

Iraq, The Trial of Saddam Hussein

A. Iraq: Law of Occupation

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[Source: House of Commons Library, Research Paper 03/51, "Iraq: Law of Occupation", 3 June 2003, online: <http://www.parliament.uk/topics/International-law.htm>]

This paper discusses some legal issues surrounding the occupation of Iraq during and after Operation *Iraqi Freedom* in spring 2003. It gives an account of UN Security Council Resolution 1483, of 22 May 2003. [...]

Summary of main points

- The USA and the UK have the status of occupying powers in Iraq.
- This started as soon as they took control of portions of Iraqi territory. The status of occupying power is a matter of *de facto* control. It does not matter whether their military campaign was lawful.
- The main laws on occupation are in The Hague Regulations of 1907 and the fourth Geneva Convention of 1949. Other laws are relevant as well.
- Occupying powers have a duty to maintain public order and safety. They have the right to protect themselves. They do not take over sovereignty.
- Occupying powers may make limited changes to institutions, laws and other arrangements, but these must serve the general purposes of maintaining order, safety and security. [...]
- The UN Security Council passed Resolution 1483 on 22 May 2003. This recognises the role of the USA and the UK and calls on them to administer Iraq effectively in order to benefit the Iraqi people. It allows the creation of an interim administration, to be run by Iraqis, until a new government is formed.
- Security Council Resolution 1483 sets up a post of UN Secretary-General's Special Representative for Iraq. Sergio Vieira de Mello, UN High Commissioner for Human Rights, has been appointed. He will coordinate UN activities and liaise with the occupying powers.

[...]

IV. Justice

The Saddam Hussein regime was accused of many very serious crimes. These included systematic and widespread torture, arbitrary justice, extrajudicial killing and “disappearances.” Crimes against humanity, and possibly genocide, were committed during campaigns against the Kurds, in particular the Anfal campaign of the late 1980s, and against the Marsh Arabs, in particular in the early 1990s. War crimes were committed during the Iran-Iraq War, and during the invasion, occupation and resistance to the liberation of Kuwait. The brutality of the regime was regarded as a key factor in its survival, and reportedly this plays strongly still in the minds of Iraqis today. There are suggestions that the business of reconstruction may itself be hampered by fear among Iraqis, who have yet to see conclusive proof that the previous regime is wholly unable to return. Justice is likely to be an important issue in practical as well as moral and emotional terms.

Security Council Resolution 1483 [See Iraq, Occupation and Peacebuilding] does not make detailed provision for the administration of justice. [...]

In the Preamble the Security Council affirms “the need for accountability for crimes and atrocities committed by the previous Iraqi regime.” In Paragraph 3 it appeals to Member States to deny safe haven to those members of the previous Iraqi regime who are alleged to be responsible for crimes and atrocities and to support actions to bring them to justice. It does not define the membership of “the previous Iraqi regime.”

A. Options

a. Geneva provisions

Geneva Convention IV covers the legal system in Articles 64 to 77. These provisions are not aimed primarily at the trial of serious international offences, but they would apply if members of the previous regime were tried in Iraq by the occupying powers.

The existing penal laws should remain in force, unless they constitute a threat to the security of the occupying power or an obstacle to the application of the Convention itself. In these two cases, the laws of the occupied territory may be repealed or suspended by the occupying power. The occupying power may also introduce new laws if these are essential to enable it to fulfil its obligations under the Convention, to maintain order, and to maintain its own security.

It might appear that the maintenance of existing laws would create the absurdity of coalition forces in Iraq having to uphold the oppressive laws and penalties of the Saddam Hussein regime. However, the provision that they may be varied if they present an obstacle to the application of the Convention would seem to circumvent this difficulty. Beyond this, the occupying powers are bound by their other legal obligations, for

instance, for the UK, those arising from the *Rome Statute of the International Criminal Court* 1998, and the strict application of existing law could conflict with these. Equally, as mentioned above, there is a precedent in the case of Nazi Germany for existing laws to be set aside on the grounds of their manifest inhumanity.

Under Article 66 the occupying power may establish “non-political military courts” to try offences against the laws it has promulgated. Under Article 68 it may impose the death penalty for these offences, but only in cases of espionage, serious sabotage against its military installations or intentional acts causing death, and only if these were capital offences in the territory concerned before the occupation.

