



IRAQ: RELEVANCE IN INTERNATIONAL CRIMINAL LAW

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I. Introduction:

Like many other developing countries, Iraq is an artificial political entity. Iraq, situated in what was ancient Mesopotamia, occupies the eastern wing of the Fertile Crescent, the relatively fertile area of land in the otherwise arid region of the Middle East and North Africa. Iraq is bordered to the north by Turkey, to the east by Iran, to the west by Syria and Jordan, and to the south by Saudi Arabia and Kuwait¹. The current population of Iraq is 40,260,115 based on the latest United Nations estimates². Iraq has an area of 437,072 sq.km and can be divided into four geographical regions: the Tigris-Euphrates alluvial plains in central and south-eastern Iraq, Al-Jazeera, an upland region in the north between the Tigris and Euphrates rivers; deserts in the west and south, covering about two-fifths of the country; and highlands in the north and northeast. The Tigris-Euphrates river system drains into Iraq, fed by melting winter snow in Turkey that gives Iraq viable soil to support agriculture, a major component of the economy³. The warfare of the last decades and the shortage of financial resources as a result, have had a major impact on nature and the environment. In Iraqi Kurdistan, for example, Baghdad implemented a policy of depopulation in the strategically important zones bordering Turkey and Iran, in an attempt to extirpate Kurdish nationalism⁴. To prevent the return of the people who had been driven out, villages were levelled, wells poisoned, and landmines lay in the newly prohibited zones.

Military posts were established around population centres, atop hills and mountains. To protect these posts from guerrillas, all the vegetation in the vicinity was burned off, often several times a year, and the posts were surrounded with mine fields. The destruction of the environment in Kurdistan reached its maximum between 1987 and 1990⁵. Deforestation also occurred, due to governmental neglect and a general popular disregard for the environment, leaving a landscape defined by long, barren mountain ridge. Since October 1991⁶, Kurdistan has no longer been under the control of the central government in

¹ Embassy Of The Republic Of Iraq, Public Relations Office, (accessed on: 5th May 2019)

² Data retrieved from Worldometers, (<https://www.worldometers.info/world-population/iraq-population/>)

³ GEOGRAPHY OF IRAQ, FANACK.COM, <https://fanack.com/iraq/geography/>, (last visited May 6, 2019)

⁴ Majid Khadduri, Hugh Kennedy, John E. Woods, Richard L. Chambers, Gerald Henry Blake, Iraq: History, Map, Population & Facts, (Accessed on: 6th May 2019), <https://www.britannica.com/place/Iraq>.

⁵ Ibid at 3

⁶ Embassy Of The Republic Of Iraq, Public Relations Office, (accessed on: 9th May 2019)

Baghdad. Although the region has continued to experience severe economic problems, much has been done, with the support of Western aid organizations, to rehabilitate destroyed villages and clear land mines. Iraq has long reflected cultural diversity. Although Iraqis generally are a religious and conservative people, there are strong secular tendencies in the country. It is a Muslim nation with Arabic and Kurdish as its official languages. There are many values that are honoured in the Iraqi culture, including generosity and humility. Men commonly hold hands or kiss when greeting each other, but this is typically not the case for men and women. Respect is given to the elderly and women, especially those with children.

Iraqi cuisine mirrors that of Syria and Lebanon, with strong influences from the culinary traditions of Turkey and Iran. In the 1970s a cultural campaign was launched to influence a national consciousness based on Iraq's history, including the pre-Islam era and the former glory of Mesopotamia and Babylon⁷. The goal was to focus on a new cultural life for modern Iraq and to emphasize Iraq's uniqueness, especially in the Arab world. Today, Iraq is a country rich in culture drawing on thousands of years of heritage. Poetry thrives in Iraq, as do fine arts like painting and sculpting, and visitors to the country can marvel at buildings from the golden age of Abbasid architecture in the 8th and 9th centuries and from the various Ottoman periods (Turkish Empire)⁸.

Vegetation in Iraq is characterized by drought. Iraq's arid climate and harsh terrain are not conducive to wildlife. The most common animals are birds, such as ducks, partridges, snipes and herons, and small mammals like badgers, otters, and muskrats. Gazelle also exist in the country's remote deserts. Other wild animals include camels, pigs, jackals, foxes and rabbits. Various species of water buffalo are bred in the marshlands. Desert locusts, which are common across the Middle East, also live in Iraq. Few forests exist, with the exception of small oak forests in the north and northeast. Alpine plants grow in the cool, dry climate of the mountains. Football (soccer) is Iraq's most popular sport. The country's national football team has been quite successful in the past. Football is played both professionally and informally in the nation. Traditionally, Iraqi society has been patriarchal in nature. However, years of wars, revolutions, and political changes led women of the country to step outside, receive education, and earn jobs to replace men who were busy in fighting. Iraqi women were among the first ones in the Arab world to enter the world of politics in top positions. However, critics claim that such progressive steps were taken by the country's government to gain international approval rather than to further the cause of women. At the societal level, however, the Iraqi society is still rooted in traditional values that prefer women to stay indoors and play the roles of obedient daughters and wives⁹

II. History Of International Crime In The Iraq: Saddam Is Iraq, Iraq Is Saddam

When Saddam Hussein invaded his small, oil-rich neighbour in the summer of 1990, the Department faced its first full-scale post-Cold War international crisis. Bush's foreign policy team forged an unprecedented international coalition consisting of the NATO allies and the Middle Eastern countries of Saudi Arabia, Syria, and Egypt to oppose Iraqi aggression¹⁰. The Department of State orchestrated the diplomacy for this grand

