



THE FORMER IRAQI GOVERNMENT ON TRIAL

A Human Rights Watch Briefing Paper

October 16, 2005

I.	Summary.....	1
II.	Background.....	2
III.	How the Supreme Iraqi Criminal Tribunal Will Work.....	3
IV.	The SICT and the Right to a Fair Trial.....	6
A.	Inappropriate Standard of Proof and Inadequate Protections against Self-incrimination.....	8
B.	Inadequate Procedural and Substantive Steps to Ensure Adequate Defense.....	9
a.	Access to defense counsel during the investigative phase.....	9
b.	Equality of arms and adequate time and facilities for the preparation of a defense.....	12
c.	Inadequate protection of the right to confront and examine witnesses.....	14
C.	Concerns that the SICT May Not Appear to be Impartial and Independent ..	15
a.	Prejudicial comments by senior public officials and political figures	15
b.	Politicization of control of the SICT and susceptibility of judges to dismissal	15
c.	The Role of U.S. Advisors.....	17
V.	The Death Penalty.....	18
VI.	Conclusion.....	18

I. Summary

This briefing paper was completed on October 16, 2005. At the time of writing, the new law governing the Supreme Iraqi Criminal Tribunal (formerly known as the Iraqi Special Tribunal) had been passed by the Transitional National Assembly and ratified by the Presidency Council, and is awaiting promulgation in the Official Gazette in order to come into force. Human Rights Watch understands that the promulgation of the new law is only a matter of time.

The analysis in this document reflects the provisions of the soon-to-be effective new law and is released now due to the imminence of the trial's commencement. However, the concerns about fair trial issues expressed by Human Rights Watch in this briefing paper apply with equal force to the pre-existing law governing the Iraqi Special Tribunal.¹

On October 19, 2005, the first trial of members of the former Ba'athist government of Iraq—including former President Saddam Hussein—is expected to commence. The trial, and those that follow after it, will present Iraqi authorities with an unprecedented opportunity to provide some measure of truth and justice for the hundreds of thousands of victims of grave human rights violations that occurred in Iraq between 1979 and 2003. At the same time, the trials need to be fair and be seen to be fair. While this is true of all trials, it is particularly true in Iraq given the high profile of the trials and the intensely politicized environment in which they will take place—like those at Nuremberg after the Second World War, the trials will be subject to intense scrutiny for years to come.

Success will not be easy. The extent of the crimes committed under Saddam Hussein—genocide, crimes against humanity and war crimes²—means that any legitimate process is complex and requires substantial time and money. There will be novel issues.

The Supreme Iraqi Criminal Tribunal (SICT) (formerly known as the Iraqi Special Tribunal or IST) will be applying a mixture of international law and domestic criminal law within a very recently reconstituted national legal system. This has important positive aspects: locating international criminal trials within the affected country is one way of making international justice mechanisms more responsive to the needs and interests of victims and the affected society. However, it also carries dangers: localization cannot come at the expense of fundamental fair trial rights or the consistent application of international criminal law.

¹ Human Rights Watch's previously expressed concerns about the Iraqi Special Tribunal are detailed in *Memorandum to the Iraqi Governing Council on 'The Statute of the Iraqi Special Tribunal'* (December 2003) available at <http://hrw.org/backgrounders/mena/iraq121703.htm>; *Briefing Paper: The Iraqi Special Tribunal Rules of Procedure and Evidence Missing Key Protections* (April 2005) available at http://hrw.org/english/docs/2005/04/22/iraq10533_txt.htm.

² See, e.g., Human Rights Watch/Middle East, *Genocide in Iraq: The Anfal Campaign Against the Kurds* (New York: Human Rights Watch, 1993); *Iraq's Crime of Genocide: The Anfal Campaign Against the Kurds* (New Haven: Yale University Press, 1995); Human Rights Watch/Middle East, *Endless Torment: the 1991 Uprising in Iraq and its Aftermath* (New York: Human Rights Watch, 1992); Physicians for Human Rights, *Winds of Death: Iraq's use of Poison Gas against its Kurdish Population* (Boston: Physicians for Human Rights, 1989).

Human Rights Watch has long called for the prosecution of senior figures in the former government, including Saddam Hussein, and has been instrumental in documenting some of the worst atrocities committed under his regime. It therefore welcomes efforts to investigate and prosecute former Iraqi leaders. However, the evolution of the SICT over the last two-and-a-half years has given rise to serious concerns about its capacity to conduct trials that are fair, and perceived among the Iraqi population to be fair.

This briefing describes how the SICT will work. It also identifies deficiencies in the SICT which, if not addressed, could jeopardize fair trial rights and undercut the legitimacy of the proceedings. Areas of particular concern identified here include:

- An inappropriate standard of proof and inadequate protections against self-incrimination;
- Inadequate procedural and substantive steps to ensure an adequate defense;
- Concerns that the SICT may not appear to be impartial and independent.

A further aspect in which Human Rights Watch finds the SICT deficient and is of grave concern is the widespread application of the death penalty without any possibility of clemency, and the requirement to execute a convicted person within 30 days of a final decision.

II. Background

In the aftermath of the fall of the Ba’thist government, the world witnessed the distressing sight of Iraqis, in numerous locations around Iraq, desperately uncovering and excavating mass graves and seizing thousands of pages of government documents, in an attempt to determine the fate of missing and “disappeared” relatives. The United States (U.S.)-led coalition forces had no coherent strategy to protect sites of potential importance to future prosecutions, and the general failure to maintain law and order and preserve civilian infrastructure in the wake of the government’s collapse extended to an inability to secure sites containing much forensic and documentary evidence.

In the town of al-Hillah, south of Baghdad, Human Rights Watch documented villagers’ attempt to excavate a mass grave with a backhoe, resulting in the disinterment and commingling of some 2,000 sets of remains and the disturbing of materials found with the bodies.³ Many of these remains were ultimately reburied without identification, and crucial forensic evidence was lost in the process. Under pressure from human rights organizations, the Coalition Provisional Authority (CPA - the administration created by the occupying powers) hastily prepared a “Mass Graves Action Plan” in the summer of 2003, but lacked both the personnel and the financial resources to implement it as the number of identified mass graves rose to over 200.⁴

Around the same time, millions of pages of government records were seized from the unguarded offices of former security services, by an array of Iraqi groups and

³ See Human Rights Watch, *The Mass Graves of Al-Mahawil*, May 2003.

