

Teisės aktualijos

FUNCTIONING OF THE IRAQI SPECIAL TRIBUNAL (MATERIAL AND PROCEDURAL ASPECTS)

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The Iraqi Special Tribunal was established directly by the Iraqi Governing Council on December 10, 2003. The Tribunal has been mandated to try the accused for crimes under international law (genocide, crime against humanity and war crimes) and some violations of Stipulated Iraqi Laws.

This article contains an analysis of the provisions of the Statute of the Iraqi Special Tribunal with regard to its material and procedural aspects. The Statute of this Tribunal was created taking for the pattern the Statute of International Criminal Court. However, the opinions of the Iraqis were also taken into account; the Iraqis wanted to have the solely power to exercise jurisdiction of this Tribunal.

Introduction

Iraqi Special Tribunal (IST) was created by the Iraqi Governing Council on December 10, 2003. A panel of judges of IST is trying those accused of committing genocide, crimes against humanity, war crimes and some of the violations of domestic law committed between July 17, 1968 and May 1, 2003.

The main focus of this article is on an analysis of provisions of the Iraqi Tribunal Statute with respect to criminal jurisdic-

tion and procedure. This Tribunal differs in some aspects from international criminal tribunals, but at the same time the IST Statute has much in common with the Statutes of other International Criminal Tribunals. Therefore, the comparison between regulations of IST and their equivalents in the statutes of international criminal tribunals will be performed. The article does not examine the practice of the IST.

At the outset it is worth mentioning the decision that has been taken on mechanisms through which the prosecutions in

Iraq are taking place. "After decades of Ba'ath Party rule, the Iraqi judiciary has been deeply compromised," said Richard Dicker, director of the International Justice Program at Human Rights Watch¹.

Therefore the best solution how to try the top Baath leaders was looked for². The choice was supposed to be made between the commissions of truth and reconciliation³, international criminal tribunal *ad hoc*⁴, hybrid court⁵, that have been taken to make a proper choice when finding the best mechanism. None of this mechanism has been chosen. The model of the Iraqi Special Tribunal is akin to the domestic jurisdiction although at the same time it has much in common with internationalized courts, in particular with the Special Court in Sierra Leone⁶. In result, it was decided

which form this court would be. The court for trying those responsible for acts committed during Saddam Hussein's presidency is the domestic court. Iraqis wanted to exercise the jurisdiction of that newly created Tribunal by themselves⁷.

It was said that "The Iraqis should certainly be involved in this process (of rebuilding the Iraqi justice system) but the country's justice system just doesn't have the capacity to handle a series of highly complicated trials"⁸. Therefore, article 6 (b) of the Iraqi Special Tribunal states: The President of the Tribunal shall be required to appoint non-Iraqi nationals to act in advisory capacities or as observers to the Trial Chambers and to the Appeals Chamber. The role of the non-Iraqi nationals shall be to provide assistance to the judges with respect to international law and the experience of similar tribunals (whether international or otherwise), and to monitor the protection by the Tribunal of general due process of law standards. In appointing such non-Iraqi experts, the President of the Tribunal shall be entitled to request assistance from the international community, including the United Nations.

Article 6 c) states: "The non-Iraqi advisors and observers referred to in the above paragraph shall also be persons of high moral character, impartiality and integrity. In this regard, it would be preferable that such non-Iraqi advisor or observer shall have the following experience: (i) such person shall have acted in either a

¹ *US Plans for Iraq Tribunals "A Mistake"*, Human Rights Watch April 8, 2003.

² E. Finn, *Who will try Iraqi war criminals? Several possible venues for prosecution of atrocities*, www.msnbc.com, D. F. Orentlicher, *Venues for Prosecuting Saddam Hussein: The Legal Framework*, ASIL Insights, December 2003, <http://www.asil.org/insights.htm>.

³ The list of commission of truth and relevance is placed in *Truth Commissions Digital Collection*, United States Institute of Peace, <http://www.usip.org/library/truth.html> oraz L. M. Olson, *Mechanisms complementing prosecution*, International Review of the Red Cross 2002, no. 845, s. 176. "One signal study in Chile, for instance, showed measurable mental-health benefits for Pinochet victims who testified before a truth commission compared with those who did not". B. Shapiro, *Rule of Noose*, The Nation December 31, 2006, <http://www.globalpolicy.org/intljustice/tribunals/iraq/2006/1231noose.htm>.

⁴ There are two international criminal tribunals so far: International Criminal Court for Yugoslavia and International Criminal Tribunal for Rwanda.

⁵ Like for example internationalized courts in Kosovo, Special Tribunal for Sierra Leone, Extraordinary Chambers.

⁶ D. Drózdź, *Z problematyki jurysdykcji Trybunału Specjalnego dla Sierra Leone*, Przegląd Prawa Karnego 2006, no. 25.

⁷ J. Milicia, *Professor prepares Iraqi judges for Saddam's trial*, www.npwj.org after: Associated Press, December 1, 2004.

⁸ *US Plans for Iraq Tribunals...*

judicial or prosecutorial capacity in his or her respective country, or (ii) such person shall have experience in international war crimes trials or tribunals”.

