

Why Saddam Hussein Must Appear Before an Internationalised Tribunal

Replies and Comments:

Kate Greenwood LL.M.

For comments:
kate.greenwood@ruhr-uni-bochum.de

On the web

<http://www.ifhv.de/>

Focus

Statute of the Iraqi Special Tribunal

16 December 2003

Available at:

http://www.cpa-iraq.org/audio/20031210_Dec10_Special_Tribunal.htm

Statute of the Special Court for Sierra Leone

16 January 2002

see articles 12 and 18 for the qualifications of judges and a simple majority required for decisions.

see article 16(4) for the provision for a Victims and Witnesses Unit.

Available at: [http://](http://www.specialcourt.org/documents/Statute.html)

www.specialcourt.org/documents/Statute.html

Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea:

Phnom Penh, 6 June, 2003.

See articles 3 and 4 for the qualified majority required for decisions.

Available at: [http://](http://www.cambodia.gov.kh/krt/pdfs/Agreement%20between%20UN%20and%20RGC.pdf)

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It is ironic that at a time when the world's most complex war crimes trial is underway in the Hague that a country with no experience of due process or fairness in over 30 years will suddenly take on the criminal trial of the century. The prospect of trying Saddam Hussein would make any well-established criminal justice system pause for thought. The case has many features that challenge justice and fairness to the accused: a notorious or much-hated defendant, large volumes of evidence, criminal acts of exceptional cruelty, an overwhelming number of charges, reliance on circumstantial evidence and decades-old crime scenes, and the need for protective measures for vulnerable witnesses.

Justice demands that there is proper accountability for some of the most appalling crimes of the 20th century. Added to the existing complexity of trying Hussein is the complex question of who should try him. The international character of his crimes gives the international community a strong interest in trying him and the devastation he has wrought on his own country means that the new authorities wish to re-assert Iraqi rule of law over the perpetrators of the Ba'athist regime. How should these demands be reconciled and how can procedural fairness be achieved so that the rule of law supplants the legacy of decades of the rule of the gun?

The international community has been tackling these issues with increasing sophistication over the last ten years, the judicial models include the ad hoc tribunals established by the Security Council, the International Criminal Court, the mixed-tribunals of Sierra Leone and Cambodia, and Truth and Reconciliation Commissions built from the South African model.

The drafting of the statute of the Iraqi Special Tribunal reflects many of the lessons learned, sensibly adopting provisions from the Rome Statute and the statutes and jurisprudence of the ad hoc and hybrid tribunals. Oddly, it fails to adopt some of the most important features of those UN tribunals. There are enormous numbers of victims of sexual assaults, torture and other atrocities yet there is no mention of a specialised victim and witnesses unit. Plus a fair trial for Saddam Hussein requires that he is able to call defence witnesses. Those witnesses must be able to travel to Iraq and give evidence without being too intimidated to participate in the trial. Special provision needs to be made for victim witnesses and sensitive witnesses.

Much fairness resides in the expertise and experience of the judges, the lawyers, and the court registry. The balance between the interests of the national authorities to run their own courts and the interests of the international community to try the accused and to ensure international standards of justice has been struck in the hybrid courts of Sierra Leone and of Cambodia. Both tribunals have a mix of national and international judges, the majorities being set to ensure that all decisions meet national and international standards. The proposed solution for Iraq, of an all Iraqi bench advised by international experts, contains no such guarantee and leads to the omission of a provision that the judges should act independently and shall not seek or receive instructions from any other source.

Much fairness also resides in the implementation of rules of procedure and evidence. The proposed method of drafting by the President of the Tribunal and adoption by a simple majority of the judges is a recipe for constant amendment and lacks the mechanisms used by the ICC, or those of the ICTY and ICTR. The Special Court of Sierra Leone chose to adopt the rules of procedure of the ICTR, thereby also profiting from a decade's worth of practice from the two ad hoc tribunals.

An internationalised Iraq court could improve on the previous models of international tribunals. Provisions for contempt of court have been missing from the statutes of earlier UN tribunals and should be included. Unlike the circumstances of the ICTY and the ICTR, an ad hoc or internationalised tribunal can be located in Iraq. An international procedure and practice modified for Islamic procedure could be a lasting contribution from Iraq to international justice. News of a reconsideration of the appropriate mechanism to try Saddam Hussein in the new year at a meeting between the UN, the US coalition, and the Iraqi governing council is welcomed.

Responsibility

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