⁷ Iraq Culture Smart Card, Retrieved from: <https://fas.org/irp/doddir/usmc/iraqsmart-0506.pdf>

⁸ Rashid, The International Destruction Of Cultural Heritage In Iraq

⁹ The culture of Iraq, *Iraq has one of the oldest cultural histories in the world*, Society, Worldatlas, (Retrieved from: <https://www.worldatlas.com/articles/the-culture-of-iraq.html>)

¹⁰ Blake Stilwell, Facts about the first gulf war, (accessed on : 7th May 2019)

(Retrieved from: <https://www.military.com/undertheradar/2015/09/21-facts-about-the-first-gulf-war>)

coalition's effective air campaign in January 1991, which was followed by "Operation Desert Storm," a 100-hour land war, which expelled Iraqi forces from Kuwait¹¹. During the Gulf crisis, Secretary of State Baker relied heavily on two men- John Bolton, Assistant Secretary of State for International Organization Affairs, who played a significant role in coordinating relations with the United Nations, and Under Secretary of State for Political Affairs Robert Kimmitt, who was Baker's day-to-day crisis manager¹². Iraq was not the only trouble spot in the Middle East during Bush's four years in office. Saddam did not know, or did not anticipate, that his troops would leave the country almost as quickly as they had invaded it. When the battle for Kuwait broke out, the Middle East was a different place. There were few major extremist currents running through the region, and most Arabs seemed to oppose religious agitation. Saddam Hussein realized this when he tried to shock the international coalition in January 1991 by saying: "We are calling on all Arabs, all religious fighters, to join the jihad. We call on you to attack the powers of evil, of treason and corruption, and their interests everywhere. It is your duty."¹³ The appeal was in vain. Nobody wanted to follow the self-proclaimed holy warrior Saddam. Iraq owed \$80 million in foreign debt from its 1980-1988 war with Iran. Saddam Hussein demanded Saudi Arabia and Kuwait forgive \$30 billion in Iraqi debt, which he saw a result of protecting Kuwait from Shia Iranian forces for eight years. He then accused Kuwait of stealing Iraqi oil through slant drilling. Unlike the Iran-Iraq War (which went on for eight years), Iraq's Elite Republican Guard (with names which sound like they were made up by an American teenager, like the 1st Hammurabi Armoured Division or the 4th Nebuchadnezzar Motorized Infantry Division) swiftly defeated Kuwaiti forces, reaching Kuwait City in an hour¹⁴. Kuwait had not mobilized for war despite Saddam's constant threats. In trying to capture Kuwait's Emir, Iraqis assaulted Dasman Palace, even though the Emir had already left. The Emir's brother was killed leading the defense of the palace for more than 12 hours, outnumbered by an entire Iraqi division. His body was placed in front of a tank and run over. In that time, the Iraqi forces committed at least sixteen crimes against the Laws of Armed Conflict as outlined in the Geneva and Hague Conventions¹⁵. Those crimes include running of at least two dozen torture sites in Kuwait City alone, torturing civilians to the point of death and disfigurement. Kuwaiti women were taken hostage and raped repeatedly. Coalition Forces didn't begin to expel Iraqis from Kuwait until January 1991, after the UN-mandated January 15th withdrawal deadline. Once Coalition forces and Iraqi forces met in the field, the Iraqis committed more war crimes. Among them, they pretended to surrender to U.S. Marines, and then opened fire on them. Iraqis would disguise themselves as civilians and then ambush Coalition forces. Iraqi troops also tortured prisoners of war. Saddam began to convey a more Islamic, religious appearance in Iraqi media, showing he praying at mosques and supporting the Palestinian cause, hoping to reframe the war as a struggle against Western imperialism and Israeli scheming. The plan didn't work. Sheik Abdul-Aziz Bin Baz, the Saudis' leading interpreter of Islamic law, called Saddam Hussein the "enemy of God."

¹¹ The First Gulf War, Office of the Historians, Department of the State (U.S.A), (accessed on :5th May 2019)
(Retrieved from: <https://history.state.gov/departmenthistory/short-history/firstgulf>)

¹² Id at 4

¹³ Kersten knipp, Saddam Hussein, the gulf war and the new middle east, 2nd Aug.2015(accessed on : 6th May 2019)
(Retrieved from: <https://www.dw.com/en/saddam-hussein-the-gulf-war-and-the-new-middle-east/a-18622913>)

¹⁴ Life Under Saddam Hussein: Past Repression and Atrocities by Saddam Hussein's Regime, Fact Sheet ,Office of the White House Press Secretary, Washington DC, April 4, 2003.(retrieved from: <https://2001-2009.state.gov/p/nea/rls/19675.html>)

¹⁵ Ronald kramer, Raymond Michalowski & Dawn Rothe, "The Supreme International Crime": How the U.S. War in Iraq Threatens the Rule of Law, 32 SOCIAL JUSTICE52-81 (2005), (Retrieved from: https://www.jstor.org/stable/29768307?seq=1#page_scan_tab_contents (last visited May 12, 2019)).