However, neither IST Statute nor Rules of Procedure and Evidence give precise details what the advisors and observers are allowed to do⁹. The difference between observers and advisors is not clearly pointed, therefore their roles should have been defined distinct; their precise competences are predominantly unknown. Information about the role of the advisors and observers is provided only by Rule 39. It states, that advisors and observers appointed to the Defense Office “shall assist in the overall administration of the Defense Office”; those assigned to investigative judges, a Trial Chamber, the Appeals Chamber or to the Prosecution Department “will provide non-partisan, confidential, non-binding expert advice and recommendation”¹⁰.

There are known the names of American lawyers like professor Michael Scharf that prepared Iraqi judges to work at the Iraqi Special Court¹¹. The United Nations refused to train the judges because they could apply the death penalty¹². The provisions of the IST Statute with regard to qualifications, disqualification or removal of the judges and prosecutors will not be discussed in this article.

Worth remembering is that the domestic support is also considerable¹³. Thanks to Iraqis, art. 14 of The Statute of the Iraqi Special Tribunal, the crime of aggression was included and the prototype of the crime of aggression was defined. The Iraqis are aware that there had been the great personal risk connected with taking judicial offices. That is why the compensation for Iraqi judges is anticipated and taken into account¹⁴.

I. The Tribunal shall have jurisdiction over any Iraqi national or resident of Iraq accused of the crimes listed in Articles 11–14, committed since July 17, 1968 and up and until May 1, 2003, in the territory of Iraq or elsewhere¹⁵. Therefore, the crime within the jurisdiction of the Iraqi Special Tribunal can be committed abroad. Neighbouring territories like Iran or Kuwait, are also taken into account as the places where crimes have been taken place. This includes jurisdiction over crimes listed in Articles 12 and 13 of the Statute for the Iraqi Special Tribunal committed against the people of Iraq (including its Arabs, Kurds, Turcomans, Assyrians and other ethnic groups, and its Shi’ites and Sunnis) whether or not committed in armed conflict¹⁶.

The further conclusion connected with art. 10 of the IST is, that the Iraqi Special Tribunal has been established to try only natural persons that are nationals and residents of Iraq. There is no provision in the IST Statute, that determines the minimum age of nationals and residents of Iraq for

⁹ *Iraq: Iraqi Special Tribunal – Fair Trials are not guaranteed*, Amnesty International, May 13, 2005.

¹⁰ *Ibidem*.

¹¹ J. Milicia, *Professor...; “WILL SADDAM HUSSEIN GET A FAIR TRIAL?”*, Case Western Reserve Journal of International Law 2005, Vol. 37 Issue 1, <http://search.ebscohost.com/login.aspx?direct=true&db=aph&AN=18001441&site=ehost-live>, p. 22.

¹² J. Milicia, *Professor...*

¹³ *Iraq: Iraqi Special Tribunal...*

¹⁴ Art. 5 (e) of the IST Statute.

¹⁵ See Art. 10 of the IST Statute.

¹⁶ See Art. 1 of the IST Statute.

criminal responsibility in all cases before IST¹⁷.

The category of another “non-state actor” is excluded from personal jurisdiction of this Tribunal. *A contrario* everyone who is not an Iraqi national or resident of Iraq will not be prosecuted before this Tribunal. Hence, members of Al-Kaida, that are not Iraqi nationals or Iraqi residents are not tried by IST¹⁸. Parties (like Baath party), organizations and another legal persons cannot be tried by the Iraqi Special Tribunal. It is consistent with the thesis formulated by International Military Tribunal in 1946: “Crimes against international law are committed by men, not by an abstract entities, and only by punishing individuals who commit such crimes can the provisions of international be enforced”¹⁹.

Unlike the Charter of International Military Tribunal, the Statute of Iraqi Special Tribunal does not state, that Tribunal can declare criminal any group or organization²⁰. In case, where a group or organi-

zation were declared as criminal by International Military Tribunal, it entitled the national, military or occupation courts to prosecute an individual for membership in such a criminal group or criminal organization²¹. There is no such possibility with regard to any group or organization as criminal before the Iraqi Special Tribunal.

The possibility to try individual for crimes committed after May 3, 2003 by IST is not possible either. The jurisdiction over any naturals that have committed any crime on the territory of Iraq belongs then to domestic or international courts. The International Criminal Court has jurisdiction to try individual, if the crime was committed after July 1, 2002 and the domestic courts are unable or unwilling to try individual by themselves²². It also means, that theoretically, this Tribunal can judge any Iraqi individuals or residents if the above-mentioned conditions are fulfilled²³.

Although the Statute of Iraqi Special Tribunal is formulated following the example of the Statute of International Criminal Court²⁴, there are some slightly differences in definitions of crimes under international law in comparison with the provisions of the statutes of the international criminal courts.

The crime of genocide defined in article 11 of the Statute of IST includes two

¹⁷ Rule 71 allows for sessions to be closed to protect privacy in cases involving children, the Tribunal Statute contains no provisions concerning the treatment of juvenile suspects or accused. Coupled with the absence of a policy decision not to exercise such jurisdiction, this is a cause of particular concern, especially as the age of criminal responsibility in Iraqi criminal law is seven. *Iraq: Iraqi Special Tribunal – Fair Trials are not guaranteed*, Amnesty International, May 13, 2005.

¹⁸ A. D’Amato, *Trying Saddam: The Iraqi Special Tribunal for Crimes Against Humanity*, JURIST Guest Columnist, <http://jurist.law.pitt.edu/forum/forumnew132.php>.