Civilians may not be prosecuted for acts committed before the occupation, except in the case of breaches of the laws and customs of war.

Under Article 67, the courts shall apply only those provisions of law, applicable prior to an offence, “which are in accordance with general principles of law, in particular the principle that the penalty shall be proportioned to the offence.”

The fair trial provisions for those prosecuted by the occupying power are set out in Articles 71 to 74. They include the right to be charged in a language understood by the accused, and the rights to present evidence, to call witnesses and to choose legal representation. There is also a right of appeal.

b. International Criminal Court

The Prosecutor of the International Criminal Court (ICC) may investigate a situation either on his own initiative, or at the request of a state party to the Rome Statute of the ICC, or at the request of the Security Council in a resolution adopted under Chapter VII of the UN Charter. If he investigates on his own initiative or at the request of a state party, an indictee must either be a national of a state party or have committed the alleged offences in the territory of a state party. Iraq is not a party to the Rome Statute. If the Prosecutor investigates at the request of the Security Council, these restrictions on nationality and territory do not apply.

Iraqis accused of war crimes, crimes against humanity or genocide could be brought before the ICC at the request of the Security Council. Without a Security Council resolution they could be prosecuted only for crimes committed on the territory of a state party to the Rome Statute. They could not be prosecuted at the ICC for crimes committed before the entry into force of the Rome Statute on 1 July 2002.

c. *ad hoc* tribunal

The Security Council could establish an *ad hoc* tribunal to deal with crimes committed by members of the Iraqi regime, armed forces and others, in the same way that it did for the former Yugoslavia and Rwanda. This would be done by means of a resolution setting out the jurisdiction of the tribunal. The Council could define jurisdiction broadly as it saw fit, citing the relevance to international peace and security, for which it

has responsibility. The tribunals for former Yugoslavia and Rwanda have retrospective jurisdiction.

Two other methods have been used in the past. The Nuremberg Tribunal was established by agreement of the Allies, embodied in a treaty, and the Tokyo Tribunal was established under US military powers. Today, the latter would be subject to the Geneva provisions mentioned above.

d. national courts

The Iraqi courts could bring to justice those accused of breaking Iraqi law, while third states could seek to prosecute crimes over which they have jurisdiction. Some states claim universal jurisdiction over serious international crimes, such as torture and war crimes.

An alternative model might be found in Sierra Leone. There a Special Court has been established to try those accused of the most serious crimes in the civil war. The Special Court was set up at Sierra Leone's request by means of an agreement between the UN and Sierra Leone. It has a hybrid nature, with jurisdiction over both international crimes and crimes existing under Sierra Leonean law. It is staffed by both local and international judges and prosecutors, appointed partly by the UN and partly by the Sierra Leone Government, after mutual consultation.

B. Comments

The Foreign Secretary, Jack Straw, made comments on trials for members of the Saddam Hussein regime in response to a question by Douglas Hogg:

I cannot give the right hon. and learned Gentleman a precise, definite answer because these matters are still subject to discussion with the United States Government, and they will not be resolved until a functioning interim authority has been established. We want the Iraqi people, in the main, to take responsibility for ensuring justice in respect of former members of the regime. They had no effective justice system during the 24 years of Saddam Hussein's rule, but historically Iraq had a reasonably well functioning and fair judicial system. I held a discussion last week with British Ministers about how our Government could aid and assist in the creation of a new judicial system in Iraq, and I am happy to write to the right hon. and learned Gentleman about that.

There is a question as to whether an international tribunal should be established to try the leaders of the regime. We have not ruled that out, but I am sceptical because of the vast costs of the international tribunals set up to deal with Yugoslavia and, even worse, Rwanda. The right hon. and learned Gentleman did not mention the International Criminal Court, but let me say that it does not have a direct role because its jurisdiction is only for events that took place after July last year (HC Deb 28 April 2003, cc32-3).

Pierre-Richard Prosper, the US Ambassador for War Crimes, was interviewed by the *Daily Telegraph* in April 2003. The report gave the following account of his arguments:

those accused of war crimes against US troops in recent weeks or during the Gulf war should be tried by military tribunals or civilian courts in America, while offences against Kuwaitis and Iranians should be dealt with by their respective countries.