⁴ Eric Stover, Hanny Megally and Hania Mufti, “Bremer’s Gordian Knot: Transitional Justice and the U.S. Occupation of Iraq,” *Human Rights Quarterly*, Volume 27, Issue 3 (2005), pp. 830-857.

individuals. These included Iraqi political parties, bereaved relatives and newly-formed human rights associations. Each of these entities held the documents for their own purposes, and generally with little concern for preserving the integrity of the documentation in order to assist future prosecutions. In a November 2004 report, Human Rights Watch concluded that the failure to protect these documents, and the absence of any coherent plan for managing their storage and archiving, meant that there were serious concerns about the integrity of the documents and their potential evidentiary value in any trial.⁵

The general state of disarray in planning for Iraq's post-conflict justice needs was symptomatic of an ad hoc approach to the process of determining how to prosecute leaders of the former government accused of human rights violations. From an early stage, the U.S. consistently opposed an international tribunal or mixed Iraqi-international court under United Nations (U.N.) auspices.⁶

Although human rights organizations and international experts advocated a mixed Iraqi-International Commission of Experts to review the situation and propose a comprehensive strategy for addressing Iraq's legacy of human rights violations, the U.S.-led CPA insisted on an "Iraqi-led" process – without establishing a transparent process to consult Iraqis or assess Iraqi attitudes towards issues of justice and accountability. Instead, the proposal for an "Iraqi Special Tribunal" emanated from individuals close to the CPA and the CPA-appointed Interim Governing Council (IGC). The process of drafting and revising the founding document of the Iraqi Special Tribunal lacked transparency. Numerous requests by Human Rights Watch and other human rights organizations and international experts to see and comment upon the draft law were rejected.

Difficulties in obtaining information about the SICT have persisted, contributing to a general lack of knowledge about the court among the Iraqi population, and internationally. Due in large part to poor security conditions in Iraq, the establishment and operationalization of the court has been a slow process. At the same time, the court has come under consistent pressure from successive Iraqi interim governments to speed up its investigations and prosecutions.

III. How the Supreme Iraqi Criminal Tribunal Will Work

The Statute of the Iraqi Special Tribunal (IST Statute) was promulgated as an Order of the CPA on December 10, 2003.⁷ In early August 2005, the IST Statute was revoked by Iraq's Transitional National Assembly, and replaced by a statute establishing the SICT.⁸

⁵ See Human Rights Watch, *Iraq: State of the Evidence*, November 2004.

⁶ See comments of U.S. Ambassador-at-Large for War Crimes, Pierre Prosper, in April 2003, quoted in Peter Landesman, "Who vs. Saddam?" *New York Times*, July 11, 2004.

⁷ *Coalition Provisional Authority Order Number 48: Delegation of Authority Regarding an Iraqi Tribunal*, CPA/ORD/9 Dec 2003/48 (2003) (IST Statute)

⁸ At the time of writing, the legal status of the law passed by the Transitional National Assembly is uncertain. Human Rights Watch has been informed that, on the first occasion the law was passed in August 2005, it was a nullity because of a failure to follow parliamentary procedure – namely, it had not been reviewed by the State

The SICT Statute preserves most of the provisions of the IST Statute, but emphasizes greater use of Iraqi criminal procedure law. For reasons detailed below, Human Rights Watch is concerned that Iraqi criminal procedure law and the SICT's new rules of evidence and procedure do not provide sufficient safeguards to ensure a fair trial.

The SICT has jurisdiction over Iraqis and non-Iraqis residing in Iraq accused of committing genocide, crimes against humanity and war crimes, between July 1968 and May 2003.⁹ The SICT Statute adopts the definitions of these crimes from the Rome Statute of the International Criminal Court. However, the SICT Statute also includes crimes from a 1958 Iraqi law that are political offenses,¹⁰ and of a breadth and vagueness that makes them susceptible to politicized interpretation and application. For example, the Statute allows individuals to be charged with "the wastage of natural resources and the squandering of public assets," and "the abuse of position and the pursuit of policies that may lead to the threat of war or the use of armed forces of Iraq against an Arab country." These offenses are not defined, either in the SICT Statute or in the 1958 Law from which they are drawn.

Investigations and trials before the SICT are regulated primarily by the Iraqi Code of Criminal Procedure.¹¹ The applicable Iraqi criminal procedure is based on the civil law system of criminal procedure as used in countries such as France in the 1950s.¹² It concentrates powers of fact-finding and investigation in the hands of an investigative judge. The investigative judge plays the role of an inquisitor whose objective is to ascertain the truth,¹³ and has broad powers to compel testimony, seek out experts and collect and preserve evidence.¹⁴ He or she must seek out both exculpatory and inculpatory evidence in order to assess whether there is sufficient evidence for trial. All evidence collected and testimony taken are recorded in a written dossier. During the investigative phase, the accused and the accused's lawyer have a limited right to be present while the investigative judge collects evidence and questions witnesses,¹⁵ and may only question a witness through the investigative judge and with the latter's permission.¹⁶ The accused can submit comments on witnesses' testimony, to be included in the dossier.¹⁷

Consultative Council (*Majlis Shura al-Dawla*). In September 2005, the Transitional National Assembly voted on further amendments to the law after the draft had been re-examined by the Shura Council, and adopted it. At this writing, the law (Law 10 of 2005) had been ratified by the Presidency Council but was still awaiting publication in the Official Gazette to enable it to come into force.

⁹ SICT Statute, Arts 1.2.

¹⁰ SICT Statute, Art 16. Two of the crimes listed in Article 16 appear to have their origins in the military tribunal that was constituted to try leaders of the monarchical government after the 1958 revolution led by 'Abdel Karim Qassim. This tribunal, known as the Mahdawi Court, conducted overtly political trials more concerned with discrediting the monarchy than with establishing the guilt or innocence of the accused. It is troubling that these offenses have been included in the substantive jurisdiction of the SICT.

¹¹ SICT Statute, Art 19. The principal law is the Code of Criminal Procedure, No. 23 of 1971.

¹² In 1993 and 2000, French criminal procedure law was amended in order to expand the rights of defendants, which were considered insufficiently protected under the earlier laws: Stewart Field and Andrew West, "Dialogue and the Inquisitorial Tradition: French Defence Lawyers in the Pre-Trial Criminal Process," *Criminal Law Forum*, Volume 14, Issue 3 (2004), pp. 261-316.

¹³ Christoph Safferling, *Towards an International Criminal Procedure* (2001), p. 217.

¹⁴ Iraqi Code of Criminal Procedure, paras 51-129.

¹⁵ Iraqi Code of Criminal Procedure, para. 57.

¹⁶ Iraqi Code of Criminal Procedure, para. 64.

¹⁷ Iraqi Code of Criminal Procedure, para. 63.

If the case is referred to trial, everything contained in the dossier constitutes evidence, and the trial court is entitled to treat all witness testimony in the investigative dossier as having been given at trial.

The Rules of Procedure and Evidence provide that the SICT will establish a Defense Office, headed by a Principal Defender and supported by the Administration of the SICT, to ensure adequate facilities for counsel in the preparation of defense cases.¹⁸ (For problems with the implementation of this provision, see below.)