¹⁹ France v. Goering cited in: W. A. Schabas, *Enforcing international law: Catching the accomplices*, International Review of the Red Cross 2001, no. 842, p. 453.

²⁰ Compare with Articles 9 of the Charter of International Military Tribunal for the Trial of the Major War Criminals, appended to Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, 8.08.1945 (the Charter of International Military Tribunal).

²¹ Compare with Article 10 of the Charter of International Military Tribunal.

²² More: M. H. Arsanjani, *Jurisdiction and Trigger Mechanism of the ICC* [w:] A. M. von Hebel, J. G. Lambers, J. Schukking [red.], *Reflections on the International Criminal Court*, Haga 1999, p. 67.

²³ More: P. Bidwai, *Saddam Hanging Boosts Case for Int’l Criminal Court*, Inter Press Service, January 6, 2007, <http://www.globalpolicy.org/intljustice/tribunals/iraq/2007/0106icboost.htm>.

²⁴ J. Milicia, *Professor...*

paragraphs. First paragraph has been taken literally from art. II of the Convention on Prevention and Punishment of Genocide; second paragraph sounds the same as art. III of the abovementioned Convention. This solution can resemble the solutions from the Statute of International Criminal Tribunal for the former Yugoslavia (art. 4.2) and the Statute of International Criminal Tribunal for Rwanda (art. 2.2), which propose a similarly broad approach to the definition of genocide. Art. III of the abovementioned Convention has been omitted in the Statute of the International Criminal Court; the International Law Commission, the Security Council and some delegations taking part in the Rome Conference expressed their concern about it²⁵.

The Tribunal has also the subject matter jurisdiction under crime against humanity. The definition of this crime is formulated similarly to article 7 of the Statute of ICC. According to art. 1 of the Statute of the Iraqi Special Tribunal, each crime under jurisdiction of this Tribunal should be punished whether or not committed in armed conflict²⁶. It is consistent with the newly recognized principles of international criminal law expressed in Tadić Judgement passed by the International Criminal Court for the former Yugoslavia²⁷ and consistent with art. 7 of the Statute for the International Criminal Court.

The IST Statute does not include all of the acts listed in art. 7 of the ICC Statute.

Art. 12 (a)(7) of the Statute of IST excludes the possibility of prosecution for apartheid.(art. 8(h) of the Statute of ICC). Forced pregnancy is an act omitted in the Statute of IST, but Iraqi judges should interpreted that as “any other form of sexual violence of comparable gravity”²⁸. It is worth noting, that the definitions of “Attack directed against any civilian population”, “Extermination”, “Enslavement”, “Torture”, “Persecution”, “Enforced disappearance of persons”, “Deportation or forcible transfer of population” are placed in the Statute of the Iraqi Special Tribunal. None of them is placed in the Statute of the International Criminal Court for Yugoslavia, the International Criminal Court for Rwanda, the Statute of Special Court for Sierra Leone, in the Regulations for the Extraordinary Chambers for Kampuchea or the regulations for the Special Panels for Serious Crimes in East Timor although the abovementioned crimes are within jurisdiction of these international courts. These definitions could help in applying the provisions of the statutes of the international criminal courts.

However, there is no definition of gender in the IST Statute, therefore, there are concerns in respect to interpretation of this term by the Iraqi judges²⁹. That is why it would be helpful to prepare a document that could assist in interpretation of the provisions of the Iraqi Tribunal Statute like the Elements of Crime prepared for the ICC do.

This Tribunal has the power to prosecute those responsible for war crimes. Similarly

²⁵ W. A. Schabas, *Genocide in International Law: The Crimes of Crimes*, Cambridge University Press 2000, pp. 94–96.

²⁶ See art. 1 of the IST Statute.

²⁷ Prosecutor v. Dusko Tadić, Case No. IT-94-I-A, Judgement, 15.07.1999, par. 292.

²⁸ Article 12.7 of the IST Statute.

²⁹ *Iraq: Iraqi Special Tribunal...*

to the definition of crime against humanity some of the acts were added, some excluded, some of them were changed. For example, the act defined in art. 8.2.b.xx of the ICC Statute, that states: “Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123” has been excluded from the Statute of the IST. The act defined in art. 13(a)5 of the Statute of the IST constitutes: “Willfully denying the right of a fair trial to a prisoner of war or other protected person”. The equivalent of this provision in the ICC Statute states: “Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial”. It seems to be substantial difference – to guarantee the regular trial or not. The Iraqi Special Tribunal seems to allow the military procedure as well, although the provisions of the Statute should be complied at the same time.

The literally repetition of the definitions of crimes from in the Statute of ICC does not mean the consistence with international law. In case of the IST Statute, its creation was not connected with the decision made during an international conference. It should be checked whether each crime listed in the IST Statute is universally recognized. The principle of *nullum crimen sine lege* is to be observed then.

Some of the newly established acts of one of the crimes under international law within jurisdiction of the Iraqi Special Tribunal could be inconsistent with the abovementioned principle. The crimes under international law listed in the IST Statute should be only universally recognized crimes, if the principle “*nullum crimen sine lege*” is to be observed.

