 17, 33, 19, 24.

[5] The International Criminal Court (ICC) is a permanent international criminal mechanism which was established in 2002 based on the 1998 Rome Treaty to try the international crime of genocide, crimes against humanity, war crimes and the crime of aggression when they are committed on the territories of the states' parties or the states that bring their situations to the Court either on their own or through the UN Security Council. The Court functions on the basis of the complementarity principle which signifies that its jurisdiction is not triggered until the national courts are considered unable or unwilling to carry out criminal proceedings genuinely. It should be mentioned that the ICC could not try the crimes of the Ba'athist Regime because of two reasons. First, Iraq was not a member state in the Court's statute; second, the concerned crimes had been committed before 1 July 2002, see the Rome Statute of the ICC (The ICC Statute) (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, Arts. 1, 5, 12, 17.

**and threatened the other regimes with a similar fate. Most importantly, the Court delivered justice and restored dignity to the victims to a certain degree.[1] Therefore, Iraq needs to reconsider the experience of the Court in the process of its judicial reform and bases its new justice system on a stronger mechanism like the membership of the ICC or adopting a comprehensive criminal legislation in the country or at least the referral to hybrid courts or *ad hoc* criminal tribunals.**

**There might be numerous books and articles on the IHCC but there is still a lack of comprehensive legal literature on the serious gaps within the Iraqi criminal justice system as to the international crimes from the lack of comprehensive substantial and procedural rules to the lack of an effective criminal mechanism. This manuscript attempts, on the basis of a descriptive and analytical method, to clarify that Iraq needs a radical judicial reform and the historical framework of the IHCC helps the country to establish a strong judicial power to prevent or limit the perpetration of grave crimes.**

**The article answers the following questions: Who did actually establish the IHCC? What were the jurisdictional parameters of the Court? How was the structure of the Court? What were the characteristics of the IHCC? What are the lessons that one could learn from the establishment and operation of the Court? What are the practical and necessary steps that Iraq needs to take in its criminal justice reform and establishing a strong judicial power in the country?**

**The article consists of the following main arguments: A brief historical background of Iraq, the establishment of the IHCC, the lessons learned from the establishment and operation of the Court, the need for practical and necessary steps in Iraqi judicial system.**

## 1. A brief historical background

**Iraq was part of the Ottoman Empire until it was invaded by Britain in 1917. The country then remained under the colonial mandate until 1932 when it finally gained its independence.[2] Iraq thereafter experienced a series of revolts and military coups until the Ba'athist Party came to power in 1968.[3] On 17 July 1968, a group of military officers from the Ba'athist Party, overthrew the third Iraqi president after the announcement of**

[1] See for example *Dujail* Case, IST Trial Judgment, Case No. (1/C1/2005), 5 November 2005.
[2] Liam Anderson and Gareth Stansfield, *The Future of Iraq: Dictatorship, Democracy or Division?* (New York: Palgrave Macmillan, 2004), p. 17.
[3] Constance A. Johnson, *Iraq: Legal History and Traditions*, the Law Library of Congress, 2004, pp. 16-25.

**republic, Abd al-Rahman Arif and seized power within two weeks.[1] The Ba'athist Regime under the authority of the president Ahmed Hassan al-Bakr started to rule Iraq by systematic fear and terror to make people obey and silent.[2] On 17 July 1979, Saddam Hussein obliged al-Bakr to leave the state presidency to him.[3] After coming to power, Saddam became the most repressive Iraqi president and committed the most heinous crimes against Iraqis, generally and ethnic and religious communities, particularly.[4] The crimes that the Saddam's Regime was accused of were Killing 149 people in *Dujail* village, after a failed attempt to assassinate him,[5] Killing an estimated 200,000 Kurds during the *Anfal* campaign which was designed to evacuate Kurdish populated areas between 1987 and 1988,[6] Killing 5000 Kurds in the city of Halabja with chemical attack in 1988,[7] Killing thousands of Shia community members for the uprisings of 1991,[8] Executing many merchants for raising product prices during the United Nations (UN) economic sanctions as a violation of the regime's order,[9] Executing civilians for protesting the government after the assassination of a religious cleric in 1999.[10] Although the international human rights groups[11] and the UN[12] documented many**

[1] Miranda Sissons and Abdulrazzaq Al-Saiedi, *Iraq a Bitter Legacy: Lessons of De-Baathification in Iraq*, International Center for Transitional Justice, 2013, p. 3.

[2] Liam Anderson and Gareth Stansfield, *supra* n 11, pp. 51-54.

[3] Joseph G. Melaragno and James O. Ollunga, *Rebuilding Iraq: The United Sates Role*, Stanford University, 2003, p. 3.

[4] International Center for Transitional Justice, *Creation and First Trials of the Supreme Iraqi Criminal Tribunal*, Briefing Paper, 2005, pp. 3-4.

[5] *Dujail* Case, *supra* n. 10.

[6] *Anfal* Case, IHCC Trial Judgment, Case No. (1/C2/2007), 24 June 2007.

[7] Mechael A Newton, 'Iraqi Special Tribunal', *Oxford Public International Law*, (2010). Available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1703> (Accessed: 13 May 2023); 'Alleged Crimes of Saddam Hussein', *The Guardian*, (19 October 2005). Available at: <http://www.theguardian.com/world/2005/oct/19/iraq> (Accessed: 13 May 2023).

[8] 1991 Case, IHCC Trial Judgment, Case No. (1/C3/2008), 2 December 2008.

[9] Merchant's Execution Case, IHCC Trial Judgment, Case No (2/First trial Chamber 2008), 11 March 2008.

[10] Mechael A Newton, *supra* n 19.

[11] Human Rights watch, *Human Rights in Iraq*, 1991; Amnesty International, *"Disappearances" and Political Killings: Human Rights Crisis of the 1990s*, 1993.

[12] The UN Commission on Human Rights appointed a special rapporteur to present information regarding human rights situation in Iraq in 1991. Based on the reports of the Rapporteur, the UN General Assembly adopted several resolutions which called Iraq for ending the violations, see for example the Resolution: (A/RES/46/134/ 17 December 1991).