As for Saddam's crimes, he believes that the Iraqis themselves should take the lead, and that their former president and his henchmen should be tried in Iraq itself. "We really need to allow the Iraqis the opportunity to do this. They are the victims. It is their country that was oppressed and abused. We want them to have a leadership role, and we're there to be supportive." (Daily Telegraph, 21 April 2003).

The *Economist* argued that the model for trying in the USA those accused of crimes against US forces "should not be contentious," but it went on,

America's current plan for the top leaders of Saddam's regime is far more controversial, and almost certainly a mistake. This is to reject the idea of an international tribunal, and instead to hold trials before Iraqi-only courts. The administration's stated goals are laudable. It rightly argues that the worst crimes of Saddam's regime were against the Iraqi people, and so concludes that they themselves should be the ones to judge their tormentors. Iraqi-controlled trials will also help establish the rule of law in Iraq, claims the administration, providing the cornerstone of a new, sorely-needed legal system.

These are indeed desirable goals, but they are unlikely to be achieved through locally controlled trials of Saddam, if he is caught alive, or his minions. Iraq's judges and lawyers have all been compromised by their own involvement in decades of repression. Returning Iraqi exiles, themselves victims of the regime, would also lack credible impartiality, even in the eyes of most Iraqis. The usual pattern after the fall of dictatorships is the escape of top leaders, revenge killings and kangaroo courts. Such could yet be the turn of events in Iraq. Trials held under American auspices will also be too easy for sceptics, inside as well as outside Iraq, to dismiss as "victors' justice." (Economist, 3 May 2003).

The *Economist* went on to advocate either an international tribunal, as in the cases of former Yugoslavia and Rwanda, or a mixed court, as in Sierra Leone. [...]

B. Iraq: Memorandum on Concerns Relating to Law and Order

[Source: Amnesty International, "Iraq: Memorandum on concerns relating to law and order", (23 July 2003) MDE14/157/2003, online: <http://www.amnesty.org>]

II. AMNESTY INTERNATIONAL'S CONCERNS

1. Applicable international law

Amnesty International welcomes the fact that the US and UK governments, in exercising their authority as the occupying powers through the CPA, have made use of international human rights standards to inform the formation of new legislation and the suspension of certain provisions of Iraqi law which were inconsistent with such standards. For example, we welcome the use of provisions of the United Nations (UN) Standard Minimum Rules for the Treatment of Prisoners as a basis for CPA Memorandum Number 2 on Management of Detention and Prison Facilities. We also welcome the CPA's suspension of the death penalty, a step which is consistent with the internationally recognized desirability of its abolition.

However, we are concerned at the statement in a letter, dated 27 June 2003, to Amnesty International from Ambassador Paul Bremer, the CPA Administrator, that "the only relevant standard applicable to the Coalition's detention practices is the Fourth Geneva Convention of 1949. This Convention takes precedence, as a matter of law, over other human rights conventions."

Amnesty International stresses that, consistent with international humanitarian law, Coalition states are also under an obligation to respect the provisions of the human rights treaties to which they are a party, as well as those to which Iraq is a party, especially given that these treaties have been formally incorporated into Iraqi domestic law. Iraq is a party to the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights; the Convention on the Rights of the Child; the International Convention on the Elimination of All Forms of Racial Discrimination; and the Convention on the Elimination of All Forms of Discrimination against Women.

The Human Rights Committee, set up under the ICCPR, and other bodies monitoring the implementation by states of their human rights obligations under the treaties they have ratified, have consistently ruled that such obligations extend to any territory in which a state exercises jurisdiction or control, including territories occupied as a result of military action. International human rights law complements provisions of international humanitarian law, for example by providing content and standards of interpretation, such as on the use of force to respond to disorders outside combat situations or with regard to safeguards for criminal suspects.

Amnesty International also points out that the European Convention for the Protection of Human Rights and Fundamental Freedoms is applicable to the conduct of forces belonging to Coalition states, such as the UK, that are parties to this treaty. Commenting on the extra-territorial application of the Convention in its Decision as to Admissibility in *Bankovic* (Application no. 52207/99), the European Court of Human Rights stated (para 71):

"the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government".

Recommendation

Amnesty International urges the CPA to recognize the applicability of international human rights law and standards, as complementary to international humanitarian law, and to abide by all the relevant obligations. [...]