The trial chamber of the SICT consists of five judges.¹⁹ The conduct of the trial is controlled by the judges, who decide which witnesses shall be called and what questions are put to the witnesses and the defendant. Lawyers for the prosecution and the defense may address questions to witnesses only through the judges.²⁰ Proceedings at the trial stage can be expected generally to entail a review of the evidence contained in the dossier, followed by statements by the lawyers for the prosecution and defense. Where the judges are satisfied of the guilt of the defendant, they will issue a verdict and sentence in a written opinion. Convictions may be appealed to the Appeals Chamber of the SICT, which is constituted by nine appeals judges including the President of the Tribunal.²¹ A conviction and sentence may be reversed, revised, or set aside and the case sent back for re-trial.

The SICT applies the penalties that are available in Iraqi law.²² Where the defendant is convicted of a crime that would also amount to murder or rape under domestic Iraqi law, the penalties for those offenses will apply.²³ The death penalty is widely prescribed under Iraqi law, including for the murder of more than one person.²⁴ Consequently, most offenses over which the SICT has jurisdiction may incur the death penalty.

The SICT Statute requires that the judges, prosecutors and staff of the SICT, and the principal defense lawyer for the accused, be Iraqi nationals.²⁵ Non-Iraqi lawyers with experience in international criminal law *may* be appointed (at the discretion of the court's president) as "advisors" to judges and prosecutors, in order to provide "assistance in the field of international law."²⁶ But the exact role of advisors, who they are accountable to

¹⁸ SICT Rules, Rule 30(3)(3).

¹⁹ SICT Statute, Art 4.1.

²⁰ Code of Criminal Procedure, para. 168(B). In June 2003, the CPA issued Memorandum 3, section 4 of which suspended the requirement in para. 168(B) that parties address questions to witnesses via the court. This amendment does not, however, give parties a right to examine and cross-examine witnesses as it preserves the judge's complete discretion to permit questioning. It is also uncertain whether CPA Memorandum 3 will be applied by the SICT, as there is no explicit reference to CPA Memorandum 3 in the SICT Statute. Article 16 of the SICT Statute makes the Code of Criminal Procedure the governing procedure for the trials, supplemented by the Rules of Procedure and Evidence.

²¹ SICT Statute, Art 4.2.

²² SICT Statute, Art. 24.

²³ SICT Statute, Art. 24.4.

²⁴ Penal Code 1969, para. 406 (1).

²⁵ SICT Statute, Art 28 (judges, prosecutors and staff), Art 22.4(B) (principal defense lawyer). Non-Iraqi defense lawyers are permitted to assist the principal lawyer, but non-Iraqis cannot register as representing the accused unless they are first approved by the Ministry of Justice.

²⁶ SICT Statute, Arts 9.2, 10.9, 11.7.

and how they exercise an “assistance” function, are unspecified. The original version of the IST Statute permitted the appointment of non-Iraqi judges with expertise in international criminal proceedings to the trial chamber. The adopted version of the SICT Statute provides that non-Iraqi judges may be appointed only if a foreign state is a party to proceedings before the SICT.²⁷ To date, no non-Iraqi judges have been appointed to any chamber of the SICT. Almost the only source of non-Iraqi advisors and assistance has thus far been the U.S. Embassy’s Regime Crimes Liaison Office (RCLO), established in March 2004 by the U.S. Department of Justice and funded by the U.S. Congress (see below).

The first trials before the SICT will concern the aftermath of an assassination attempt on Saddam Hussein in the town of al-Dujail in 1982. It is alleged that reprisals for the assassination attempt led to the extrajudicial execution and “disappearance” of over 140 individuals by government security forces, and the widespread destruction of property. Most of the victims were reportedly Shi’a Muslims and were targeted because of their suspected allegiance to the Shi’a Muslim political party *al-Da’wa al-Islamiyya*.²⁸ Among the defendants in the case are Saddam Hussein and several former senior government figures, including former Vice-President Taha Yassin Ramadan, ‘Awwad Hamad al-Bandar al-Sa’dun (former president of the Revolutionary Court) and Barzan al-Tikriti (Saddam Hussein’s half-brother and former head of Iraqi Intelligence). It is unclear with which crimes within the jurisdiction of the SICT the accused have been charged, as the indictments and particulars of the alleged offenses have not been made publicly available.

IV. The SICT and the Right to a Fair Trial

The first trial before the SICT will be commencing in a political context of considerable instability and uncertainty. In such a context, it is essential that the trials be fair and *be seen to be fair* so that accusations that the trials amount to “victors’ justice” do not gain credence. There is also evidence that victims of the former government demand a transparent, open legal process that publicly exposes the nature of human rights violations committed in Iraq.²⁹ A trial that meets international human rights standards of fairness will also be more likely to ventilate and verify the historical facts at issue and contribute to the public recognition of the experiences of victims of different religious groups and ethnicities.

Essential Elements of a Fair Trial

The Republic of Iraq ratified the International Covenant on Civil and Political Rights (ICCPR) in 1971, and all successor governments remain bound by it. Article 14 of the ICCPR provides that any person charged with a criminal offense is entitled to “a fair and

²⁷ SICT Statute, Art 4.3.

²⁸ John Burns, “A Town That Bled Under Hussein Hails His Trial,” *New York Times* (New York), July 3, 2005; Paul Eedle and Lindsey Hilsum, “The Day They Tried to Kill Saddam ... And 148 Paid for it with Their Lives,” *The Observer*, September 18, 2005.

²⁹ See International Center for Transitional Justice and Human Rights Center, University of California, Berkeley, *Iraqi Voices: Iraqi Attitudes Towards Transitional Justice and Social Reconstruction* (May 2004).

public hearing by a competent, independent and impartial tribunal established by law.”³⁰
A “fair trial” under the ICCPR means that a person being tried for a criminal offense must be guaranteed, at a minimum, the following rights:³¹

- To be informed of the charges against her/him in detail and promptly, in a language she/he understands;
- To have adequate time and facilities for the preparation of a defense and communication with counsel of her/his own choosing;
- To be tried without undue delay; to be tried in her/his own presence, and to defend her/himself in person or through legal counsel of her/his own choosing;
- To examine witnesses against her/him and be able to obtain the attendance and examination of witnesses on her/his behalf, under the same conditions as the prosecution;
- Not to be compelled to confess guilt or incriminate her/himself;
- To be able to appeal to a higher tribunal against conviction and sentence.³²

These basic fair trial guarantees apply irrespective of whether the legal system of the country conforms to an adversarial model (such as in the United States or the United Kingdom) or an inquisitorial model (such as in Iraq). They are the minimum requirements for a trial to be considered “fair” in international law. The realization of fair trial standards is particularly challenging where persons are accused of crimes such as genocide, crimes against humanity and war crimes. Trials for these kinds of crimes often carry high political stakes, and require large amounts of time and resources in order to adequately prosecute *and* defend.