**evidences during the 1990s to hold Saddam and the other perpetrators responsible, the attempts failed until the United Sates (US)-led Coalition (The Coalition) invaded Iraq in March 2003.**

**2. The establishment of the IHCC**

**The Coalition started its military operations against Saddam's Regime on 19 March 2003. The military operations ended on 1 May 2003 and resulted in official occupation of Iraq. The Coalition established a provisional authority known as Coalition Provisional Authority (CPA) as an administrative body to rule Iraq along with the Iraqi Governing Council (IGC).[1] The CPA delegated power to the IGC to establish a special tribunal for the crimes of the previous regime. The IGC adopted the statute of the tribunal on 10 December 2003 and established the Iraqi Special Tribunal (IST).[2] The tribunal was mandated to bring to justice the Iraqi nationals and residents who were accused of committing international crimes during the period from 17 July 1968 to 1 May 2003 in Iraq or elsewhere.[3] The Coalition transferred the power to the interim government on 28 June 2004 and declared the end of the occupation on 30 June 2004. On 30 January 2005, national elections were held in Iraq that established the Transitional National Assembly (TNA).[4] The TNA revised the statute of the Tribunal on 11 August 2005 and changed its name to Iraqi High Criminal Court (IHCC).[5]**

**2.1. Jurisdiction of the Court**

**The IHCC was, unlike regular national courts, established for a specific period, a particular group of people, a given geographical location and some certain crimes. Thus, the jurisdiction of the court, as the power to deal with criminal cases or matters under its statute, included temporal, personal, territorial and subject-matter parameters.[6]**

**2.1.1. Temporal jurisdiction**

[1] Christian Eckart, *Saddam Hussein's Trial in Iraq: Fairness, Legitimacy & Alternatives, a Legal Analysis*, Graduate Student Papers, Cornell Law School, 2006, p. 6. Available at: <http://scholarship.law.cornell.edu/lps_papers/13> (Accessed: 15 November 2023).

[2] The IST Statute, *supra* n 6, Art. 1 (a).

[3] *Ibid*., Art. 1 (b).

[4] Christian Eckart, *supra* n 25, p. 6.

[5] The name of the Court has been translated into English by some as 'Supreme Iraqi Criminal Tribunal' and by some others as 'Iraqi High Tribunal' but the most correct translation is 'The Iraqi High Criminal Court', see the IHCC Law, *supra* n 7, Art 1 (1).

[6] The IST Statute, *supra* n 6, Art. 1.

**The IHCC was designed to try the crimes committed by the Ba'athist Regime from the date when the Ba'athist Party came to power on 17 July 1968 to the formal occupation of Iraq by the US-led Coalition on 1 May 2003.[1] Thus, the temporal jurisdiction of the Court is limited to the thirty-five year rule of the Ba'hsit Regime in the last three decades of the previous century in Iraq.**

**2.1.2. Personal jurisdiction**

**The Court has jurisdiction over natural persons: Iraqi nationals and residents who were/are accused of committing international crimes and some certain violations of Iraqi laws. The jurisdiction of the Court did not/does not extend to the complaints against the Coalition forces and legal persons (non-natural persons) including corporations.[2]**

**2.1.3. Territorial jurisdiction**

**The IHCC was mandated to try the serious crimes of the Ba'hsit Regime that had been committed on the territory of Iraq as well as on the territories of Iran and Kuwait by Iraqi nationals and residents during the Regime's thirty-five-year rule in the country.[3] Although the statute of the Court did not mention the states in Article 1(2) but the meaning of 'elsewhere' was these two countries based on the previous statute.[4]**

**2.1.4. Subject-matter jurisdiction of the Court**

**The subject-matter jurisdiction of the Court is the international crime of genocide, crimes against humanity, war crimes and some national crimes related to abuse of power in Iraq between 17 July 1968 and 1 May 2003. The statute includes these crimes in articles 11 through 14.[5]**

**Article 11 mentiones genocide as a crime within the jurisdiction of the Court. The definition of the statute to genocide is exactly the same as provided in the 1948 Genocide Convention[6] and the Rome Statue of the International Criminal Court (ICC).[7] According to the IHCC statute, genocide meant "any of the following acts committed**

[1] The IHCC Law, *supra* n 7, Art. 1 (2).
[2] *Ibid*.
[3] *Ibid*
[4] The IST Statute, *supra* n 6, Art. 1 (b).
[5] See the IHCC Law, *supra* n 7, Arts. 11-14.
[6] See the Genocide Convention, *supra* n 4, Arts. II, III.
[7] See the ICC Statute, *supra* n 9, Art. 6.

**with intent to abolish, in whole or in part, a national, ethnic, 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 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." [1]**

**Paragraph two of article 11 is also the repetition of article III of the Genocide Convention that considers the acts of "genocide", "conspiracy to commit genocide", "direct and public incitement to commit genocide", "attempt to commit genocide", "complicity in genocide" as punishable acts.[2]**

**The statute, in article 12, entailes crimes against humanity and closely followes article seven of the ICC statute regarding their definition. According to the IHCC statute, the crimes against humanity meant "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" as such: willful murder, extermination, enslavement, deportation or forced displacement, imprisonment, torture, sexual violence, persecution against political, racial, national, ethnic, cultural, religious or gender group, enforced disappearance and other inhumane acts of a similar character.[3]**

**Article 13 of the statute encompasses war crimes and is also closely modeled on article eight of the ICC statute. The IHCC statute regardes war crimes as grave breaches of the Geneva Conventions of 12 August 1949, serious violations of the applicable laws and customs of international armed conflicts, crimes committed against persons who had no active participation in hostilities including combatants laid down their weapons and *hors de combat* by sickness, wounds, detention or any other cause and serious violations of the humanitarian laws and customs applicable in non- international armed conflict.[4]**

**Article 14 of the statute includes some certain crimes concerning the abuse of power in Iraq during thirty-five year of the Ba'athist Party rule as such: intervention in the**

[1] See the IHCC Law, *supra* n 7, Art. 11.
[2] See the Genocide Convention, *supra* n 4, Art. III.
[3] See the IHCC Law, *supra* n 7, Art. 12.
[4] *Ibid*, Art. 13.