Iraq fired Scud missiles at Israel in an attempt to draw the country into the conflict, a move that would force many Arab states in the Coalition to choose between withdrawing or fighting alongside Israel, neither of which were appealing to the Arabs. In response, the U.S. and Netherlands deployed Patriot Missile Battalions to Israel and Turkey to keep Israel from retaliating. Seventy-four Israelis died as Iraq fired Scud missiles toward Tel Aviv. Strangely, only three Israelis died from the missiles- the rest died of heart attacks or similar ailments as a result of the bombing. Iraq launched some 88 Scud missiles toward Israel and Saudi Arabia over the course of the war. Under Saddam's regime many hundreds of thousands of people have died as a result of his actions, the vast majority of them Muslims. According to a 2001 Amnesty International report, "victims of torture in Iraq are subjected to a wide range of forms of torture, including the gouging out of eyes, severe beatings, and electric shocks ... some victims have died as a result and many have been left with permanent physical and psychological damage." Saddam has had approximately 40 of his own relatives murdered. Allegations of prostitution are used to intimidate opponents of the regime and have been used by the regime to justify the barbaric beheading of women¹⁶. There have been documented chemical attacks by the regime, from 1983 to 1988, resulting in some 30,000 Iraqi and Iranian deaths.

Human Rights Watch estimates that Saddam's 1987-1988 campaign of terror against the Kurds killed at least 50,000 and possibly as many as 100,000 Kurds. The Iraqi regime used chemical agents to include mustard gas and nerve agents in attacks against at least 40 Kurdish villages between 1987-1988¹⁷. The largest was the attack on Halabja which resulted in approximately 5,000 deaths. Almost 2,000 Kurdish villages were destroyed during the campaign of terror. According to Human Rights Watch, "senior Arab diplomats told the London-based Arabic daily newspaper al-Hayat in October 1991 that Iraqi leaders were privately acknowledging that 250,000 people were killed during the uprisings, with most of the casualties in the south." Refugees International reports that "Oppressive government policies have led to the internal displacement of 900,000 Iraqis, primarily Kurds who have fled to the north to escape Saddam Hussein's Arabization campaigns and Marsh Arabs, who fled the government's campaign to dry up the southern marshes for agricultural use. More than 200,000 Iraqis continue to live as refugees in Iran¹⁸."

Over the past five years, 400,000 Iraqi children under the age of five died of malnutrition and disease, preventively, but died because of the nature of the regime under which they are living¹⁹. Under the oil-for-food program, the international community sought to make available to the Iraqi people adequate supplies of food and medicine, but the regime blocked sufficient access for international workers to ensure proper distribution of these supplies. The Iraqi regime has repeatedly refused visits by human rights monitors. From 1992 until 2002, Saddam prevented the UN Special Reporter from visiting Iraq. The UN Special Reporter's September 2001, report criticized the regime for "the sheer number of executions," the number of extrajudicial executions on political grounds, and the absence of a due process of the law²⁰.

¹⁶ Id at 10

¹⁷ WAEL AL-SALLAMI, Iraq During Saddam , 2nd Jul.2014,
(Retrieved from: <https://www.businessinsider.in/Iraq-During-Saddam/articleshow/37653648.cms>)

¹⁸ Lisa Blydes, Compliance and Resistance in Iraq under Saddam Hussein, Department of Political Science, Stanford University, 4th Feb.2015, (accessed on: 4th May 2019)

¹⁹ Neil Mac Farquhar, *Saddam Hussein, Defiant Dictator Who Ruled Iraq With Violence and Fear, Die*, 30th Dec.2006 New York Times, (accessed on : 7th May 2019)

²⁰ Saddam's Regime And What Might Follow, Global Policy Forum,2002(accessed on : 4th May 2019)

Since Iraq's independence in 1932, the country has experienced numerous conflicts and periods of civil war. In 2003²¹, without the sanction of the UN Security Council, the United States and United Kingdom led an invasion of Iraq with the alleged aim of destroying weapons of mass destruction supposedly possessed by the regime of Saddam Hussein. The invasion resulted in years of violence and thousands of civilian deaths over the period 2003-08. In early 2014, the emergence of ISIS and its occupation of Iraqi territory resulted in renewed civil strife and the commission of grave international crimes, including an alleged genocide against the Yazidi minority²².

III. Iraqi Higher Criminal Court and Its Procedure

The Iraqi Higher Criminal Court was established to bring to justice Iraqi nationals and residents of Iraq accused of atrocities and certain other crimes committed during the thirty-five year period of Ba'athist power. The Court was originally set up by the Iraqi Governing Council in late December 2003. Iraq's Transitional National Assembly is in the process of adopting a new Statute for the Court aimed at legitimizing its status as an Iraqi institution. The new Statute changes the name of the Court from the Iraqi Special Tribunal to the Iraqi Higher Criminal Court and makes certain other changes designed to bring the Court more firmly within the framework of the Iraqi criminal justice system²³. On 13 December 2003, three days after the Tribunal was established, Saddam Hussein was found hiding in a small hole in the ground outside his home town of Tikrit. After he had spent six months in US custody as a 'prisoner of war,' legal authority over Saddam was transferred to the Iraqi Interim Government on 30 June 2004²⁴.