At the same time, these crimes achieved recognition as such principally through international law; the legitimacy of prosecuting them is inextricably linked to whether the prosecution meets international fair trial standards. Over the last fifteen years, since the creation of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, a body of law and practice concerning trials for gross human rights violations has emerged, and some benchmarks for prosecution, adjudication, the rights of the accused and the protection of victims and witnesses, have been established.

The SICT Statute specifies rights for the accused to a much greater extent than pre-existing Iraqi criminal law. Article 22 of the SICT Statute enumerates rights for the accused that closely match the guarantees required by the ICCPR. Human Rights Watch commends these provisions as necessary preconditions for fair trials before the SICT. However, the rights provided for under Article 22 of the SICT Statute are not adequately protected by the Iraqi Code of Criminal Procedure – which is the principal procedure of the SICT³³ – or the SICT’s Rules of Evidence and Procedure (SICT Rules). The

³⁰ Art. 14(1).

³¹ Art. 14(3)(a)-(g).

³² ICCPR, Art 14(5).

³³ Article 19 of the SICT states that: “The provisions of the Criminal Procedure Law 23 of 1971 and the Rules of Procedures and Evidence appended to this Statute, of which it shall be considered an integral part, shall apply

recognition of fair trial rights in the SICT Statute therefore by no means guarantees that the rights will be properly implemented or given effect in the practice and procedure of the SICT.

Human Rights Watch has several specific areas of concern which, if uncorrected, could undermine the fairness of trials before the SICT. These are as follows:

A. Inappropriate Standard of Proof and Inadequate Protections against Self-incrimination

The right to a fair trial requires that the accused be found guilty only if the charge is proved beyond reasonable doubt.³⁴ The reasonable doubt standard is applied by all international criminal tribunals trying crimes such as crimes against humanity, war crimes and genocide.³⁵ Iraqi criminal law permits an accused to be convicted on the “satisfaction” of the judge.³⁶ This standard of proof is insufficient to assure a fair trial, particularly given the large evidentiary base and the multi-faceted elements of the crime that must be proved in trials for genocide, war crimes and crimes against humanity. A conviction must be based on a reasoned judgment that demonstrates the establishment of each of the elements of the crime beyond reasonable doubt.

International law protects a defendant’s right not to incriminate him- or herself, which includes a right to silence. A defendant cannot be compelled to testify against him- or herself, and a refusal to answer questions cannot be used as evidence of guilt.³⁷ The SICT Statute duly provides that an accused has a right to silence and cannot be compelled to testify, and that silence cannot be a consideration in the determination of guilt or innocence.³⁸ However, the Iraqi Code of Criminal Procedure permits the judges to ask questions directly to a defendant, regardless of whether the defendant is willing to testify or has chosen to give an unsworn statement to the court. Where the defendant refuses to answer a question posed by the court, “it *will* be considered as evidence

to the procedures followed by the court.” Unlike Article 20, this Article is **not** prefaced as “Subject to the Statute and the Rules...” This suggests that the Code of Criminal Procedure will have priority over the Rules.

³⁴ Human Rights Committee, General Comment 13, *Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Article 14)*, 13 April 1984, para.7; *Flick*, Vol. 6, Nuremberg Military Trials, 1189. The words “beyond reasonable doubt” are associated with the common law system, while in civil law systems such as France, a finding of guilt requires the “*intime conviction du juge*” (the innermost conviction). The European Court of Human Rights has held that the two expressions have the same basic substance: that doubts should benefit the accused and the evidence against should be sufficient that all reasonable doubts about her or his guilt are silenced. See *Barberá, Messegue and Jabardo v Spain*, European Court of Human Rights, Judgment of 6 December 1988, para.77; Safferling, *Towards an International Criminal Procedure*, p. 259.

³⁵ Rome Statute of the International Criminal Court, Art.66(3); Rule of Procedure and Evidence, International Criminal Tribunal for the former Yugoslavia, Rule 87(A); Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda, Rule 87(A).

³⁶ Code of Criminal Procedure, para. 213(A).

³⁷ *John Murray v. United Kingdom*, European Court of Human Rights, Judgment of 8 February 1996, para. 45. The European Court of Human Rights recognizes that under very limited circumstances, the failure of a defendant to answer a question under interrogation could be “*taken into account in assessing the persuasiveness of the evidence adduced by the prosecution.*” (para. 47, emphasis added). In other words, a defendant’s silence cannot be treated as direct evidence of guilt and a conviction cannot be solely or mainly based on the defendant’s silence.

³⁸ SICT Statute, Art. 22(4)(f).

against the defendant.”³⁹ In June 2003 the CPA issued a regulation (“Memorandum 3”) that suspended the requirement that a refusal to answer be considered as evidence against the defendant.⁴⁰ It is uncertain whether the judges will consider themselves bound by CPA Memorandum 3, because it is not mentioned as part of the procedural law applied by the SICT.

Human Rights Watch urges the SICT, no later than the beginning of the trials, to declare that it will apply the standard of proof of beyond reasonable doubt, and that it will not count as evidence of guilt that a defendant does not give evidence or refuses to answer questions put to the him or her by the court.

B. Inadequate Procedural and Substantive Steps to Ensure Adequate Defense

A trial that is fair and is seen to be fair requires a vigorous and competent defense. International human rights law protects a defendant’s right to an effective defense in respect of the charges brought against that person, by guaranteeing the accused: unrestricted and regular access to legal counsel of his or her own choice at all stages of criminal proceedings,⁴¹ or to counsel appointed by the court in any case where the interests of justice so require, and without payment if the accused does not have sufficient means to pay for it⁴²; adequate time and facilities to prepare a case in response to the particular charges against the defendant, including facilities to ensure the confidentiality of lawyer-client communications and the ability of the defendant to properly instruct his or her lawyer⁴³; and the right to confront and examine witnesses against the defendant, and call witnesses on behalf of the defense under conditions equal to those of the prosecution.⁴⁴

a. Access to defense counsel during the investigative phase

Human Rights Watch is concerned that current arrangements by the SICT have not sufficiently safeguarded defendants’ right of access to counsel, or to adequate time and facilities to prepare a defense.

The U.S. military holds in custody on behalf of the SICT more than 90 so-called “High Value Detainees”, comprising most of the senior leadership of the former government. The SICT, although established by law in December 2003 (as the IST, see above), did not become functional until December 2004, and consequently the detainees did not have access to counsel until that time. Yet in July 2004, twelve of the detainees were brought before a judge of the Central Criminal Court of Iraq and notified of possible

³⁹Code of Criminal Procedure, para. 179, emphasis added.