**judiciary, the waste of national wealth and misuse of position to direct armed forces against an Arab country.[1]**

**2.2. The structure of the Court**

**The Court, following its establishment and based on its statute, consisted of first: A. a cassation panel, B. one or more criminal courts, C. investigating judges, Second: public prosecution, third: administration department.[2]**

**The cassation panel was composed of nine judges. The judges elected someone among themselves as a president. The president of the cassation panel became the president of the Court and supervised administrative and financial affairs.[3] The cassation panel was deciding by majority rule to confirm, revise or overturn the judgments of the criminal court.[4]**

**The criminal court or each criminal chamber was composed of five judges. The judges were electing one among themselves to supervise the trials.[5] The criminal court or chambers were presiding the trials and rendering verdicts which might be appealed within thirty days to the cassation panel.[6]**

**The Court had sufficient investigative judges[7] who were conducting investigation with persons responsible for the crimes fell within the jurisdiction of the Court.[8] The chief investigative judge and his deputy were elected by the investigative judges themselves.[9] Later, the chief would refer the cases to investigative judges individually.[10] The investigative judges were acting independently from the Court[11] and gathering evidences from appropriate sources.[12] From the date of receiving the notification, the**

[1] *Ibid*, Art. 14.
[2] *Ibid*, Art. 3.
[3] *Ibid*, Art. 3 (4) (a).
[4] Criminal Procedure Code No. 23 of 1971(as amended 14 March 2010), Decree Number 230-the Revolutionary Command Council, (14 February 1971), Arts. 243–276.
[5] The IHCC Law, *supra* n 7, Art. 3 (4) (b).
[6] Criminal Procedure Code No. 23 of 1971, *supra* n 45, Art. 329.
[7] The IHCC Law, *supra* n 7, Art. 8 (1).
[8] *Ibid*, Art. 8 (2).
[9] *Ibid*, Art. 8 (3).
[10] *Ibid*, Art. 8 (4).
[11] *Ibid*, Art. 8 (7).
[12] *Ibid*, Art. 8 (6).

**decisions of the investigative judge could be appealed before the cassation panel within fifteen days.[1]**

**The Court also had sufficient prosecutors[2] who were conducting prosecution with the accused of the relevant crimes.[3] The chief and his deputy were elected by the prosecutors.[4] The chief prosecutor was, similarly to the chief investigative judge, referring the cases to the prosecutors[5] who were acting individually and independently from the Court.[6]**

**The administration department provided administrative and financial services to the Court and public prosecution.[7] The department was run by someone who held a bachelor degree in law with judicial and administrative experience.[8]**

**3. Lessons learned from the establishment and operation of the IHCC**

**Iraq is a country whose people has been experiencing unimaginable suffering, injustices and indignities since the dawn of history through facing the crimes that are today known as the crimes shock the conscience of mankind (international crimes). Hence, it is not exaggerated if one calls it: the land of the grave crimes.[9] The perpetration of such crimes and their sociological consequences have negatively impacted on the political, administrative and cultural life in the country from which hundreds of problems have arisen from the crisis of collapsing legal system to the lack of**

[1] *Ibid*, Art. 8 (8).
[2] *Ibid*, Art. 9 (1).
[3] *Ibid*, Art. 9 (2).
[4] *Ibid*, Art. 9 (3).
[5] *Ibid*, Art. 9 (6).
[6] *Ibid*, Art. 9 (5).
[7] *Ibid*, Art. 10 (2).
[8] *Ibid*, Art. 10 (1).
[9] See for example: Andre Wink, *Al-Hind: The Making of the Indo-Islamic World* (New York *et al*: Brill, 1997); James J. Martin, *supra* n 1; Peter BetBasoo, *Incipient Genocide: The Ethnic Cleansing of the Assyrians of Iraq*, Assyrian International News Agency, 2007; Human Rights Watch, 'Whatever Happened to The Iraqi Kurds?', 1991. Available at: <Refworld | Whatever Happened To The Iraqi Kurds? (archive.org)> (Accessed: 10 November 2023); Human Rights Watch, *'Genocide in Iraq–the Anfal Campaign Against the Kurds.'* 1993. Available at*:* GENOCIDE IN IRAQ: The Anfal Campaign Against the Kurds (Human Rights Watch Report, 1993) (archive.org) (Accessed: 10 November 2023); Human Rights Watch, "World Report 2015: Events of 2014", 2015; Human Rights Watch, "World Report 2016: Events of 2015", 2016; Human Rights Watch, "World Report 2017: Events of 2016", 2017.

**social co-existence and absence of political order.[1] Therefore, preventing or limiting such serious violations of human rights is an inevitable historical necessity for the Iraqi society.**

### 3.1. The Court and its judicial model

**The international community witnessed horrific scenes throughout the twentieth century which was unimaginable destruction and causalities. The inability and unwillingness of national courts in the prosecution of the perpetrators of such crimes made the international community step to unite voices to establish a complementary criminal justice system to try people who would cause such catastrophic incidents to humanity and could escape from national justice. The first attempts were made after the first and second world wars which were the establishment of Nuremburg and Tokyo Tribunals[2] for the political and military officials of the Nazi Regime and Japanese Empire.[3] Further attempts were followed during the second half of the same century through establishing special commissions to draft international criminal rules and universal definitions of international crimes. The attempts eventually resulted in incorporating the modern criminal rules and principles into national laws and alternatively establishing hybrid criminal tribunals and the ICC as complementary mechanisms to end criminal impunity at the end of the previous century and the**

[1] Harith Al-Qarawee, Sectarian Relations and Scio-Political Conflict in Iraq, *ISPI*, 2013. Available at: <(13) (PDF) Sectarian Relations and Socio-Political Conflict in Iraq (researchgate.net)> (Accessed: 11 November 2023).

[2] The Nuremburg and Tokyo Tribunals were two *ad hoc* criminal bodies which were established by the Allied Powers (US, UK, France and Soviet Union) to try the high responsible officials of the Nazi Regime in Europe and the Japanese Empire in the East after the end of the World War Two in 1945 and 1946. The tribunals prosecuted many people for committing grave crimes like crimes against humanity, war crimes and the crime against peace and eventually became the bases for the establishment and function of the ICC and other hybrid criminal tribunals, see Charter of the International Military Tribunal (The Charter of the Nuremberg Tribunal), annexed to the London Agreement (adopted 8 august 1945, entered into force 8 August 1945) 82 UNTS 279; Charter of the International Military Tribunal for the Far East (The Charter of the Tokyo Tribunal), annexed to the Special Proclamation by the Supreme Commander for the Allied Powers (adopted 19 January 1946, entered into force 19 January 1946) 4 USTIA 20.