C. Tribunal Established Without Consultation

[Source: Amnesty International, "Tribunal established without consultation", Press Release, 10 December 2003, MDE14/181/2003, online: <http://www.amnesty.org>]

Iraq: Tribunal established without consultation

Amnesty International has expressed concern to the Coalition Provisional Authority (CPA) and the Iraqi Governing Council about the decision to establish an Iraqi special tribunal that was taken without prior consultation with the Iraqi civil society or the international community.

"We have been urging that the proposals to establish the tribunal be subject to widespread consultation within Iraqi civil society, especially the legal profession and human rights groups, as well as the international community," said Amnesty International today. "Unfortunately, the draft statute of the tribunal was not made public before its adoption."

Under international humanitarian law, the authority of the CPA as an Occupying Power to establish a tribunal of the scope envisaged for the Iraqi special tribunal is doubtful at best. Amnesty International is concerned about reports that the tribunal will use Iraqi criminal code – some aspects of which are inconsistent with international human rights standards – to regulate trial procedures and define crimes and punishments.

"We are particularly concerned that the Iraqi Penal Code provides for the death penalty for crimes under the jurisdiction of the tribunal," said Amnesty International.

Amnesty International is seeking a copy of the statute that was adopted in order to analyze it in detail.

D. Iraqi Special Tribunal: Questions & Answers

[Source: Human Rights First, "Iraqi Special Tribunal: Questions and Answers", <http://www.humanrightsfirst.org>]

On the basis of what authority was the tribunal established and what is its supervisory body?

The Statute of the Iraqi Special Tribunal was enacted directly by the Iraqi Governing Council on December 10, 2003. The then-U.S. Administrator for Iraq, Paul Bremer, temporarily ceded legislative authority to the

Council for that purpose.

The Interim Government of Iraq has assumed all of the supervisory powers given under the Statute to the Governing Council.

Who will the tribunal try?

The Statute provides the tribunal with jurisdiction over Iraqi nationals or residents of Iraq.

It also includes the principle of command responsibility, according to which not only those who directly commit a crime, but those in the chain of command who order it to be carried out can be held responsible. It further specifies that no one shall have immunity from criminal responsibility, for instance because of any official position including head of state.

At this time, it is unclear how many individuals will be tried by the tribunal or how many trials will take place.

Currently, 12 former high-ranking members of the former Ba'ath regime have appeared before an Iraqi judge and are apparently awaiting indictment. [...]

What crimes can the tribunal prosecute?

The tribunal has jurisdiction over crimes against humanity, war crimes and genocide.

The tribunal also is able to prosecute three crimes under Iraqi law:

- Attempting to manipulate the judiciary
- Wasting national resources or squandering public assets and funds
- Abusing position and pursuing policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country

For the tribunal to have jurisdiction, these crimes must have been committed between July 17, 1968 – the date on which the Ba'ath party came to power in Iraq by a political coup in which Saddam Hussein played a leading role – and May 1, 2003 – the date President Bush declared that major combat operations in Iraq had ended.

It is not necessary for the crimes to have been committed on the territory of Iraq. The tribunal also has jurisdiction to prosecute crimes committed elsewhere by Iraqi nationals or residents of Iraq, such as during Iraq's war against Iran (1980-1988) and its invasion and occupation of Kuwait (1990-1991). [...]

Who are the judges?

[...] According to the Statute, the authority to appoint judges and investigative judges resided with the Governing Council, and now rests with the Interim Government, which is required to consult on all

appointments with a new Judicial Council.

In general, the Statute provides that judges and investigative judges shall be Iraqi nationals. It allows, however, for non-Iraqi judges with experience in dealing with crimes against humanity, genocide, war crimes and crimes under Iraqi law to be appointed if necessary.

The Statute further provides that a judge or investigative judge may not have been a member of the Ba'ath party. [...]

Discussion

1. According to IHL, may the CPA and/or the Governing Council of Iraq create a tribunal? May the Iraqi Special Tribunal be considered as having been established by the occupying power? If so, for which crimes and according to which law may the occupying power create such a court? (GC IV, Arts 64, 66 and 71)
2. What options existed in IHL to try Saddam Hussein? Discuss the advantages and disadvantages of every option.