⁴⁰ CPA Memorandum 3, s. 4(g), CPA/MEM/27 June 1994/03.

⁴¹ Human Rights Committee, Concluding Observations on Georgia, CCPR/C/79/Add.74, 9 April 1997 para. 28; *Murray v United Kingdom*, para 62; UN Basic Principles on the Role of Lawyers, Principle 1.

⁴² ICCPR, Art. 14(3)(d); Human Rights Committee, *Henry and Douglas v Jamaica*, 26 July 1996, CCPR/C/57/D/571/1994 para. 9.2.

⁴³ ICCPR, Art. 14(3)(b); Human Rights Committee, General Comment 13, para.9; Human Rights Committee, *D. Wolf v Panama*, 26 March 1992, A/47/40 para. 6.6. Basic Principles on the Role of Lawyers, Principle 22.

⁴⁴ ICCPR, Art. 14(e).

charges punishable under the Penal Code.⁴⁵ Reports submitted to the U.S. Congress by the U.S. Department of State record that, between June and December 2004, U.S. investigators from the RCLO reviewed seized government documents held in Qatar in order to question detainees, and questioned thirty of the detainees.⁴⁶ Prima facie, it would appear that this questioning occurred before any of these detainees had access to legal counsel, and it is impossible to determine whether they were properly informed of their right to counsel and freely waived that right.

The SICT has stated to Human Rights Watch that the court will not use as evidence against the detainees statements that were given by detainees without defense counsel present, but may use the statements as a basis for further investigation. Human Rights Watch urges the SICT to ensure that evidence obtained before detainees could effectively and freely exercise their right to be represented by counsel is not admitted against them.

Iraqi lawyers acting for several of the accused alleged that they faced difficulties in gaining regular access to their clients, and other obstacles. Among their allegations are that:

- The SICT has delayed or failed to accept their applications to register as counsel for defendants, and therefore the lawyers could not gain access to the accused. Some defense lawyers have claimed that families of the accused granted them power of attorney, but that this power of attorney was not certified by the SICT. Without certification, the defense lawyers could not request access to the accused and therefore were unable to defend them.
- Foreign lawyers' registration as defense counsel was not facilitated in practice. Several foreign lawyers submitted documentation to register as counsel for the defendants through the Iraqi Bar Association. These were subsequently not approved.
- Requests for appointments to meet with defendants were not responded to promptly, or when access was given, it was given with little or no prior warning, or only when their client was due to be questioned by an investigative judge.
- A U.S. official with knowledge of Arabic was present in the room when one of the lawyers conferred with his client.
- It was a matter of general complaint that when a defendant was questioned by an investigative judge, his lawyer was not given advance notice about the hearing or its subject matter. In some cases, counsel requested and were granted permission to visit their clients, but upon arrival counsel found that a questioning session by the investigative judge had been scheduled without their knowledge. As a result, the lawyers claimed that they felt unprepared to adequately advise their clients during questioning. The visits with the

⁴⁵ Robert Worth, "Saddam Hussein Sees Lawyer for First Time Since Capture," *New York Times*, December 17, 2004.

⁴⁶ Department of State, *Quarterly Update to Congress: Section 2207 Report on Iraq Relief and Reconstruction* (October 2004), I-28; Department of State, *Quarterly Update to Congress: Section 2207 Report on Iraq Relief and Reconstruction* (December 2004), I-41.

clients themselves were delayed until after the questioning by the investigative judge. A defense counsel claimed that on one occasion the questioning by the judge lasted five hours, leaving only thirty minutes for counsel to meet with the defendant afterwards.

- No access to documents or evidence was given during the course of investigations.
- Transcripts of judicial questioning were not made available during the course of the investigation, despite repeated requests from defense counsel. In some cases, defense counsel were advised by the court that transcripts would be made available at a later date, but were not. In another case, a defense counsel was told by the court that the transcripts would be included in the dossier, but they were not.
- When the dossier was transferred to the trial court, defense counsel were not provided with adequate facilities at the court to review the dossier. Defense counsel claimed that they had no option but to sit in the public reception area of the court building while reviewing the dossier, and the amount of time granted to view the dossier during these visits was limited.

Human Rights Watch raised some of these allegations with the SICT. The SICT rejected claims that it had not adequately facilitated accused persons' right to meet with and instruct counsel. The SICT attributed defense counsels' claims of difficulties in meeting with or representing the accused to a lack of due diligence on the part of defense counsel. The SICT offered to make available to Human Rights Watch documents that would verify the SICT's contention that it had not impeded the defense counsels' ability to meet with or represent the accused, an offer the organization accepted. At the time of writing, however, the SICT had yet to make this documentation available.

The allegations made by defense counsel are sufficiently serious to warrant investigation as possible violations of basic fair trial guarantees. Human Rights Watch urges the SICT to conduct a credible and impartial assessment of these claims, if they are raised by defendants at trial. If any of the allegations are found to be warranted, the SICT should take such measures as may be necessary to remedy any unfairness or prejudice accruing to the defendant.

Apart from being present during the questioning of their client by an investigative judge, defense lawyers appear not to have been present during the taking of other witness statements or the collection of evidence by the investigative judge. As noted above, in Iraqi criminal procedure (as in other civil law jurisdictions) the dossier compiled by the investigative judge may be treated as evidence by the trial court.⁴⁷ The opportunity to cast doubt on the credibility of witnesses, submit comments on evidence and request further investigations on behalf of the accused, is generally exercised at the investigative

⁴⁷ The International Criminal Tribunal for the former Yugoslavia has rejected the use of a civil law "dossier" approach as inadequate for the protection of the accused's fair trial rights. It held in *Kordic and Cerkez* that the admission into evidence of material in a dossier must be considered on a category by category basis, and subject to objections as to authenticity and cross-examination: *Kordic and Cerkez*, Decision on the Prosecution Application to Admit the Tulica Report and Dossier into Evidence, July 29, 1999.

phase in civil law systems.⁴⁸ The lack of defense counsel participation at the investigative phase of SICT proceedings heightens the need for trial judges to give defendants' counsel adequate opportunity to prepare their cases, cross-examine witnesses against the defendants and call witnesses for the defense.

b. Equality of arms and adequate time and facilities for the preparation of a defense

“Equality of arms” refers to the principle that every party to a case must be afforded a reasonable opportunity to present his or her case under conditions that do not place the party at a substantial disadvantage vis-à-vis the opponent.⁴⁹ This includes not only equality in presenting arguments, but also equality in being able to present evidence. Human Rights Watch is concerned that the degree of inequality of arms in the cases before the SICT court between the prosecution and the defense – in terms of institutional support, expertise and training, and infrastructure – may be so great as to diminish the fairness of the trials.