[3] The Charter of the Nuremberg Tribunal, *supra* n 64, Art. 1; The Charter of the Tokyo Tribunal, *supra* n 64, Art. 1.

**beginning of this century.[1] The IHCC was based on the same historical reality which initially intended to become a hybrid criminal mechanism like Extraordinary Chambers in the Courts of Cambodia 1997[2] and Special Panels of the Dili District Court in 2000[3] under the coordination and supervision of the International Coalition to be able to function in accordance with the modern criminal and procedural rules and principles but the Court never acted as such and remained as a national criminal court.**

### 3.2. The establishment of the Court

**The establishment of the Court was an important step towards the assumption of criminal liability and ending the criminal impunity of political and military actors in Iraq as such that from the beginning; one could imagine that no one would ever dare to commit a grave crime again and all that was expected was a dramatic political and legal change from destruction and suffering to rebuilding and prosperity. However, the practice of the Court in a short period of time made people a bit hopeless due to the poor legislation and implementation of the procedural and substantial rules in the criminal cases brought before it.[4]**

### 3.3. The legal ground of the Court

[1] See the ICC Statute, *supra* n 9; Law on the Establishment of the Extraordinary Chambers, with Inclusion of Amendments as Promulgated on 27 October 2004 (NS/RKM/1004/006); The Statute of the Special Court for Sierra Leone, Security Council resolution 1315/14 August 2000.

[2] The Extraordinary Chambers in the Courts of Cambodia was a special Court that was established in 1997 and operated until 2007 based on an agreement between the government of Cambodia and the UN as a hybrid criminal model to prosecute the high-profile leaders of the Democratic Kampuchea for their crime of genocide, crimes against humanity, war crimes and some certain crimes relating to Cambodian law during the rule of the Pol Pot Regime from 1975 to 1976, see David Scheffer, 'The Extraordinary Chambers in the Courts of Cambodia', in Cherif Bassiouni (ed.), *International Criminal Law*, 3rd (ed.) (New York: Martinus Nijhoff Publishers, 2008).

[3] The Special Panels of the Dili District Court, also known as the Special Panels for the Serious Crimes or the East Timor Tribunal, was a hybrid criminal tribunal that was established in 2000 and operated until 2006. The mission of the tribunal was to try the serious crimes committed on the territory of Timor in 1999, see Suzannah Linton, "Prosecuting Atrocities at the District Court of Dili", *Melbourne Journal of International Law*, 2 (2), 2001.

[4] Human Rights Watch, "The Former Iraqi Government on Trial", (16 October 2005). Available at: <https://www. hrw.org/legacy/backgrounder/mena/iraq1005/4.htm> (Accessed: 12 November 2023).

**The initial and essential issue of the IHCC was the legitimacy of the power that founded it and the basis of the Court's punitive authority. In other words, the Court was not established in accordance with and as part of the regular Iraqi judicial system, neither was a regular international criminal mechanism or a hybrid criminal means based on an agreement between Iraq and the UN. It was rather established under the Coalition authority as part of the process of transitional justice to the country which was still not a clear and an established legal ground in international practice. However, after the TNA revised the statute of the Court and the Iraqi constitution recognized it[1] in October 2005, the Court obtained sufficient legitimacy and brought such arguments to an end.**

**3.4. The Court and international participation**

**The original statute of the Court, in article four, included a provision according which the IGC could appoint international judges if deemed necessary. Based on article six of the same statute, the president was required to appoint international advisors or observers to provide the trial chambers and appeals chamber with assistance regarding international law. Similar provisions could be found concerning the appointment of international advisors or observers by the chief investigative judge and prosecutor to assist the process of investigation and prosecution.[2] It should be mentioned that such appointments were to be through the help of international community including the UN.[3] However, the revised statute of October 2005 allowed the Council of Ministers, based on a proposal from the president of the Court, to appoint international judges; it restricted the possibility to the time when another state was a plaintiff.[4] The new statute preserved the provision which allowed the IHCC president to appoint international advisors to assist the criminal court and the cassation panel in respect of international law.[5] With regard to advisory assistance to investigation and prosecution process, the statute did not amend the provision and the chief investigative judge and prosecutor, after consultation with the president of the Court, could appoint international experts.[6] However, the Courts' judges, from the beginning until now, have all been Iraqis and no**

[1] Iraqi Constitution (adopted 15 October 2005), Art. 134.
[2] The IST Statute, *supra* n 6, Arts. 7 (n), 8 (j).
[3] *Ibid*.
[4] The IHCC Law, *supra* n 7, Art. 3 (5).
[5] *Ibid*, Art. 7 (2).
[6] *Ibid*, Arts. 8 (9), 9 (7).

**international judge, advisor, observer or expert has been appointed.[1] The issue was not even from the revision of the statute which still left possibility for international participation but the Iraqi political popular will on the Court's national staff and practice[2] It is worth mentioning that the UN did not provide any assistance to the Court directly and it was rather the US and United Kingdom (UK) which provided the expertise and assistance to the Court.[3]**

### 3.5. Applicable law before the Court

**The statute of the Court provided the laws which were applicable to the Court during criminal proceedings. The procedural rules were included in article 16 based on which the Court was to apply in the first place: the Criminal Procedure Law No. 23 of 1971 and the Rules of Procedure and Evidence appended to the statute of the Court.[4] Article 17 included the secondary applicable law to the Court which were the substantive rules. According to the article, the Court should apply general principles of criminal law which were found in a- The Baghdadi Penal Law of 1919, for the period starting from 17 July 1968 to 14 December 1969. b- The Penal law No.111 of 1969, which was in force in1985 (third version), for the period starting from 15 December 1969 to 1 May 2003. c- The Military Penal Law No.13 of 1940 and the military procedure law No.44 of 1941.[5] In the third place, the Court might apply the relevant decisions of the international criminal courts regarding the interpretation of articles 11 through 13 of the statute but the main applicable law before the Court was the Iraqi law and the Court never applied international law. [6]**

### 3.6. The eligibility of the Court's staff

**The judges of the Court were finally chosen under the Coalition supervision from the Kurds and Shiites[7] who all had been the subject of oppression by the Ba'thist**

[1] International Center for Transitional Justice, *supra* n 16, p. 12.
[2] Mechael A Newton, *supra* n 19.
[3] International Center for Transitional Justice, *supra* n 16, pp. 13-14.
[4] See the IHCC Law, *supra* n 7, Art. 16.
[5] *Ibid*, Art. 17 (1).
[6] *Ibid*, Art. 17 (2).
[7] Jessica Martin, Is the Saddam Hussein Trial One of the Most Important Court Cases of All Time?, *Washington University in StLouis*, (21 October 2005). Available at: <Is the Saddam Hussein trial one of the most important court cases of all time? Not necessarily, says international law expert - The Source - Washington University in St. Louis (wustl.edu)> (Accessed: 13 November 2023).