The Iraqi Higher Criminal Court²⁵, which will try them, is a special court established to try Iraqi nationals and residents of Iraq for crimes of genocide, crimes against humanity, war crimes and a small number of domestic Iraqi offences relating to the abuse of political power. The first legal hearing in Saddam Hussein's case was held before the Iraqi Special Tribunal on 1st July 2004. Saddam Hussein rejected charges against him. Although no attorneys for Saddam Hussein were present at the July 1 hearing, his first wife, Sajida Talfah, had hired a multinational legal team of over 20 attorneys. Saddam Hussein and other Ba'athist leaders stand accused of serious crimes including genocide and crimes against humanity. Unlike Slobodan Milosevic, whose trial in The Hague is a thoroughly international process, Saddam Hussein and his colleagues will be tried in their homeland before a court that forms part of Iraq's domestic legal system. The Iraqi Higher Criminal Court was established by Iraqi authorities (although it was initially a product of the foreign occupation), is staffed overwhelmingly by Iraqis and relies heavily on Iraqi criminal law. Despite this strongly local flavour, a number of key international elements have been built into the Court's structure and practice. For example, the Statute makes provision for international advisers and there is an option (which may not be exercised) for international judges to be appointed to the Court's judiciary. The Iraqi government announced in late June 2005 that the former dictator would answer

²¹ Nefer Munoz, *Iraq: International Criminal Court Could Have Jurisdiction*, 26 March 2003, Inter Press Service (accessed on: 7th May 2019)

²² Id at 17

²³ An unofficial English translation of the new Statute is available at www.law.case.edu/grotian-moment-blog/documents/IST_statute_unofficialenglish.pdf. The previous Statute is appended to Coalition Provisional Authority Order Number 48 'Delegation of Authority Regarding an Iraqi Special Tribunal', (accessed on 12th May 2019), Available at: <http://www.iraqispecialtribunal.org/en/about/statute.htm>.

²⁴ Trial Of Saddam Hussein, Trial International, Last Modified: 2nd May 2016, (retrieved from <https://trialinternational.org/latest-post/saddam-hussein/>)

²⁵ Sonya Sceats, *the trial of Saddam Hussein*, Chatham House (The Royal Institute of International Affairs) is an independent body which promotes the rigorous study of international questions and does not express opinions of its own.

12 charges of crimes against humanity, although there were more than 500 confirmed cases against him. Saddam Hussein at a first stage stood trial for what is called the Dujail massacre. He was charged simultaneously with seven other former high officials who are said to have ordered and overseen the killing, in July 1982, of more than 140 Shi'ite men from Dujail, a village 35 miles north of Baghdad, acts which constituted crimes against humanity. At the first court session, Saddam Hussein pleaded not guilty to all charges. His seven co-defendants then equally pleaded not guilty. After a short court session on 28 November, during which some testimony regarding the killings in Dujail was presented. In the weeks following the first audience, serious security concerns for the defence team of Hussein and the other accused became apparent. Some 36 hours after the first hearing, a group of unidentified armed men dragged one of the attorneys from his office in east Baghdad and shot him dead. As a consequence, calls for the trial to be held abroad were heard.

The defence lawyers imposed a boycott on the trial, until their security concerns were met with specific measures. After a short court session on 28 November, during which some testimony regarding the killings in Dujail was presented, Judge Rizgar Mohammed Amin ordered a one-week adjournment until Dec. 5, to grant the defence teams time to find new counsel after one of their lawyers was killed and another fled Iraq. The trial then continued for several months. On 19 June 2006, the Prosecutor asked the court, in his closing arguments, that the death penalty be imposed upon Saddam Hussein, Barzan al-Tikriti and Taha Yassine Ramadan. On 5 November 2006, Saddam Hussein was sentenced to death by hanging. According to the procedural rules, whenever a death sentence or life imprisonment is pronounced an automatic appeal procedure comes into effect.

On 3 December 2006²⁶, the defence team lodged the appeal against the verdicts for Saddam Hussein, Awad Hamed Al-Bander and Barzan Ibrahim Al-Tikriti, who had been sentenced to death. On 26 December 2006, the Appeals Chamber confirmed the death sentence against Saddam Hussein. In the Anfal trial, Saddam Hussein was charged with genocide, crimes against humanity and war crimes. The trial began on 21 August 2006. The presiding judge was replaced on 20 September 2006, after he had been accused of bias towards Saddam Hussein. The defence team strongly objected to what they considered to be an undue interference by the government in the trial. After Saddam Hussein's execution, the trial continued without him and the Tribunal rendered its verdict on 24 June 2007²⁷. There are rumours that the Court has been pressured to try and convict Saddam as quickly as possible. Political leaders hope that the trial will be interpreted by the Iraqi people as a sign of progress and control in the current climate of chaos²⁸. The Court has jurisdiction to try a limited range of international and Iraqi crimes. The relevant International crimes are genocide, crimes against humanity and war crimes, defined in terms that mirror almost exactly the definitions provided in the Rome Statute of the International Criminal Court. Three domestic Iraqi offences relating to the abuse of political power have also been included.

²⁶ Id at 25

²⁷ Issam Michael Saliba, Is The Death Penalty An Option In the Trial of Saddam Hussein, The Law Library of Congress (last updated: 7th March 2007), (Retrieved from: <https://www.loc.gov/law/help/hussein/capital.php>)

²⁸ Saddam Hussein Trial Fast Facts, CNN Library (last updated: 4th March 2019), (accessed on: 11th May 2019)

IV. Relevance of Saddam's Trial in the context of ICC and International Criminal Law

The definitions of most of the crimes that the Court has power to try are based on settled international definitions and the judges may rely on international case law to assist them in reaching their decisions. A fusion of international elements into an otherwise domestic legal process has come to be known as the 'hybrid' approach to criminal justice²⁹. Other contexts of 'transitional justice' where hybrid processes have been adopted include East Timor, Kosovo and Cambodia. Each of these courts has a varying degree of international involvement³⁰. Saddam Hussein has already insinuated that the Iraqi Higher Criminal Court was established under dubious legal authority. During his initial court appearance in July 2004, he asserted the continuing existence of his presidency of Iraq and challenged the legitimacy of a judicial process established 'by order of the invasion forces'³¹. The same themes have dominated media interviews given by Western lawyers claiming to represent Saddam. The theoretical support such claims have attracted reflects ongoing controversy about the legality of the invasion of Iraq in March 2003. Indeed concerns about the legal validity of the Court's original Statute are said to have motivated the Transitional National Assembly to reconstitute the Court under a new, unequivocally local law. It is hoped this move will forestall arguments raised by the defence that the Court lacks legal authority to conduct the trials³².