Trying an individual for crimes such as genocide, crimes against humanity and war crimes presents a special challenge to equality of arms. The resources required to investigate and prosecute these crimes are very substantial, and often require the cooperation and assistance of foreign governments and intergovernmental organizations. The prosecution of such cases – particularly command responsibility cases – may involve hundreds of witnesses and thousands of exhibits for the prosecution,⁵⁰ as well as expert evidence in forensics, history, and military affairs. Because of this, the international criminal tribunals have recognized that “equality of arms” in the trial of an international crime implies not only procedural equality but also a measure of substantive equality in which the court may need to *actively facilitate* the defense’s efforts to present witnesses and obtain evidence:

Under the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. This principle means that the Prosecution and Defense must be equal before the Trial Chamber. It follows that the Chamber shall provide *every practicable facility* it is capable of granting under the Rules and the Statute when faced with a request by a party for assistance in presenting its case.⁵¹

⁴⁸ Caroline Buisman, Ben Gumpert and Martine Hallers, “Trial and Error – How Effective is Legal Representation in International Criminal Proceedings?” *International Criminal Law Review*, Volume 5, Number 1 (2005), pp. 1-82. In 2000, French criminal procedure was amended to strengthen the right of defense counsel to request the investigative judge to interview or re-interview certain witnesses and seek other evidence. If the investigative judge refuses without good reasons, the defendant may appeal and have certain investigative acts declared “null”: Field and West, above.

⁴⁹ *Kaufman v Belgium* (1986) 50 DR 98, 115; *Foucher v France* (1998) 25 EHRR 234 at [34].

⁵⁰ For example, in the *Krstic* Case before the ICTY (alleging command responsibility for genocide), 128 witnesses were heard and 1098 Exhibits were entered. In the *Kupreskic* case, involving 6 co-accused, 157 witnesses were heard and 700 Exhibits were entered: Richard May and Marieke Wierda, *International Criminal Evidence* (2002), p.143.

⁵¹ *Tadic*, Appeals Chamber Judgment, July 15, 1999 at para.52 (emphasis added).

Under the SICT Statute, lead defense counsel must be Iraqi and the language of the SICT is Arabic. Non-Arabic speaking, non-Iraqi lawyers with direct experience in defending international criminal cases are effectively precluded from directly representing the accused in court. Iraqi defense lawyers, who have been isolated from developments in international criminal law and practice for three decades, have not been provided with training in international criminal law and procedure or forensic analysis. Meanwhile, the prosecution and the investigative judges have had the benefit of extensive support and assistance from the RCLO, including training (see below).

At the time of writing, a Principal Defender had been appointed but the Defense Office (see above) was not fully functional and provided very limited support. Defense lawyers working on behalf of the accused claim to have had no contact with, or knowledge of, the SICT's Defense Office. Further, the independence of the position of Principal Defender is not sufficiently protected, as the SICT's Rules allow this person to be dismissed by the director of administration "with good cause"; the meaning of good cause is not specified and no review is provided for.

Some defendants may have access to substantial financial resources, but this will not be the case for all and should not be presumed by the court. Moreover, in a very unstable and insecure environment such as Iraq, financial resources will not resolve serious obstacles that the defense may encounter in locating and protecting witnesses on behalf of defendants, obtaining access to documents and securing the attendance of international experts it may wish to call in support. Of particular concern is the deletion from the most recent version of the SICT Rules of Procedure of any requirement to consult the Defense Office concerning protection measures for defense witnesses.⁵² The SICT Statute as adopted has also deleted the requirement that the defense be able to obtain the attendance of witnesses on its behalf "under the same conditions as witnesses against him."⁵³

Human Rights Watch urges the SICT to take positive steps to ensure equality of arms between prosecution and defense through the creation of an independent and adequately resourced Defense Office, and by taking the steps reasonably necessary to facilitate the proper presentation of a defense case on conditions equivalent to the prosecution. In particular, the court should be open to reasonable requests for the extension of time for preparation of a defense. The SICT Rules require the prosecution to disclose all evidence against the defendant forty-five days before trial.⁵⁴ A period of forty-five days is likely to be insufficient for the preparation of a defense to charges of crimes against humanity or genocide, where a case is likely to involve dozens of witnesses and hundreds or thousands of exhibits and much expert evidence. A defendant has a right to adequate time to prepare his or her case,⁵⁵ and the meaning of "adequate" will depend on the size and complexity of the case against the defendant.⁵⁶ By way of example, when the prosecutor sought to introduce fourteen new charges of complicity in genocide against a

⁵² Ibid, Rule 16(1).

⁵³ SICT Statute, Art. 22(4)(e).

⁵⁴ SICT Rules of Procedure and Evidence, Rule 40.

⁵⁵ ICCPR, Art. 14(3)(b).

⁵⁶ Human Rights Committee, General Comment 13, para. 9.

defendant at the ICTY, the Appeals Chamber held that the defense's request for seven additional months to prepare its case was "not unreasonable."⁵⁷

At the time of writing this briefing, the Statute and the Rules of the SICT had not been published in the Official Gazette, and so defense counsel had no access to an official text of the Statute and Rules only days before the first trial was due to begin.

c. Inadequate protection of the right to confront and examine witnesses

The defendant's right to confront and examine witnesses against him or her is a fundamental fair trial guarantee applicable to both common law and civil law systems. It is essential to test the credibility of witnesses and their evidence. The right requires that an accused should be given "adequate and proper opportunity to challenge and question a witness against him, either at the time the witness makes his statement or at some later stage in the proceedings."⁵⁸ This does not mean that every witness must be heard and cross-examined, but a conviction cannot be based substantially on the statements of witnesses whom the defense is unable to cross-examine.⁵⁹

The SICT Statute is confused – and confusing – as to whether defendants can confront and cross-examine witnesses against them. On the one hand, Article 22(4)(e) of the SICT Statute states that the accused has the right to examine witnesses against them. On the other hand, the Code of Criminal Procedure does not confer a right on the defendant to cross-examine a witness at trial.⁶⁰ Paragraph 168 of the Iraqi Code of Criminal Procedure gives judges discretion to *permit* parties to question a witness, via the court.⁶¹ Rule 57 of the Rules of Procedure and Evidence states that examination, cross-examination and re-examination "must be granted", but also states that the court must "take into account the provisions of Article 168 of the Iraqi Criminal Proceeding Law." The result is ambiguity about the right to confront witnesses.

Human Rights Watch urges the SICT to clarify its rules to provide defendants with an unambiguous right to question witnesses against them, and to ensure that defendants have a genuine opportunity to exercise these rights at trial.

⁵⁷ *Kovacevic*, Appeal Chamber Decision Stating Reasons for Appeal Chamber's Order of May 29, 1998, July 2, 1998 at paras. 28-31.