**Regime and previously members of the Ba'thist Party were all declared ineligible to become the Court's staff.[1] Moreover, the judges were not qualified because they lacked expertise in investigation and prosecution of international crimes and they were trained only a few weeks by a team of US lawyers.[2] The Court, however, must be independent based on the most basic principle of the separation of powers enshrined in the Iraqi constitution; politicians constantly interfered into the appointment and dismissal of the judges and made 'prejudicial comments' that consequently undermined the judicial credibility of the Court.[3]**

**3.7. The rights of accused and fair trial**

**The statute of the Court, in article 19, followed the International Covenant on Civil and Political Rights[4] and included numerous rights for accused in the criminal trials as such: equality before the tribunal,[5] presumption of innocence until the guilt is proven,[6] entitlement to public hearings[7] and providing with fair impartial trials[8] which guaranteed promptly informing the charge,[9] giving adequate time and facilities for defense,[10] conducting criminal trials without undue delay,[11] receiving trials in presence with counsel or legal assistance,[12] examining witnesses and presenting evidence in defense [13]and not compelling to confess guilt.[14] Yet, the Court failed to provide the defendants with their sufficient rights of due process. The Court did not promptly notify some defendants regarding their charges. It did not provide adequate counsel, time and facilities for defense preparation. The Court prevented monitoring investigation and limited evidence accession to defense. Moreover, the Court's evidence standard was**

[1] The IHCC Law, *supra* n 7, Art. 33.
[2] Eckart, Christian, *supra* n 25, p. 7.
[3] Human Rights Watch, "The Former Iraqi Government on Trial", *supra* n 69.
[4] See International Covenant on Civil and Political rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Art. 14.
[5] The IHCC Law, *supra* n 7, Art. 19 (1).
[6] *Ibid*, Art. 19 (2).
[7] *Ibid*, Art. 19 (3).
[8] *Ibid*, Art. 19 (4).
[9] *Ibid*, Art. 19 (4)(a).
[10] *Ibid*, Art. 19 (4)(b).
[11] *Ibid*, Art. 19 (4)(c).
[12] *Ibid*, Art. 19 (4)(d).
[13] *Ibid*, Art. 19 (4)(e).
[14] *Ibid*, Art. 19 (4)(f).

**based on the judge satisfaction[1] rather than 'beyond a reasonable doubt'[2] and therefore the trials were not standardly fair.[3]**

### 3.8. Capital punishment

**According to the statute, the criminal court was to deliver judgments by majority rule.[4] The penalties that the Court was to impose were those specified in the Iraqi Penal Code No (111) of 1969 with the consideration of the applicable law before the Court.[5] The code included capital punishment[6] while such a punishment was not being imposed by international courts and tribunals anymore. Based on the Penal Code, the Court imposed death penalty on dozens of criminals between 2006 and 2010 in *Dujail* case, *Anfal* case, and the case related to the suppression of the Shiite rebellion in 1991.[7] The capital punishment made the Court to be the subject of a wide-ranging criticism by the human rights groups, UN Secretary General, UK Foreign Secretary. Due to the same reason, the European investigators refused to offer any contribution and some states decreased their fund to the Court.[8]**

### 3.9. The dissolution of the Court and the alternative mechanisms

**The IHCC still operates within its limited temporary, personal and subject-matter jurisdiction. However, the number of its cases have decreased and the Court steps towards the accomplishment of its criminal mission. After the announcement of the Islamic State in Iraq and Syria (ISIS) and committing all the grave crimes within the**

[1] Article 213 of the Iraqi Criminal Procedure Code provides the term of 'satisfaction of the judge' as the court's standard of evidence. The term requires courts to deliver judgments based on the extent of satisfaction of the evidence, see the Criminal Procedure Code No. 23 of 1971, *supra* n 45, Art. 213.

[2] The term of 'beyond a reasonable doubt' refers to the court's proof standard in modern criminal justice system. The term requires judges not to convict defendants unless they are absolutely sure, beyond any reasonable doubt, as to their guilt, see Ryan Essex and Jane Goodman-Delahunty, "Judicial Directions and the Criminal Standard of Proof: Improving Juror Comprehension", *JJA* 24 (75), 2014, pp. 80-82.

[3] Human Rights Watch, "The Former Iraqi Government on Trial", *supra* n 69.

[4] The IHCC Law, *supra* n 7, Art. 23. (2).

[5] *Ibid*, Art. 24. (1).

[6] See The Iraqi Penal Code No. 111 of 1969 (amended 14 March 2010), Art. 406.

[7] Chatham House, *The Iraqi Tribunal: The Post Saddam Cases*, a Summary of the Chatham House International Law Discussion Group meeting held on 4 December 2008, p. 3.

[8] Sonya Sceats, *The Trial of Saddam Hussein*, Chatham House, 2005, p. 7.

**jurisdiction of the IHCC,[1] the Court did not open investigations due to the issue of its temporal and personal jurisdiction and the cases were rather brought before regular courts based on the Iraqi Anti-Terrorism Law[2]. The process consequently spread much more judicial chaos as those courts committed mass violations of substantial and procedural rules in those cases.[3] The ISIS era shocked the Iraqis again as such that the violations of the rights of the accused before the courts was as tragic as the ISIS atrocities against civilians. The era demonstrated huge legislative and judicial gaps and shortcomings in Iraq as to the investigations and prosecutions of the grave crimes genuinely in the country.**

### 3.10. Iraq and the constant threat of the perpetration of grave crimes

**The historical and political realities in Iraq have made the concepts like genocide, crimes against humanity and war crimes be very familiar to every single Iraqi family and individual whether literate or illiterate from Arabs and Kurds to Assyrians and Turkmens and from Muslims Shiites and Sunnis to Yazidis and Christians. In other words, it is rare to find an Iraqi who has not experienced or witnessed the tragedy of grave crimes. People may not know to verbalize these crimes as mentioned in the international documents but their sorrows and tears make one understand clearly the essence and fatal impact of these crimes. The tragedies of the grave crimes are not only historical which are specifically seen before the establishment of the IHCC but are also**