For example, “Some of the definitions of war crimes in the Tribunal Statute are inconsistent with international law. Article 13(b)(4) (prohibiting environmental damage) and Article 13(b)(5) (protecting civilians and civilian objects) of the Tribunal Statute are based on Article 8(2)(b)(iv) of the Rome Statute of the ICC. However, these definitions are a much weaker version of Articles 55(1) and 57(2)(b) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)”³⁰. Both these crimes are inconsistent with Protocol I. Trying individuals for these crimes is inconsistent with international criminal law, specifically with the principle of *nullum crimen sine lege*.

In contrast to the IST Statute, the ICC Statute was accepted and signed by the parties on the Rome Diplomatic Conference. Hence, the ICC could even create new offences. The ICC Statute went into force on July, 1, 2002 after ratification of at least 60 states. Pursuant to the ICC Statute, since that moment the principle of *nullum crimen sine lege* should be observed.

The violations of domestic law are defined in article 13 of the Statute of IST.

³⁰ Iraq: Iraqi Special Tribunal...

This regulation of the art. 13 of the above-mentioned Statute seems to be formulated not in an accurate way. “Regrettably Article 17(b) of the Tribunal Statute does not apply to crimes under Iraqi law (included in Article 14) or require that the interpretation of those crimes be fully consistent with international law, including international human rights law and international humanitarian law”. It is hard to apply such a broadly formulated provision. The article 13 does not give any details about the meaning of the elements of this acts that should be realized, to commit this crime.

Violations of Stipulated Iraqi Laws are:

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

This act is considered as a crime of aggression, so far undefined in the Statute of International Criminal Court. Therefore the act defined in Art. 11 c) should be treated as a *novum*.

A person who commits a crime within jurisdiction of the IST Tribunal shall be individually responsible and liable for punishment in accordance with this Statute.

The Iraqi Special Tribunal does not punish other crimes apart from some of the domestic crimes. For example the acts of terror are not mentioned in the IST Statute, while these crimes may have been often committed in Iraq. Other domestic courts (in Iraq or elsewhere) should punish and prosecute those responsible for that crimes. However, the obstacle is lack of the definition of “terror” or “terrorism”³¹. S. Gasser claims that acts of terrorism can be treated as crimes against humanity or most probably as war crimes, if terrorists have committed their crimes during armed conflict³². Both abovementioned crimes under international law are anticipated in the IST Statute.

Amnesty International reckons, it could have been assumed that there was no link between other crimes under international law and the situation in Iraq³³. Therefore, the inclusion of other international crimes has seemed to be unnecessary. Amnesty International has voiced fear for the consequence of the lack of all international crimes in the IST Statute. It could have predetermined the relevant crimes before the investigation and prosecution have taken place and in this way prejudiced the outcome³⁴. “It is of paramount importance that the Tribunal Statute and the Rules include all crimes under international law”³⁵.

Article 17(b) provides that in interpretation of crime of genocide, crimes against humanity, and war crimes, the Tri-

³¹ H.-P. Gasser, *Acts of terror, “errorism” and international humanitarian law*, International Review of the Red Cross 2002, no. 847, p. 552.

³² *Ibidem*, s. 556.

³³ *Iraq: Iraqi Special Tribunal...*

³⁴ *Ibidem*.

³⁵ *Ibidem*.

bunal “may resort to the relevant decisions of international courts or Tribunals as persuasive authority for their decisions”. Article 14 of the IST Statute does not create an obligation of interpreting these crimes in a manner that is fully consistent with international law, including international human rights law and international humanitarian law. That is only a hint that can be taken into account by judges of the IST.

In accordance with this Statute, and the provisions of Iraqi criminal law, a person shall be criminally responsible and liable for punishment for a crime within jurisdiction of the Iraqi Special Tribunal if that person³⁶:

1. Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
2. Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
3. For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
4. In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - a) Be made with the aim of furthering the criminal activity or criminal pur-

pose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Tribunal; or

- b) Be made in the knowledge of the intention of the group to commit the crime;
5. In respect of the crime of genocide, directly and publicly incites others to commit genocide;
6. Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

[Taking into account the Art. 11 of the IST Statute, it is worth mentioning that there are two provisions – first one, defining genocide for the purposes of the IST³⁷, second one, stating for instance about different forms of criminal participation³⁸. As a result, the statute contains two different provisions dealing with complicity and incitement.

These regulations cannot be regarded as a *novum*. Equivalent solutions are applied pursuant to the Statute of International Court for the former Yugoslavia and to International Criminal Court for Rwanda.

³⁶ Art. 15 of the IST Statute.

³⁷ Art. 11 of the IST Statute.

³⁸ Art. 15 (b) of the IST Statute.

Both forms are applicable to crime of genocide. Equivalent forms to the forms from art. 11 the IST Statute are named by the jurisprudence of ICCY and ICTR as forms of participation in act³⁹ and equivalent forms to those from art. 15 of the IST Statute are called as forms of liability⁴⁰. The judges of IST can interpret the provisions in a similar way as judges of the ICTY or ICTR have done. Art. 17 (b) could be complied in similar cases].

a) The official position of any accused person, whether as president, prime minister, member of the cabinet, chairman or a member of the Revolutionary Command Council, a member of the Arab Socialist Ba'ath Party Regional Command or Government (or an instrumentality of either) or as a responsible Iraqi Government official or member of the Ba'ath Party or in any other capacity, shall not relieve such person of criminal responsibility nor mitigate punishment. No person is entitled to any immunity with respect to any of the crimes stipulated in Articles 11 to 14.