Saddam Hussein³³ and his co-defendants are charged in the present trial with the international offense of crimes against humanity. It is not clear whether the charges are based on international or domestic criminal law. While international criminal law has recognized this offense for about sixty years, Iraq has not yet incorporated this offense in its domestic law. Law Number 10 of 2005, a statutory framework that established a special tribunal to try Saddam Hussein, mentioned this offense in the course of determining the jurisdiction of the newly created tribunal. Its inclusion in Law Number 10 as an offense is interesting because it has not been declared a crime nor has it been assigned a penalty in either the Iraqi Penal Code or other Iraqi criminal statutes. Geneva Convention IV³⁴ 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*

²⁹ Id. at 25

³⁰ Types of Court, International Criminal Database

³¹ Id. at 18

³² Eric H. Sunderman, *The Conviction Of Saddam Hussein For "The Crime Against Humanity and other Inhumane Acts"*, 30(4), Penn Law: Legal Scholarship Repository, 2014 (Accessed On : 6th May 2019)

³³ Iraq: The Trial of Saddam Hussein, IHL Database (accessed on: 6th May 2019).

³⁴ Geneva Convention, 1949

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 inhumanity³⁵.

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 2002³⁶.

The IST represents an unusual effort to use international law, local participants and foreign financial and logistical support to effectuate post-conflict justice. It is largely funded by the United States, and heavily staffed by U.S. personnel, particularly behind the scenes. Although Saddam was formally transferred to Iraqi legal custody on June 30, 2004, he remains in U.S. physical (military) custody³⁷. Although the judges are Iraqi nationals, they were appointed by the Iraqi Governing Council, which was itself appointed by the Coalition Provisional Authority, which represented the U.S. occupying forces in Iraq³⁸. The Statute provides that Iraqis must serve as judges, prosecutors, and defense counsel, with only limited possibilities for non-Iraqis to participate, either by seconding the defense team (which must be headed by an Iraqi national) or by serving as judges. The Court may try 'any Iraqi national or resident of Iraq'. In some respects this jurisdiction is restrictive. For example, members of the 'coalition of the willing' have been insulated from prosecution for possible war crimes committed during the course of the conflict. In keeping with the jurisdiction of international criminal tribunals, 'legal' (i.e. non-natural) persons, including corporations, have also been placed beyond the Court's reach. In other respects, the Court's 'personal' jurisdiction is expansive³⁹. The International Criminal Tribunals for the former Yugoslavia and Rwanda may try only those 'persons responsible for serious violations', while the Special Court for Sierra Leone may try only those bearing 'the greatest responsibility' for relevant crimes. No such limitation applies to the Iraqi Higher Criminal Court⁴⁰. The Foreign Secretary, Jack Straw, made comments on trials for members of the Saddam Hussein regime in response to a question by Douglas Hogg⁴¹:

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

³⁵ Id. at 28

³⁶ Leila Nadya Sadat, *New Developments Regarding The Prosecution Of Saddam Hussein By The Iraqi Special Tribunal*, 9(24), *ASIL Insight*, 5th Aug. 2005

³⁷ Bureau of Resource Management, *Report on Iraq Relief and Reconstruction*, April 6, 2005, at 30, (available at: <http://www.state.gov/s/d/rm/rls/2207/apr2005>), (accessed on : 5th May 2019)

³⁸ John Burns, *First Trial Set in Iraq for Saddam in Killings*, *Int'l Herald Trib.*, July 18, 2005, (accessed on: 8th May 2019).

³⁹ Id. at 36

⁴⁰ Id. at 30

⁴¹ Id. at 37

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. There is a question as to whether an international tribunal should be established to try the leaders of the regime. 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. Basically the trial of Saddam actually contains the elements of international crime which are prescribed under Rome Statute but because the Iraq did not sign Rome Convention therefore they are in the dilemma to answer other countries. 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.”

V. Saddam Hussein’s Trial Was Fundamentally Unfair: Critical Analysis

Saddam Hussein's trial for crimes against humanity was undermined by so many flaws, including political interference and failures to disclose evidence properly, that his conviction is unsound, the New York-based watchdog Human Rights Watch said today. The organisation, one of only two independent bodies allowed to attend every session of the trial, also interviewed dozens of judges and lawyers. It concluded the proceedings were “fundamentally unfair”. Human Rights Watch, which opposes the death penalty, warns that hasty implementation of the death sentence by hanging for the former Iraqi president could deprive thousands of victims of their day in court. There is currently an active debate within the international legal community on whether and to what extent customary international law prohibits the death penalty. Over the last decade, the international legal community has witnessed the establishment of a variety of international and national tribunals that have had to come to terms with capital punishment. The latest tribunal formed, and perhaps the most prominent, is the Iraqi tribunal where Saddam Hussein has been accused of crimes against humanity. In light of judicial opinion and available learned commentary, as well as the prosecution’s June 19 death penalty demand, it is timely and relevant to ask whether the death penalty is legally available as an option in the trial of Saddam Hussein for the offense of crimes against humanity.