[1] United Nations Assistance Mission for Iraq (UNAMI) and the Office of the High Commissioner for Human Rights (OHCHR), "Report on the Protection of Civilians in the Non International Armed Conflict in Iraq: 5 June – 5 July 2014"; UNAMI and OHCHR, "A Call for Accountability and Protection: Yazidi Survivors of Atrocities committed by ISIL", August 2016; UNAMI and OHCHR, "Report on the Protection of Civilians in the Armed Conflict in Iraq: 6 July – 10 September 2014"; UNAMI and OHCHR, "Report on the Protection of Civilians in the Armed Conflict in Iraq: 11 December 2014 – 30 April 2015"; UNAMI and OHCHR, "Report on the Protection of Civilians in the Armed Conflict in Iraq: 1 May – 31 October 2015"; UNAMI and OHCHR, "Report on the Protection of Civilians in the Armed Conflict in Iraq: 1 November 2015 – 30 September 2016".

[2] The Anti-Terrorism Law is part of the Iraqi criminal legislation that was adopted in 2005 by the Council of Ministers following its approval by Parliament. The law has been criticized too much for its broad definition of terrorism, the lack of the seriousness threshold in the acts considered terrorist acts and the severity of the prescribed punishments, see The Iraqi Anti-Terrorism Law, No. 13 (adopted 7 November 2005).

[3] Rebaz R. Khdir, *The Jurisdiction of the International Criminal Court: The Crimes of the Islamic State in Iraq and Syria*, PhD Thesis, University of Minho, 2018, pp. 166-168.

**evident after the establishment of the Court.[1] Moreover, the threat of their occurrence is even actual as such that they may be perpetrated in every single moment. Yet, Iraq has not taken so far necessary steps to prevent or limit their perpetration.**

**4. The need for practical and necessary steps in Iraqi judicial system**

**Iraq is a country whose population is comprised of different ethnic and religious communities since its establishment. The communities have constantly attempted to peacefully co-exist and govern the country on the basis of political compromises and mutual benefit of the country's resources but such compromises have never been made practically. Therefore, the social tensions constantly exist and such tensions consequently reflected in political and administrative policies. The authorities have then referred to take revenge for the social upheaval and such a revenge policy eventually led to the formation of oppressive regimes.[2] The means of oppressive regimes to control the situation and protect the political order is violence and violence by its nature constitutes breaches of human rights and such breaches eventually establish criminal responsibility. Yet, in such a situation, the rule of law cannot exceed the limits of the constitutional theory and such a consequence creates gaps in the legislative and judicial systems in the form of criminal impunity.**

**4.1. Iraq and the necessity for real and effective transitional justice**

**As we mentioned before that the threat of perpetration of grave crimes in Iraq has actually remained constant and therefore the country needs to seriously take steps to encounter it by all means available whether national and international. The first ever step that the country needs to take is removing the historical factors that contributed to the perpetration of such crimes as such discrimination on the bases of ethnicity, religion or denomination along with political and social reconciliation through the spread of awareness and respect of co-existence among the members of different groups and communities. The state further needs to conduct broad institutional reforms to be able to establish good governance through conducting real democratic elections, the execution of the rule of law, encountering corruption and providing people with**

[1] See for example: UNAMI and OHCHR, 5 June – 5 July 2014"; UNAMI and OHCHR, August 2016; UNAMI and OHCHR, 6 July–10 September 2014"; UNAMI and OHCHR, 11 December 2014 – 30 April 2015", *supra* n 105.

[2] See for example: William R. Polk, *Understanding of Iraq: The Whole Sweep of Iraqi History, from Genghis Khan's Mongols to the Ottoman Turks to the British Mandate to the American Occupation* (New York: Harper Collins, 2005).

**financial transparency and finally respecting and promoting the human rights of people as individuals and as group members.**

### 4.2. Iraq and the need for strengthening criminal justice

**The primary criminal responsibility to try any crime, whether grave or ordinary, committed on the territory of a country is the national courts of that country. This judicial power is basically derived from the principle of sovereignty and political independence enshrined in some of the international instruments including the UN Charter.[1] In practical words, the primary responsibility to try the crimes of Ba'thist Regime and ISIS committed on the territory of Iraq is the responsibility of Iraq and the national courts of this country have priority to conduct criminal trials. However, the courts must be able and willing to do so genuinely, otherwise the process would lack justice and credibility.[2] Given the judicial system of Iraq, the state currently lacks a comprehensive criminal legislation, qualified judiciary staff, effective procedural rules and infrastructure, besides the inability of the courts in guaranteeing fair trials and due process rights. The law that the regular courts apply in Iraq while trying grave crimes is Anti-Terrorism Law.[3] The adoption of this law was the result of the political failure and sectarian upheaval in 2005. The application of the law was the implementation of a political agenda rather than realizing justice as part of the country's legal order. Besides, the judiciary staff in Iraq is completely dependent and partial from the north to the south of the country as such that the judges are mostly from the communities or people who are loyal to the regime.[4] Therefore, the country needs an instant reform in its judicial system to bring about a dramatic change to its criminal justice.**

### 4.3. Iraq and the accession to the Rome Treaty and other instruments

**The basic and essential step for Iraq to have a comprehensive criminal legislation as to the definition of grave crimes, the acts that constitute such crimes, the substantial elements of such crimes as well as the rules that regulate the procedural aspects of their trials is taken through becoming the member of the relevant international instruments like the Rome Treaty, Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of non-International Armed Conflicts and any**

[1] Rebaz R. Khdir, *supra* n107, p. 165.
[2] The ICC Statute, *supra* n 9, Art. 17.
[3] Rebaz R. Khdir, *supra* n107, pp. 165-166.
[4] *Ibid*, pp. 166-167.