[This article is formulated much the same as art. 7 of the Charter of the Inter-

national Military Tribunal. The position or rank of the person does not relieve such person of criminal responsibility, nor does it mitigate punishment].

b) The fact that any of the acts referred to in Articles 11 to 14 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to submit the matter to the competent authorities for investigation and prosecution.

[Art. 15 (d) of the IST Statute states about the superior responsibility. Command responsibility is provided for, but the phrase "if that person had effective command and control or authority and control over the subordinate" is not wording down from the Statute of International Criminal Court].

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

[This article is formulated the same like art. 8 of the Charter of the International Military Tribunal. The provisions in art. 15 (c), (d), (e) of the IST Statute are much alike those in art. 7 (1),(2),(3) of the ICTY Statute and art. 12(1),(2),(3) of the ICTR Statute].

There is no principle of *nullum crimen sine lege* that is directly expressed for ex-

³⁹ The art. III of the Convention on Prevention and Punishment of Genocide, the article 11 (b) of the IST Statute and state about the acts. Art. 11 (b) states: The following acts shall be punishable:

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

⁴⁰ For ICCY and ICCR: W. A. Schabas, *Genocide in...*, p. 101. More about the relations between forms of liability and forms of participation in: A. Obote-Odora, *Complicity in genocide as understand through the ICTR experience*, International Criminal Law Review 2002, nr 22, pp. 390–291.

ample in ICC Statute, although this Statute is elsewhere so broadly cited in IST Statute. The grounds for exclusion of criminal responsibility under the said Iraqi Criminal Code shall be interpreted in a manner consistent with the Statute and with international legal obligations concerning the crimes within the jurisdiction of the Tribunal⁴¹.

This provision does not answer the question about the elements of the specific grounds for exclusion of criminal responsibility. What is more, there is no codification on defenses in international criminal law – *Code of Offenses Against the Peace and Security of Mankind* did not come into force⁴². The grounds for exclusion of criminal responsibility are codified in the ICC Statute. These are for example: self-defense, intoxication, insanity, mistake of law, mistake of fact. The international criminal law distinguishes also other defenses: for example: coercion, compulsion, military necessity⁴³. These defenses are not named as “the grounds for exclusion of criminal responsibility”; term “the grounds for exclusion of criminal responsibility” seems to be used only in the Statute of International Criminal Court⁴⁴. It can become a bit complicated issue if these defenses, although not defined in the ICC

Statute, exclude criminal responsibility as well. But it looks as if these “other” defenses should also be taken into account if the judges comply with the provisions of the IST Statute. They should act “in a manner consistent with the Statute and with international legal obligations concerning the crimes within the jurisdiction of the Tribunal”⁴⁵. But W. A. Schabas claims, that both terms are synonyms⁴⁶.

The problem is, the elements of the “other” defenses are usually not precisely defined, while it depends much on the context, in which the grave crime was committed; “it can be helpful to work then with the relevant decisions of international courts or tribunals as persuasive authority for their decisions”, as article 17 (b) of the IST Statute states.

“The crimes stipulated in Articles 11 to 14 [of the IST] shall not be subject to any statute of limitations”⁴⁷.

II. Regulations in respect to procedure are placed in articles 18–27 of the IST Statute. The investigations are initiated “*ex-officio* or on the basis of information obtained from any source, particularly from the police, and governmental and non-governmental organizations”. The Tribunal Investigative Judge shall assess the information received or obtained and decide whether there is sufficient basis to proceed⁴⁸. If it is determined that the case exist, the indictment is prepared by Tribunal Investigative Judge⁴⁹. The Chief

⁴¹ Art. 17 (c) of the IST Statute.

⁴² The history of making these unsuccessful attempts to put into force *Code of Offenses Against the Peace and Security of Mankind* in: L. J. van der Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law*, Martinus Nijhoff Publishers Leiden / Boston 2005, pp. 95–96.

⁴³ About the defenses in international criminal law compare with: A. Cassese, *International criminal law*, Oxford University Press 2003, pp. 222–262.

⁴⁴ W. A. Schabas, *Genocide in...*, pp. 325.

⁴⁵ Art. 17 (b) of the IST Statute.

⁴⁶ W. A. Schabas, *Genocide in...*, pp. 325.

⁴⁷ Art. 17 (e) of the IST Statute.

⁴⁸ Art. 18 of the IST Statute.

⁴⁹ Art. 18 (c) of the IST Statute.

Tribunal Investigative Judge shall confirm or dismiss the indictment without prejudice⁵⁰.

In the IST Statute, the rights of accused are defined. It looks as if they were similar to the rights of accused defined in International Covenant on Civil and Political Rights (ICCPR) (art. 8). Everyone shall be presumed innocent until proven guilty before the Tribunal in accordance with the law⁵¹.

The rights set forth in the IST Statute are not literally taken from the abovementioned Covenant. Therefore some omissions can be noticed. For example there is no guarantee in respect to the right to civil counsel before police, prosecutor or security forces⁵². "The Tribunal Statute, the Rules and Iraqi law do not guarantee the right of the accused to be informed of the nature, cause and content of the charges in a language which they fully understand. Rule 46 guarantees the right to have the free assistance of an interpreter if the suspect cannot understand or speak the language used during questioning by an investigative judge only"⁵³.

There is the provision about the rights of witnesses and victims as well. It offers facilities for giving the evidence by them. Some protection measures are constituted. They "shall take into account the rights of the accused and shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the identity of the victim or witness"⁵⁴.