⁵⁸ *Delta v France*, (1990) 16 EHRR 574 at para. 36.

⁵⁹ *Kosotovski v. Netherlands* (1990) 12 EHRR 434; D.J. Harris, M. O. Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (1995) 212. The fair trial rights provided for in Article 6 of the European Convention on Human Rights are essentially identical to those found in the ICCPR. The interpretations of these rights by the European Court of Human Rights are therefore applicable.

⁶⁰ Code of Criminal Procedure para. 168(B).

⁶¹ As noted above, CPA Memorandum 3 section 4 abridged the requirement to direct questions via the court but did not create a right of cross examination. CPA Memorandum 3 is nowhere mentioned in the Statute or Rules of the SICT.

C. Concerns that the SICT May Not Appear to be Impartial and Independent

The independence of a tribunal is essential to a fair trial. Decision-makers must be free to decide cases before them impartially, on the basis of the facts and in accordance with the law, without interference or pressure from any branch of government or other actors. The appearance of impartiality is as important as actual impartiality where a trial concerns highly politicized issues. Human Rights Watch is concerned that the SICT's perceived and actual independence are not adequately safeguarded.

a. Prejudicial comments by senior public officials and political figures

State officials and political figures must not prejudice the accused's fair trial rights by encouraging the public to believe that the accused is guilty, or undermine the perceived impartiality of the tribunal by prejudging the assessment of the facts by the competent judicial authority.⁶²

In an interview with Iraq's state-funded broadcaster Al-Iraqiya on September 6, 2005, Iraqi President Jalal Talabani stated "I received the investigating magistrate who is in charge of questioning Saddam [Hussein]. I encouraged him to continue his interrogation. He told me good news, saying that he was able to extract important confessions from Saddam Hussein."⁶³ President Talabani added that "Saddam signed these confessions," and that "Saddam Hussein is a war criminal and he deserves to be executed 20 times a day for his crimes against humanity."⁶⁴ On June 24, 2005 Abdul Aziz Hakim, head of the Shi'a Muslim political party the Supreme Council of the Islamic Revolution in Iraq (SCIRI), stated in an interview with Reuters that "there is no doubt that Saddam deserves more than just execution ... I am among those who are going to file a complaint for killing 64 members of my family. For these crimes alone he deserves 64 executions."⁶⁵

Human Rights Watch urges Iraqi officials to refrain from comments such as these, which may undermine the fairness of the trials, and to instead encourage a climate of respect for the fair trials rights of the accused.

b. Politicization of control of the SICT and susceptibility of judges to dismissal

The SICT has not been adequately protected from political struggles over its control, undermining its perceived independence from political groups that form part of the current government of Iraq. Since the formation of the Interim Governing Council,

⁶² Human Rights Committee, General Comment 13, para. 7; *Gridin v. Russian Federation*, 20 July 2000, A/55/40, para. 8.3; *Alenet de Ribemont v. France*, European Court of Human Rights, Judgment of 10 February 1995, para.35; ACHPR, *International Pen and Others (on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organizations) v. Nigeria*, Communication Nos. 137/94, 139/94, 154/96, and 161/97, decision adopted on 31 October 1998, paras. 94-6.

⁶³ BBC Worldwide Monitoring, "Iraq's Talabani says Saddam 'confessed' and deserves to die," Al-Iraqiyah TV, Baghdad, in Arabic 17:35 GMT, September 6, 2005.

⁶⁴ *Ibid.*

⁶⁵ Reuters, "Iraqi Shiite Leader Wants Insurgents Wiped Out," June 24, 2005.

control over the SICT has been the subject of political disputation and interference by Iraqi political factions. Interference has taken the form of attempts by Iraqi political leaders to dismiss or appoint SICT officials and judges thought to be loyal to one faction or another. The SICT's first administrative director, Salem Chalabi, was dismissed in September 2004,⁶⁶ and there were reportedly attempts to have "Chalabi loyalists" removed from the SICT and replaced by personnel selected by officials in the government headed by interim Prime Minister Ayad Allawi. Subsequently, under the government of Prime Minister Ibrahim Ja'fari, further attempts were made to effect widespread dismissals within the personnel of the SICT through the "de-Ba'thification" process, which was led by Deputy Prime Minister Ahmad Chalabi. This process resulted in the dismissal of nine administrative staff, including the then Administrative Director 'Ammar al-Bakri (an Allawi appointee), but stopped short of dismissal of judicial personnel after intervention by both President Talabani and Prime Minister Ja'fari.⁶⁷ These developments seriously damage the SICT's appearance of independence and impartiality.

Article 36 of the SICT Statute makes any person who was a member of the Ba'th Party ineligible to hold a position with the SICT. However, a de facto "pause" in the applicability of Article 36 means that former Ba'th members have in fact been appointed to the SICT, although they remain vulnerable to dismissal should the article be enforced.⁶⁸ The susceptibility of judicial personnel to dismissal at any time is a threat to the independence of the SICT. It creates the possibility that judges who belonged to the Ba'th Party may be selectively dismissed or threatened with dismissal as a means of influencing their judgments. Any procedure for the dismissal of judges must preserve the independence of judicial personnel, for example by considering their performance on an individual basis, and with avenues for review against a dismissal decision.

Article 36 is at variance with the general rules for de-Ba'thification applied by the National De-Ba'thification Commission, which render persons holding any of the top four levels of Party membership potentially ineligible for government employment.⁶⁹ Membership of the Ba'th Party was a prerequisite for admission to judicial training under the former government, and does not necessarily imply that the member was a supporter of the Ba'th Party or the government of Saddam Hussein, so former membership of the Ba'th Party, without regard to rank or extent of participation, is unlikely of itself to be sufficient to render a person unfit for office with the SICT. The eligibility of former Ba'th Party members for appointment with the SICT should be assessed on a case-by-case basis with regard to past performance and seniority of membership in the Ba'th Party.

⁶⁶ Nancy Youssef, "Salem Chalabi Reportedly Removed from Post Overseeing Saddam Trial", *Knight Ridder New Service*, September 7, 2004.

⁶⁷ John Burns, "Hussein Tribunal Shaken by Chalabi's Bid to Replace Staff," *New York Times*, July 20, 2005, A9; John Burns, "Ignoring U.S., Chalabi Pursues Attempt to Fire Hussein Judge," *New York Times*, July 27, 2005, A12; Edward Wong, "Iraqi Leader Vows to Block Purges on Hussein Tribunal," *New York Times*, July 29, 2005; Kathleen Ridolfo, "Iraq: Debaathification Commission Backs Away from Tribunal Purge," AFP, July 29, 2005

⁶⁸ Article 5(3)(b) of the SICT Statute provides that all appointments of judicial and other personnel to the SICT prior to its coming into force shall remain binding, albeit "taking into consideration the provisions of Article 36".