Saddam Hussein and his co-defendants are charged in the present trial with the international offense of crimes against humanity. It is not clear whether the charges are based on international or domestic criminal law. While international criminal law has recognized this offense for about sixty years, Iraq has not yet incorporated this offense in its domestic law. Law Number 10 of 2005, a statutory framework that established a special tribunal to try Saddam Hussein, mentioned this offense in the course of determining the jurisdiction of the newly created tribunal⁴². Its inclusion in Law Number 10 as an offense is interesting because it has not been declared a crime

⁴² N. Bhuta, ‘Fatal Errors: The Trial and Appeal Judgments in the Dujail Case’, *Journal of International Criminal Justice*, 2008, Vol. 6, pp. 39-65

nor has it been assigned a penalty in either the Iraqi Penal Code or other Iraqi criminal statutes. It must be highlighted that while the international offense of crimes against humanity has not been incorporated in Iraqi domestic law, as we have explained, the underlying acts constituting its physical elements such as murder, rape and enslavement, are each a separate crime under Iraqi criminal law. An important question for the trial, then, is: If the defendants were to be found guilty for violating Iraqi Law Number 10⁴³ as charged, what penalties may the court impose upon them and is the death penalty an option? The provisions relevant to answering this question are to be found in the Iraqi Penal Code Number 111 of 1969⁴⁴ and the Supreme Iraqi Criminal Tribunal Law Number 10 of 2005. Iraqi Law Number 10 of 2005 is a legislative act which established a special tribunal outside the Iraqi regular judicial system for the purpose of trying Saddam Hussein and members of his regime for certain international and domestic criminal offenses. This law abolished a similar prior law issued in 2003 by The Coalition Provisional Authority during the direct administration of Iraq by the United States-led occupation. Critics viewed the trial as a show trial that did not meet international standards on the right to a fair trial. Amnesty International stated that the trial was “unfair”⁴⁵.

While Iraqis will clearly play the leading role, “there’s lots of flexibility built into the statute the court can be as international as we want it to be,” says Ruth Wedgwood⁴⁶, a professor of international law at Johns Hopkins School of Advanced International Studies who favours the Iraqi court. The tribunal judges, investigative judges, and prosecutors should all be Iraqis, but the IGC can make exceptions. Judges and lawyers from outside Iraq will serve as observers and advisers “to provide assistance to the judges with respect to international law” and make sure the trial is conducted in accordance with “general due process of law standards,” the law states. Saddam Hussein or other suspects could have non-Iraqi lawyers, but their principal lawyers must be Iraqi. The law also states that judges must have a “high moral character, impartiality, and integrity” no former members of Saddam Hussein’s Baath Party will be considered.

This is a matter of debate. U.S. officials say that it will, and President Bush has said that Iraqis are “capable of conducting the trial themselves.” In addition, many experts say the tribunal conforms to international standards of justice. A key element of credibility is fairness, that is, whether the trial met standards of fairness defined by international human rights law and its own governing statute. Did the *Dujail* trial meet the minimum fair trial guarantees contained in Article 14⁴⁷ of the International Covenant on Civil and Political Rights² and enshrined in Article 19 of the Iraqi High Tribunal (IHT) statute? But some human rights groups have said the tribunal is flawed and that Iraqis lack the experience and know-how to run the court. Some critics suggest modelling the prosecution of Saddam Hussein on the U.N.-sponsored war crimes tribunal established in Sierra Leone after that country’s civil war. “Iraq has no experience with trials lasting more than a few days,” says Kenneth Roth, the executive director of Human Rights Watch⁴⁸. Supporters say that because Saddam’s greatest crimes were against

⁴⁴ Saddam’s Trial Was Unfair, The Law Library Of Congress, (accessed on: 5th May 2019).

⁴⁵ Id. at 36

⁴⁶ Sharon Otterman, Iraq: Saddam Hussein On Trial, Council On Foreign Relations, 2nd Feb. 2005, (Accessed On: 5th May 2019)

⁴⁷ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

⁴⁸ Peter Beaumont, Saddam's trial farce stumbles to climax, World News, The Guardian, (accessed on: 6th May 2019)

the Iraqi people, they should have a right to try him. The condemnation of Saddam's rule is something that Iraqis need to see at close range, not through a process distantly administered by members of the United Nations Security Council. Some international lawyers are concerned that the court will lack legitimacy because its judges will be selected by an Iraqi body hand-picked by the United States. Most Iraqis, particularly Kurds and Shiites victimized under the former regime, want to see justice served and crimes punished⁴⁹. Experts say the trial will provide some form of closure to a grim and gruesome chapter of Iraq's history. Others, however, warn that the trial could further inflame the pro-Saddam and ex- Baathist elements of the Sunni insurgency.

Unlike past war-crimes tribunals, legal experts expect a speedy trial and a swift death sentence. "It's going to be a pro-forma trial for public consumption," Bassiouni says⁵⁰. "Everyone's convinced he should be hanged high and dry, but they need to put on some sort of show." Another problem, Bassiouni points out, is most Iraqis still have little knowledge about the workings of the tribunal; he favours establishing a "public information campaign" or "Iraqi truth commission," not unlike South Africa's, "to teach generations of Iraqis about the horrors of the past." Human Rights Watch, which had criticized the Iraqi regime under Hussein, opposes the death penalty and has issued several previous reports critical of the Dujail trial. There was no immediate response from the Iraqi government to the latest report, which was released early Monday in Baghdad. Sunday's report⁵¹ concludes that the prosecution undermined several guarantees necessary to a fair trial under international law, including the right to an independent and impartial court, the presumption of innocence, the ability to prepare a defense and the right to cross-examine witnesses. Hussein and others are still being tried for genocide in the killings of up to 100,000 Kurds during the 1988 Anfal campaign against Kurdish rebels -a campaign that included the use of poison gas against Kurdish towns in northern Iraq⁵². The report accuses Iraqi leaders, including Prime Minister Nuri al-Maliki, of declaring Saddam guilty before the trial and said criticism of the original presiding judge in the case "created an enormous sense of pressure" on members of the Iraqi High Tribunal that heard the case⁵³.