Further rights of victims and witnesses are constituted in Rules of Procedure and Evidence⁵⁵ in more precise way. As article 21 of the IST Tribunal states "The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with this Statute and the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses"⁵⁶. Furthermore there was taken a decision to constitute a Victims and Witnesses Unit and Defence Office. Appropriate provisions about both institutions are placed in Rules of Procedure and Evidence for IST⁵⁷.

However, the Amnesty International calls attention to omissions of the Statute of Iraqi Special Tribunal and the Rules of Procedure and Evidence. For example, this non-governmental organization reckons, that Statute and the Rules do not prohibit any form of using torture and ill-treatment, duress, coercion and threat⁵⁸. This omission could be removed through the amendments to the Statute or the Rules.

The concept of impunity begins to be nowadays as important as the position of victims and survivors of international humanitarian crimes⁵⁹. But the chances of

⁵⁰ Art. 19 of the IST Statute.

⁵¹ Art. 20 of the IST Statute.

⁵² *Iraq: Iraqi Special Tribunal...*

⁵³ *Ibidem*.

⁵⁴ Art. 22 of the IST Statute.

⁵⁵ By the end of March 2005, the Rules had not been made generally available. At the beginning of April more than one version of the Rules were posted on the newly created website for the Tribunal. *Iraq: Iraqi Special Tribunal...*

⁵⁶ Compare with the Article 16 of the IST Statute.

⁵⁷ Compare with Rules 31 and 49 of the Rules of Procedure and Evidence for IST.

⁵⁸ *Iraq: Iraqi Special Tribunal...*

⁵⁹ D. Drózdź, *O naprawianiu skutków naruszeń prawa humanitarnego w Sierra Leone (On redressing the effects of humanitarian law's violations in Sierra Leone)*, Books of the Lodz University (in printing), p. 249,

improvement of the material situation or any compensation for the living victims are not anticipated in the IST Statute. The IST Statute and the Rules for IST do not provide provisions for reparations to victims and their families nor establish a trust fund for victims⁶⁰.

By contrast, the Statutes as well as Rules of Procedure and Evidence of international criminal tribunals involve provisions which consider the position of victims⁶¹. Article 2 of the ICCPR guarantees the right to a remedy⁶². Article 14(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states that the: “victim of an act of torture [should obtain] redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.”

However, like the abovementioned Statutes of international courts, the IST Statute (The Trial Chambers) “may order the forfeiture of proceeds, property or assets derived directly or indirectly from the crime within the jurisdiction of that Tribunal, without prejudice to the rights of the *bona fide* third parties”. The question is whether it can be enforced in practice not only in

case of IST, but in case of international criminal courts as well⁶³.

IST Statute does not provide for compensation for victims⁶⁴. In contrary the articles of 106 Rules for Procedure and Evidence for MTKJ and MTKR, 105(B) Rules for Procedure and Evidence for Special Court for Sierra Leone provide the possibility of obtaining the compensation by victims.

In Sierra Leone, according to the relevant national legislation, victim or persons claiming through him may bring an action in a national court or other competent body to obtain compensation, if only the accused was convicted by the Special Court in Sierra Leone. In advance the Registrar of Special Court for Sierra Leone shall transmit to the competent authorities judgment finding the accused guilty of a crime which has caused injury to victims. Such a possibility of obtaining a compensation through the IST is not mentioned in the IST Statute or Rules for Procedure and Evidence for IST. There is no equivalent provision in the IST Statute for article 75 of the ICC Statute either⁶⁵.

The provisions of the IST Statute in respect to commencement and conduct of the trial are almost the same as article 20 of the

Ch. Muttukumaru, *Reparation to Victims* [in:] R. S. Lee (ed.), *The International Criminal Court The Making of the Rome Statute Issues, Negotiations, Results*, Kluwer Law International, Haga-Londyn-Boston, 1999, p. 262.

⁶⁰ Iraq: *Iraqi Special Tribunal – Fair Trials are not guaranteed*, Amnesty International, May 13, 2005.

⁶¹ D. Drózd, *O naprawianiu ...*, p. 252.

⁶² Iraq: *Iraqi Special Tribunal...*

⁶³ This question have been actual in accordance with ICTR and ICTY, like T. van Boven reckons. T. van Boven, *The Victim and the ICC Statute* [in:] A. M. von Hebel, J. G. Lammers, J. Schukking (ed.) *Reflections on the International Criminal Court, Essays in Honour of Adriaan Bos*, T.M.C. Asser Press, Haga 1999, pp. 81–82.

⁶⁴ D. Drózd, *O naprawianiu ...*, p. 252.

⁶⁵ More about art.75 of the ICC Statute on reparations for victims in: Ch. Muttukumaru, *Reparation to ...*, pp. 262–267, S. Garkawe, *Victims and the International Criminal Court: Three major issues*, International Criminal Law Review 2003, nr. 3, pp. 263–264.

Statute of the International Criminal Court for the former Yugoslavia. A person against whom an indictment has been issued shall, pursuant to an order or an arrest warrant of the Tribunal Investigative Judge, be taken into custody, immediately informed of the charges against him and transferred to the Tribunal⁶⁶. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea⁶⁷.