**other relevant humanitarian and criminal law instrument which has basically been adopted to prevent or limit the perpetration of the international crimes without the expression of any reservation on any article or provision. Taking this step helps Iraq to have a comprehensive criminal legislation and an effective alternative criminal mechanism to refer its situations and cases to, when a crime or some crimes within the jurisdiction of the Court are committed on its territory.[1]**

**4.4. Iraq and an alternative to the ICC**

**An alternative step that Iraq can take within its comprehensive policy to prevent or limit the perpetration of the grave crimes is amending the statute of the IHCC, particularly the Court's jurisdiction to be able to open investigations and prosecutions in all criminal cases and situations that are systematic, serious and of sufficient gravity. This step is apparently easy as the Court still exists with all its administrative and judicial staff and infrastructure but the ISIS era and the group's criminal cases before the regular courts demonstrated that such a step is not supported by the Iraqi political popular will.[2] The reasons might be the universal focus and support to the Court and the experience that the Court has attained throughout the years of its operation which ultimately threatens the political and military actors of the country and not only the members of the irregular armed groups like ISIS.**

**4.5. Iraq and the adoption of its criminal legislation and punitive authority**

**In case of rejection of the accession to international humanitarian and criminal instruments due to political reasons and complications on the reach of political compromise, Iraq may resort to amend its penal law or draft relevant penal provisions independently based on the statute of the IHCC within its criminal legislation. In such a way, it will have a law to enforce on the establishment of criminal liability and fight impunity within the country. In other words, Iraq will not only have specific criminal code but also the bases for punitive authority of its courts before which the criminals may be brought for investigations and prosecutions of grave crimes. [3]**

**4.6. Iraq and the referral to a hybrid court**

[1] *Ibid*, p. 188.
[2] *Ibid*, pp. 179-180.
[3] *Ibid*, pp. 187-188.

**Another alternative step during or following the perpetration of grave crimes is that Iraq may ask the UN to play its criminal role in the country through concluding agreements with, to establish hybrid criminal mechanisms like Special Court for Sierra Leone in 2002[1] and Special Tribunal for Lebanon in 2009[2]. Such criminal mechanisms have also demonstrated crucial roles in establishing criminal responsibility and restoring rights for victims of grave crimes.[3]**

**4.7. Iraq and the referral to an *ad hoc* criminal tribunal**

**One of the alternative mechanisms that was the subject of the legal discussions among the Iraqi and international lawyers to try the crimes of ISIS committed on the territory of Iraq and Syria from 2014 to 2018 was establishing an *ad hoc* international criminal tribunal by the UN Security Council in the absence of national investigations and prosecutions and genuine criminal proceedings. Yet, establishing such a mechanism needed the consensus of the international community, particularly the five permeant members of the Security Council which they never reached it.[4] It is quite obvious that referring a situation to the Security Council for the purpose of criminal justice poses challenges due to political interests and ideological perspectives of the countries with veto powers and huge amount of funding but maintaining international peace and security often unites the members of the Council and make them to reach compromises**

[1] The Special Court for Sierra Leone (SCS) was an *ad doc* criminal tribunal that was established based on an agreement between the UN and the Government of Sierra Leone and pursuant to the resolution of the UN Security Council No. 1315 of 14 August 2000 to try the crimes committed on the territory of Sierra Lione since 30 November 1996. The Court started its criminal mission in 2002 and was finally replaced by Residual Special Court for Sierra Leone in 2013 to complete the SCS's mandate, see the Statute of the Special Court for Sierra Leone, Security Council Resolution No. 1315 of 14 August 2000.

[2] The Special Court for Lebanon was similarly an *ad hoc* criminal model established for a specific criminal mission based on an agreement between the UN and the government of Lebanon and pursuant to the resolution of the UN Security Council No. 1664 of 29 March 2006. The Mission of the tribunal was to prosecute those who were accused of killing former Prime Minister of the Country, Rafiq Hariri and some others in a terrorist attack on 14 February 2005. The Tribunal started its mission in 2009 and issued its verdict in 2020, see the Statute of the Special Tribunal for Lebanon, the Security Council Resolution No. 1664 of 29 March 2006.

[3] Rebaz R. Khdir, *supra* n 107, p. 188.

[4] *Ibid*, pp. 180-181.

**on such tribunals just like in cases of Darfur and Libya.[1] Yet, if the concerned state makes a request to the Council, the possibility of establishing such a tribunal would be greater. Hence, Iraq may resort to such a mechanism when no other means of criminal prosecution is available to prevent criminals to escape from criminal responsibility and realize national criminal justice.[2]**

**Conclusion**

**In the end of this study, the author reaches some conclusions which can be summarized as follows:**

1. **The historical roots of grave crimes in Iraq are deep as such that some of the international criminal terms have been coined on the heinous atrocities of the Iraqi authorities against their nationals. The horror of grave crimes is not only that these crimes are systematic and large scale in nature which target the victims in multiplicity but the perpetrators are usually people with considerable amount of authority that makes them possibly escape from justice. The establishment of the IHCC was basically within the measures to prevent such a possibility.**
2. **The IHCC was established by the CPA after the occupation of Iraq by the US-led Coalition in 2003 with the mission of trying the crimes of the high responsible officials of the Ba'athist Regime from the date when the Ba'athist Party came to power on 17 July 1968 to the occupation of Iraq on 1 May 2003.**
3. **The Court was empowered to try natural persons: Iraqi nationals and non-Iraqi residents who had committed crimes on the territory of Iraq, Islamic Republic of Iran and the State of Kuwait. The crimes that the Court established for their prosecution were the international crime of genocide, crimes against humanity, war crimes and crimes related to abuse of power in Iraq.**
4. **The structure of the Court was composed of a cassation panel with one or more criminal courts and investigating judges, public prosecution and the department of administration.**

[1] The cases of Darfur and Libya were both referred to the ICC by the Security Council in (2005) and (2011), see the UN Security Council Resolution, (1593), 13 March 2005 and the UN Security Council Resolution (1970) on 26 February 2011.

[2] Rebaz R. Khdir, *supra* n 107, p. 188.