VI. Conclusion

Since the US invasion of Iraq, by one widely reported estimate, as many as 655,000 Iraqis have been killed, in air strikes, by bombs, in death-squad executions and generalized civil strife⁵⁴. Now, add one by hanging: the kangaroo-court trial and execution of Saddam Hussein. In life, even in prison, he inspired many loyalists to fight for his legacy; but his death is certain to spark even fiercer violence, not just from his remaining lieutenants and senior Baath party officials but throughout the broader Sunni Arab community in Iraq. The hanging of Saddam Hussein ended the life of one of the most brutal tyrants in recent history and negated the fiction that he himself maintained even as the gallows loomed — that he remained president of Iraq despite being toppled by the United

⁴⁹ Hussein Trial 'Fundamentally Unfair', 20th Nov.2006, CNN.INTERNATIONAL.com, (accessed on: 7th May 2019)

⁵⁰Id. at 44

⁵¹Id. at 46

⁵²Saddam's Iraq and Support for Terrorism, Statement of Judith S. Yaphe to the National Commission on Terrorist Attacks Upon the United States, July 9, 2003.

⁵³ Lloyd Busch, Saddam's War Trial, Journal Of Theoretics, 24th April 2017, (Retrieved from: <https://owlcation.com/social-sciences/Saddams-Wars>).

⁵⁴ "Iraq: What Impact Will Hussein's Death Have?", RadioFreeEurope RadioLiberty(Available at: <https://www.rferl.org/a/1073744.html>).

States military and that his power and his palaces would be restored to him in time⁵⁵. In a statement shortly after the execution, President George W. Bush⁵⁶ said that while the execution wouldn't immediately end the sectarian violence already tearing apart Iraq, it would mark "an important milestone on Iraq's course to becoming a democracy that can govern, sustain and defend itself, and be an ally in the war on terror." Hussein's death was supposed to give birth to a new era in Iraq and the region. But the new era didn't last five minutes. A cluster of Shiites wildly celebrated beside Hussein's body, creating a sense of an undisciplined lynching rather than a clinical state-sponsored operation. Within hours, at least 75 people were killed in bombing attacks across the country, in what were likely Sunni retaliatory strikes targeting Shiites. The U.S. military, meanwhile, announced the deaths of six more U.S. troops, making that December the most violent month for U.S. service members in two years.

Billowing smoke now obscures the sunrise in towns across the Middle East 10 years after Hussein's execution, and 13 years after Bush's promise that "a free Iraq is going to be one that will have an amazingly positive effect on its neighbourhood."⁵⁷ The neighbourhood is now a charnel house. "The world will know that Saddam Hussein lived honestly, died honestly, and maintained his principles. He did not lie when he declared his trial null", said Saddam's lawyers in a statement⁵⁸. According to reports from an official, there was dancing and Shi'a chants around Saddam's body after the execution took place. Mahmoud Ahmadinejad, President of Iran said that⁵⁹ "The execution of Saddam has proven that trusting the United States is not convenient," referring to the Iran-Iraq War in 1980-88 during which, he alleged, Washington encouraged Saddam in going to war with Tehran but then ousted him from power in 2003 "when he wasn't useful anymore. Countries in the region should learn the lesson and, like Iran, should only trust the will of their people and not corrupt powers. Different countries have different reaction on Saddam's Execution. LONDON, England (CNN)⁶⁰ - While many countries and rights groups around the world said they did not support the death penalty, most expressed the hope that the execution of Saddam Hussein would prove a turning point for the people of Iraq. British Foreign Secretary Margaret Beckett⁶¹: "I welcome the fact that Saddam Hussein has been tried by an Iraqi court for at least some of the appalling crimes he committed against the Iraqi people. He has now been held to account. The British Government does not support the use of the death penalty, in Iraq or anywhere else ... We have made our position very clear to the Iraqi authorities, but we respect their decision as that of a sovereign nation."

For almost every Iraqi, the past 15 years have been full of unimaginable twists and turns. In the Saddam era Iraq was like a big prison⁶². There are still visible remnants of the destruction from 2003. Buildings collapsed by airstrikes are left unrepaired. But without the nearly constant threat of car bombs that existed for almost a decade, neighbourhoods have sprung up and thrived. Near the square in central Baghdad where Saddam's statue was

⁵⁵ Hussein executed with 'fear in his face', CNN.international.com (available at: www.cnn.com/2006/WORLD/meast/12/29/hussein/index.html)

⁵⁶ Id. at 51

⁵⁷ Hussein execution: World reaction, CNN.international.com (available at: <http://edition.cnn.com/2006/WORLD/meast/12/29/hussein.world.reaction/>)

⁵⁸ Bob Dreyfuss, The Consequences of killing Saddam, The Nation. 31st Dec.2006, (available at: <https://www.thenation.com/article/consequences-killing-saddam/>)

⁵⁹ Id. at 52

⁶⁰ CNN.international.com (available at: <http://edition.cnn.com/2006/WORLD/meast/12/29/hussein.world.reaction/>)

⁶¹ Id. at 52

⁶² Amann, Diane Marie, Saddam Hussein and the Impartiality Deficit in International Criminal Justice (September 24, 2005). (Available at SSRN: <https://ssrn.com/abstract=813249> or <http://dx.doi.org/10.2139/ssrn.813249>)

toppled in April 2003, Qatham Sherif al-Jabouri sits in his motorcycle repair shop and reflects on the role he played in Iraqi history⁶³. No one can know what would have happened to Iraq had Saddam stayed in power. With that question unanswerable, many Iraqis look back at the death and destruction of the past 15 years, and in a haze of nostalgia for the stability of dictatorship, believe they would have been better off with Saddam.