The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence⁶⁸. The penalties shall be imposed by the Tribunal pursuant to Iraqi law⁶⁹. One of the penalties is death penalty, although not mentioned *explicite* in the Statute.

The penalty for any crimes under Articles 11 to 13 which do not have a counterpart under Iraqi law shall be determined by the Trial Chambers taking into account such factors as the gravity of the crime, the individual circumstances of the convicted person and relevant international precedents⁷⁰. But the international community has excluded the death penalty as an appropriate penalty for genocide, crimes against

humanity and war crimes from the Statutes of: the ICC, the International Criminal Tribunals for the former Yugoslavia and for Rwanda, the Special Court for Sierra Leone, the Special Panels for Serious Crimes on East Timor, the internationalised courts in Kosovo and the Extraordinary Chambers in Cambodia⁷¹. That is the reason why the international and mixed courts do not impose death penalty, so there are no precedens connected with imposing such a penalty. What is more, the imposing of the death penalty is not pursuant to standards promoted by UN.

International standards state that the death penalty may be imposed “only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts”⁷². But the IST Statute and the Rules of Procedure and Evidence for IST do not require proof of guilt beyond reasonable doubt. That is the reason why these provisions should be amended. The imposing of the death penalty is inconsistent with standards of international law directly expressed in “UN Safeguards guaranteeing protection of the rights of those facing the death penalty”, Safeguard 4⁷³.

Neither the Tribunal Statute nor the Rules require the prosecution to prove guilt beyond reasonable doubt in order to secure a conviction – the standard of proof required by international law⁷⁴. This is particularly troubling given that many of

⁶⁶ Art. 21 (a) of the IST Statute. Compare with art. 20(2) of ICTY Statute.

⁶⁷ Art. 21 (a) of the IST Statute. Compare with art. 20(3) of ICTY Statute.

⁶⁸ See art. 21 (d) of the IST Statute. Compare with art. 20(4) of ICTY Statute.

⁶⁹ Art. 24 (a) of the IST Statute. *A contrario* art. 23 of ISTY Statute states: 1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.

⁷⁰ Art. 27 (e) of the IST Statute.

⁷¹ *Iraq: Iraqi Special Tribunal...*

⁷² “UN Safeguards guaranteeing protection of the rights of those facing the death penalty”, Safeguard 4.

⁷³ *Iraq: Iraqi Special Tribunal...*, footnote. 6.

⁷⁴ *Ibidem*.

those appearing before the Tribunal could face the death penalty if convicted⁷⁵.

Rule 56 of the Rules of Procedure and Evidence for the IST allows for trials and other procedures to be carried out in the absence of the accused. This provision is in conformity with the Iraqi Code of Criminal Procedure⁷⁶. It is also consistent with the procedure of the International Military Tribunal. Trials *in absentia* were permitted and took place⁷⁷.

During the procedure of drafting the ICC Statute there were made references to more recent experiences. In existing international Tribunals *ad hoc* trials *in absentia* were conducted, where the accused could not be found and therefore it was not possible to hold a trial⁷⁸. As there were opposing views of delegates when working on the ICC Statute⁷⁹, the consensus was almost impossible to reach. Finally it was decided that “the accused shall be present during the trial”⁸⁰. Trials *in absentia* are permissible, for example, where an accused refuses to appear for trial, or, where he disrupts the trial⁸¹.

Trials *in absentia* before the Iraqi Special Tribunal, although not prohibited under international law, are not precisely

defined. The Rules do not give any further details of when *trials in absentia* are allowed. Article 147(a) of the Iraqi Code of Criminal Procedure allows for *trials in absentia* if the accused has absconded or is absent without legal excuse, despite having been informed of the trial⁸². However, neither the Code of Criminal Procedure nor the Rules specify what legal excuses are permissible⁸³. There is no information about the measures to be taken to find the accused. The time given the legal services to find the accused is not estimated either.

The right of appeal is guaranteed. The grounds of appeal are defined subsequently: 1. an error on a question of law invalidating any decision; 2. an error of procedure; or 3. an error of material fact which has occasioned a miscarriage of justice. In contrast, there are four grounds of appeal in article 81 of the ICC Statute.

The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers⁸⁴. Where a verdict of acquittal is reversed by the Appeals Chamber, the case shall be referred back to a Trial Chamber for retrial⁸⁵.

Art. 26 of the abovementioned Statute states about the review proceedings. According to this provision: “Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals

⁷⁵ *Ibidem*.

⁷⁶ *Ibidem*.

⁷⁷ See Article 12 of the Charter of the International Military Tribunal.

⁷⁸ H.-J. Behrens, *The trial Proceedings* [in:] R. S. Lee [ed.], *The International Criminal Court. The Making of the Rome Statute. Issues, negotiations, Results*, Haga-Londyn-Boston 1999, p. 256.

⁷⁹ H. Friman, *Rights of Person Suspected and Accused of a Crime*, [in:] R.S. Lee [ed.], *The International Criminal Court. The Making of the Rome Statute. Issues, Negotiations, Results*, Haga-London-Boston 1999, pp. 255–61.

⁸⁰ Art. 63(1) of the ICC Statute.

⁸¹ Art. 63(2) of the ICC Statute.