5. **The IHCC initially faced the challenge of the legitimate authority of the International Coalition to its establishment but the 2005 Constitution removed such a challenge and legally grounded the Court. The Court was initially intended to be hybrid to some extent as there was some possibility to appoint international judges and the implementation of international law but the TNA amended the original statute and further restricted such a possibility in favor of domestic practice in 2005.**
6. **The IHCC underwent some other major issues as such: dependence, partiality and disqualification of the judges, lack of fair trials and insufficient due process rights of the defendants and imposing death penalty which ultimately undermined the credibility of the whole criminal process designed to realize justice regarding the Ba'thist Regime.**
7. **The establishment of the Court was still a significant step within the broader transitional justice process and its criminal experience could be the foundation of a comprehensive judicial reform and strong criminal justice system through accession to modern universal criminal instruments and institutions or adopting its criminal legislation and criminal mechanism to prevent or limit the threat of the perpetration of grave crimes in Iraq.**

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# دادگای باڵای تاوانەکانی عێراق: وانە دادوەرییەکان و هەنگاوە پێویستەکان

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**پوختە**

**لە ساڵی (2003) دا، دەسەڵاتی کاتی هاوپەیمانان دەسەڵاتیدا بە ئەنجومەنی بەڕێوەبردنی عێراق بۆ دامەزراندنی دادگایەکی تاوانکاری تایبەت بۆ لێپێچینەوە لە تاوانە گەورەکانی ڕژێمی بەعس لە نێوان ساڵانی (1968) تا (2003). ئەنجومەنی بەڕێوەبردنی عێراق، لەسەر بنەمای مۆدێلی پێکهاتەیی و یاسایی دادگا نێودەوڵەتییەکان و دادگا تێکەڵەکان، دادگاکەی دامەزراند و ناوی لێنا دادگای تایبەت بە عێراق، بەڵام دوای هەڵبژاردنەکانی ساڵی (٢٠٠٥)، پێداچوونەوە بە پەیڕەوی ناوخۆی دادگاکەدا کرا و ناوی دادگاکە گۆڕدرا بۆ دادگای باڵای تاوانەکانی عێراق. لەسەرەتای دامەزراندنیدا، مەبەستی دەسەڵاتی دامەزرێنەر ئەوە بوو کە دادگاکە دادگایەکی تێکەڵ بێت، بەڵام ئەزمونی کرداری دادگا لە چوارچێوەی تایبەتمەندییە ناوخۆییەکاندا مایەوە و هەرگیز بە شێوەیەکی نێودەوڵەتی یان وەک دادگایەکی تێکەڵ مامەڵەی نەکرد. دادگا ئەزموونێکی دادوەری جیاواز بوو بۆ عێراق لە ڕووی سروشتەکەی و ڕەوایەتی دامەزراندنی و پێکهاتەکەی و یاسای کارپێکراو لەبەردەمیدا و مەرجی هەڵبژاردنی ستافی دادوەری و کارگێڕییەکەی و مافی دادگاییکردنی دادپەروەرانەی تۆمەتباران و مافی ڕێکاری یاسایی و سزای لەسێدارەدان، بۆیە پێویستە عێراق بە چوارچێوەی تیۆری و پراکتیکی دادگادا بچێتەوە و وەک وانەگەلێکی دادوەری لە لە ئەزموونی دادگا بڕوانێت و بیکاتە بنچینە بۆ بەهێزکردنی دەسەڵاتی دادوەری داهاتووی خۆی. لەسەر بنەمای ئەزمونی دادگا، عێراق پێویستە چاکسازی لە سیستەمی دادوەری تاوانکاریدا دەستپێبکات لە ڕێگەی پەیوەستبوون بە بەڵگەنامە و دامەزراوە تاوانکارییە نێودەوڵەتییەکان یان دەرکردنی یاسای تاوانکاری تایبەتی خۆی بۆ فەراهەمکردنی دەسەڵاتێکی سزادانی کاریگەر بۆ دادگا نیشتمانییەکانی تا بتوانن ڕێگری لە هەڕەشەی ڕودانی تاوانە گەورەکان بکەن یان ئەو هەڕەشەیە سنوردار بکەن.**

**وشەی سەرەکییەکان: دەسەڵاتی کاتی هاوپەیمانان، دادگای باڵای تاوانەکانی عێراق، ڕژێمی بەعس، تاوانە گەورەکان، چاکسازی دادوەری، دادگای نیشتمانی، دادگای تاوانی نێودەوڵەتی.**

# المحكمة الجنائية العراقية العُليا: الدروس القضائية والخطوات اللازمة

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**ملخص**

**فوضت سلطة الإئتلاف المؤقتة مجلس الحكم العراقي في عام (2003) إنشاء محكمة جنائية خاصة لمحاكمة الجرائم الجسيمة التي ارتكبها النظام البعثي من عام (1968) حتى عام (2003). ولقد أنشأ مجلس الحكم العراقي هذه المحكمة على أساس النموذج الهيكلي والقانوني للمحاكم الدولية والمحاكم المختلطة وأطلق عليها اسم المحكمة العراقية الخاصة، لكن بعد انتخابات عام (2005)، تم تعديل النظام الأساسي للمحكمة وتغيير اسم المحكمة إلى المحكمة الجنائية العراقية العُليا. كان المقصود من إنشاء المحكمة في البداية أن تكون محكمة مختلطة، لكن تجربتها العملية ظلت ضمن الخصائص المحلية ولم تتصرف المحكمة على هذا النحو على الإطلاق. وكانت المحكمة تجربة قضائية مختلفة في العراق من حيث طبيعتها وشرعية إنشائها وهيكلها والقانون المطبق أمامها وشروط اختيار وتعيين موظفيها القضائيين والإداريين و في حق محاكمة عادلة للمتهمين والحق في الإجراءات القانونية الواجبة وعقوبة الإعدام، لذلك من الضروري أن يعيد العراق النظر في الإطار النظري و العملي للمحكمة و تُعد تجربتها دروسا قضائية هامة واستخدامها كأساس لتعزيز سلطتها القضائية في المستقبل. واستناداً إلى تجربة المحكمة، ينبغي للعراق أن يبدأ إصلاحاً للقضاء الجنائي من خلال الإنضمام للوثائق والمؤسسات الجنائية الدولية أو سن قانون جنائي خاص به لتوفير صلاحيات عقابية فعالة لمحاكمه الوطنية، وذلك للمنع أو الحد من التهديد بارتكاب جرائم ما تسمى بالجرائم الجسيمة (الدولية).**

**الكلمات المفتاحية: سلطة الإئتلاف المؤقتة، المحكمة الجنائية العراقية العُليا، النظام البعثي، الجرائم الجسيمة (الدولية)، الإصلاح القضائي، المحكمة الوطنية، المحكمة الجنائية الدولية.**