References

1. Primary Source:

➤ Codes and Statutes-

- *Iraq: Penal Code* (Iraq), No. 111 of 1969, July 1969, available at: <https://www.refworld.org/docid/452524304.html> (accessed 15 May 2019)
- National Legislative Bodies / National Authorities, Iraq: Statute of the Special Tribunal for Human Rights, 10 December 2003, available at: <https://www.refworld.org/docid/404c7d8c3.html> (accessed 16 May 2019)
- UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.refworld.org/docid/3ae6b3aa0.html> (accessed 16 May 2019)
- UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6

2. Secondary sources:

➤ Journals and Research Papers-

- “Other Inhumane Acts”, 30(4), Penn Law: Legal Scholarship Repository, 2014
- Eric H. Sunderman, The Conviction Of Saddam Hussein For The Crime Against Humanity Of
- Jane Arraf, 15 Years After U.S. Invasion, Some Iraqis Are Nostalgic For Saddam Hussein Era, 30th April 2018.
- Kevin M. Woods & Mark E. Stout, Saddam’s Perceptions and Misperceptions: The Case of ‘Desert Storm’, 33(1), The Journal of Strategic Studies, 2010
- Lee Kuan Yew, “The United States, Iraq, and the War on Terror”, Foreign Affairs, 2007
- Lisa Blaydes, Compliance And Resistance In Iraq Under Saddam Hussein: Evidence From The Files Of The Ba`Th Party, Department of Political Science, Stanford University, 2015
- Miranda Sissons, Ari S. Bassin, Was the *Dujail* Trial Fair?, *Journal of International Criminal Justice*, 5(2), May 2007, pp.272–286, (available at: <https://doi.org/10.1093/jicj/mqm014>)
- Nita M. Renfrew, “Saddam Hussein”, Chelsea House Publishers, New York.
- Sharon Otterman, Iraq: Saddam Hussein On Trial, Council On Foreign Relations, 2nd Feb. 2005

⁶³Jane Arraf, 15 Years After U.S. Invasion, Some Iraqis Are Nostalgic For Saddam Hussein Era, 30th April 2018, (available at: <https://www.npr.org/sections/parallels/2018/04/30/605240844/15->)

- Williamson Murray, Elizabeth A. Nathan, Laila Sabara, Ana M. Venegas, “Project 1946: Phase II”, IDA Document, 2010

3. Other Sources:

➤ Websites and News Material-

- “Iraq: What Impact Will Hussein's Death Have?” RadioFreeEurope RadioLiberty (Available at: <https://www.rferl.org/a/1073744.html>)
- Geography, Embassy of the republic of Iraq, Public Relations Office, (available at: <http://www.iraqiembassy.us/page/geography>)
- Hussein executed with ‘fear in his face’, CNN.international.com (available at: www.cnn.com/2006/WORLD/meast/12/29/hussein/index.html)
- Hussein Trial, “Fundamentally Unfair”, Posted : 20th Nov.2006, CNNinternational.com, (available at: <http://edition.cnn.com/2006/WORLD/meast/11/20/saddam.trial.unfair/index.html>)
- Iraq: The Trial of Saddam Hussein, casebook, House of Common Library, (available at: <https://casebook.icrc.org/case-study/iraq-trial-saddam-hussein>)
- Life Under Saddam Hussein: Past Repression and Atrocities by Saddam Hussein’s Regime, Fact Sheet, U.S. Department of State, 2003(available at: <https://2001-2009.state.gov/p/nea/rls/19675.html>)
- Lionel Beheener, Iraq’s Post Insurgency, Council on foreign Relations, 2006 (available at : <https://www.cfr.org/background/iraqs-post-saddam-insurgency>)
- N. Bhuta, ‘Fatal Errors: The Trial and Appeal Judgments in the Dujail Case’, *Journal of International Criminal Justice*, 2008, Vol. 6, pp. 39-65
- Praful Bidwai, Saddam Hanging Boosts Case for International Criminal Court, 2007, (available at: <https://www.tni.org/en/article/saddam-hanging-boosts-case-for-international-criminal-court>)
- Saddam Hussein Trial Fast Facts, CNN Business, 2019, (available at: <https://edition.cnn.com/2013/10/30/world/meast/saddam-hussein-trial-fast-facts/index.html>)
- Saddam Hussein, Trial International, 2016, (available at: <https://trialinternational.org/latest-post/saddam-hussein/>)
- Saddam’s Iraq and Support for Terrorism, Statement of Judith S. Yaphe to the National Commission on Terrorist Attacks Upon the United States, July 9, 2003
- Sonya Sceats, The Trial Of Saddam Hussein, International Law, Chatham House (The Royal Institute of International Affairs), October 2005,(available at : <https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/>)
- The Public Prosecutor in the High Iraqi Court et al. v. Saddam Hussein Al Majeed et al., International Criminal Database, (available at: <http://www.internationalcrimesdatabase.org/Case/187/Al-Dujail/>)