⁸² *Iraq: Iraqi Special Tribunal*. Compare with: *Rules of Procedure and Evidence Missing Key Protections*, Briefing Paper: The Iraqi Special Court, Human Rights News, <http://hrw.org/english/docs/2005/04/22/iraq10533.htm>

⁸³ *Iraq: Iraqi Special Tribunal – Fair Trials are not guaranteed*, Amnesty International, May 13, 2005

⁸⁴ Art. 25 (b) of the IST Statute.

⁸⁵ Art. 25 (c) of the IST Statute.

Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the Tribunal an application for review of the judgment”.

The review proceedings are constituted as well. Pursuant to art. 26 of the Statute for Iraqi Special Tribunal, where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the Tribunal an application for review of the judgment. The Appeals Chamber shall reject the application if it considers it to be unfounded⁸⁶.

The right to compensation for unlawful arrest or detention or for miscarriages of justice is not guaranteed. In contrast to the IST Statute, article 85(1) of the Statute of the ICC provides that: “[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”. Both article 14(6) of the ICCPR and article 85(2) and (3) of the ICC Statute guarantee the right to compensation for miscarriages of justice⁸⁷.

Conclusions

Despite some flaws in design, the Iraqi Special Tribunal has had a potential to bring justice and accountability to Iraq.

The crimes under international law that are within the jurisdiction of the IST do not testify to the international character of this Tribunal. Nowadays there should be nothing exceptional in prosecuting by domestic or international tribunals for genocide (crime defined identical to that in customary international law⁸⁸), crimes against humanity or war crimes that are both crimes universally recognized. Some other international crimes like acts of terror have been omitted in the IST Statute. In these cases however, there is the possibility to prosecute natural persons for crimes against humanity or war crimes instead. The provisions of the IST Statute contains many positive guarantees of fair trial. However, the Amnesty International has noticed some omissions of some of the rights guaranteed by international criminal law. Therefore, a supplementary document that could follow the example of the Elements of Crime should be attached to the IST Statute, like the Amnesty International claims. It would assist in interpretation of the Statute, especially when the provisions are inaccurate. Any omissions in the Rules of Procedure or Evidence could be removed through adopting the amendments.

⁸⁸ The definition of genocide, which is considered customary international law, is contained in Article II of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 and Article 6 of the Rome Statute of the ICC. *Iraq: Iraqi Special Tribunal – Fair Trials are not guaranteed*, Amnesty International, May 13, 2005, footnote no. 33. Compare also with: W. A. Schabas, *Genocide in International Law: The Crimes of Crimes*, Cambridge University Press 2000, p. 3.

⁸⁶ Art. 26 of the IST Statute.

⁸⁷ *Iraq: Iraqi Special Tribunal*....

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SPECIALIOJO IRAKO TRIBUNOLO FUNKCIONAVIMAS (MATERIALINIAI IR PROCESINIAI ASPEKTAI)

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S a n t r a u k a

Straipsnyje analizuojamos Irako specialiojo tribunolo, įkurto 2003 m. gruodžio 10 d., statuto nuostatos, materialiniai ir procesiniai Tribunolo veiklos aspektai. Nurodoma, kad Statutu įdiegtas stebėtojų ir patarėjų tarptautinės teisės klausimais institutas – keliamas jų veiklos teisinio apibrėžtumo klausimas; apibūdinama Tribunolo jurisdikcija: nuo 1968 m. liepos 17 d. iki 2003 m. gegužės 1 d. padarytiems nusikaltimams, numatytiems Statuto 11–14 straipsniuose, už kuriuos gali būti traukiami tik Irako piliečiai ir nuolatiniai Irako gyventojai, nusikaltimus padarę Irake ir už jo ribų teisti. Nurodoma, kad nėra reglamentuota asmenų, Tribunolo trauktinų baudžiamojon atsakomybėn, amžiaus riba; juridiniai asmenys (pvz., Baath partija) nėra teisiami. Taip pat, lyginant su Tarptautinio karinio tribunolo nuostatomis, Irako specialusis tribunolas negali paskelbti nė vienos grupės ar organizacijos kriminaline.

Straipsnyje taip pat analizuojami nusikaltimai, už kuriuos gali teisti Irako specialusis tribunolas,

lyginamas kitų *ad hoc* tribunolų veiklos teisinis reglamentavimas. Autorė, be to, palyginusi Irako specialiojo tribunolo statuto ir Romos statuto bei 1949 m. Ženevos konvencijos papildomo protokolo nuostatas, daro išvadą, kad baudimas už kai kurias Irako specialiojo tribunolo statute numatytas nusikaltimus būtų nesuderinamas su *nullum crimen sine lege*, nes tai nėra universaliai tarptautiniu lygiu pripažįstami nusikaltimai; terorizmo nusikaltimo Statute taip pat nenumatyta – tai būtų Irako nacionalinių teismų jurisdikcijos klausimas.

Taip pat teigiama, kad Statuto 11c) punktas turėtų būti traktuojamas kaip novela, nes numato agresiją kaip nusikalstamą veiką.

Straipsnyje analizuojamos kaltinamųjų, liudytojų, nukentėjusiųjų teisės procese; pabrėžiama, kad Irako specialiojo tribunolo statute nenumatyta žalos atlyginimo instituto, kompensacijos už neteisėtą areštą ar sulaikymą; skiriama dėmesio reguliuojant procesą in absentia, Tribunolo sprendimo peržiūrai.

Įteikta 2007 m. birželio 19 d.

Priimta publikuoti 2007 m. spalio 26 d.