⁶⁹ Coalition Provisional Authority, Order Number 1, De-Ba'thification of Iraqi Society, CPA/ORD/16 May 2003/01, paras.2-3

c. *The Role of U.S. Advisors*

The CPA's judicial sector assessment undertaken in June 2003,⁷⁰ and a later UN assessment mission,⁷¹ both concluded that the forensic capacity for large-scale criminal investigations was non-existent, knowledge of international legal developments outside Iraq very limited, and that judges and lawyers had no experience with investigating and trying crimes on the scale of crimes against humanity and genocide. In the absence of these technical capacities, and a source of funding, any Iraqi-led tribunal was likely to be heavily dependent on foreign assistance.⁷²

The U.S. Congress appropriated U.S.\$75 million in 2003 to pay for investigations and prosecutions of former government officials in Iraq.⁷³ This has been expanded to U.S.\$128 million.⁷⁴ The appropriation funds the RCLO, which comes under the authority of the U.S. Ambassador to Iraq. Although claimed to play only a "support role" under the SICT Statute,⁷⁵ Quarterly Reports to Congress make clear that the RCLO's staff of over fifty have played the lead role in many aspects of the operations of the SICT, including: the building of the courtroom,⁷⁶ the conduct of exhumations,⁷⁷ interviews with "High Value Detainees",⁷⁸ review of seized documents and preparation of an evidence database,⁷⁹ and training of SICT staff. Over the last twelve months, the U.S. has actively sought out assistance for the SICT from other states and the U.N., in order to bolster the legitimacy of the SICT and ward off claims that the court is U.S. dominated. The UK Foreign and Commonwealth Office has provided £1.3 million in capacity building and training assistance to the SICT,⁸⁰ but the SICT has faced considerable difficulty in obtaining international assistance from other sources. This difficulty can be attributed in part to the SICT's application of the death penalty (all European donor countries are abolitionist), in part to the poor security situation in Iraq, and in part to donor government concerns about working within a U.S.-dominated process.

⁷⁰ Report of the Iraq Judicial Assessment Team, June 2003.

⁷¹ *World Bank – UNDG Legal Needs Assessment Mission to Iraq*, August 2003.

⁷² This reality was also acknowledged in an update to Congress which declared that "Currently, Iraq lacks the professional and technical investigative and judicial expertise to [prosecute crimes against humanity and war crimes] on its own, and therefore needs Coalition assistance": Department of State, *Quarterly Update to Congress: Section 2207 Report on Iraq Relief and Reconstruction* (January 2004), p. 43.

⁷³ Department of State, *Quarterly Update to Congress: Section 2207 Report on Iraq Relief and Reconstruction* (January 2004), p. 43.

⁷⁴ Department of State, *Quarterly Update to Congress: Section 2207 Report on Iraq Relief and Reconstruction* (April 2005), p. 30.

⁷⁵ See comments of then-RCLO head Greg Kehoe, in Vanessa Blum, "A Slow Search for Justice in Iraq," *Legal Times*, January 24, 2005.

⁷⁶ Department of State, *Quarterly Update to Congress: Section 2207 Report on Iraq Relief and Reconstruction* (October 2004), I-28.

⁷⁷ *Ibid*; Department of State, *Quarterly Update to Congress: Section 2207 Report on Iraq Relief and Reconstruction* (January 2005), I-41.

⁷⁸ Department of State, *Quarterly Update to Congress: Section 2207 Report on Iraq Relief and Reconstruction* (July 2004), I-24; Department of State, *Quarterly Update to Congress: Section 2207 Report on Iraq Relief and Reconstruction* (October 2004), I-28: "The RCLO has continued investigations of high value detainees (HVDs) ... IST investigators have *been involved* in the investigative process" (emphasis added).

⁷⁹ Department of State, *Quarterly Update to Congress: Section 2207 Report on Iraq Relief and Reconstruction* (October 2004), I-28; Department of State, *Quarterly Update to Congress: Section 2207 Report on Iraq Relief and Reconstruction* (January 2005), I-41.

⁸⁰ UK FCO, Frequently Asked Questions on Iraq, available at:

<http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1024313967149>

The appearance that the SICT is heavily dependent on the assistance and financial support of the U.S. undermines its perceived impartiality. It may also make it easier for those who deny the extent of human rights violations under the former regime to dismiss the SICT as an exercise of “victors’ justice.”

V. The Death Penalty

Human Rights Watch opposes the death penalty as an inherently cruel and inhumane punishment. As noted above, the death penalty will be widely applicable for crimes tried before the SICT. Human Rights Watch expresses its grave concern that Article 30(a) of the SICT Statute makes the carrying out of death sentences handed down by the tribunal mandatory, by prohibiting the commutation of death sentences by any government official. The mandatory application of the death penalty, without any opportunity for clemency, directly violates Iraq’s human rights obligations under the ICCPR. Article 6(4) of the ICCPR states that “anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.”

Article 30(b) requires that a sentence be executed no later than thirty days after a final decision is handed down. This creates the possibility that a person charged in several cases can be tried, convicted and executed for one of those cases, before any other cases are subject to public trial, and as such is likely to deprive victims, witnesses and the Iraqi people as a whole of the opportunity to conclusively establish which individuals were legally responsible for some of the worst human rights violations in Iraq’s history. The execution of convicted individuals while other charges are pending against them means that there may never be a public accounting of the evidence for and against them in relation to these events.

VI. Conclusion

Jawad Khadim `Ali’s son Mustafa was “disappeared” at the age of 19 by the former Government’s security forces, as part of a crackdown against the Al-Sadr uprising of 1999. In 2003, he received information that his son had been executed in May 1999.⁸¹ In an interview with Human Rights Watch, Jawad Khadim `Ali reflected on his strong desire for revenge, but concluded that “That is not the way ... I have lived my life and I have buried my son ... I want justice.”⁸²

The first trials before the SICT will be a litmus test for whether it is up to the task of delivering justice. The charges against the accused are the most serious recognized by the international community, and the SICT must be able to demonstrate that it is capable of trying them fairly and independent of political pressure or apprehensions of bias.

⁸¹ Human Rights Watch, *Ali Hassan Majid and the Basra Massacre of 1999*, February 2005.

⁸² *Ibid.*, p. 23.

Fair trials are not only the entitlement of defendants. They are also a prerequisite for acknowledging the experiences of hundreds of thousands of victims of the former regime in an open, transparent and publicly accessible way. In an atmosphere of insecurity and great political uncertainty, the SICT has the challenge of establishing its credibility with Iraqis and the international community. Human Rights Watch has set out several areas of serious concern that need to be addressed by the SICT if it aims to satisfy the promise of delivering justice rather than vengeance.