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Focus

Article 146 of GCIV

“Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.”

Article 5(2) of the Convention Against Torture

“Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in Paragraph 1 of this article“

Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity
3 December 1973

“1. War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.”

Looking for Saddam Hussein

The clearest duty of a State to look for Saddam Hussein is encapsulated in the grave breaches provisions of the 1949 Geneva Conventions which provides that States are compelled to “search for persons alleged to have committed, or to have ordered to be committed, such grave breaches”. Undoubtedly, Saddam Hussein committed and/or instigated such breaches in all three gulf wars (Iran-Iraq 1980-1988, Kuwait 1991, Gulf 2003).

The wording of article 146 of Geneva Convention IV is not limited to the strict territory of the high contracting party. This means that, if Saddam Hussein is in Iraq, the US, being a High Contracting Party to the Geneva Conventions exercising exclusive jurisdiction over territory that it occupies, is obliged to search for him and to bring him before a court that will provide him with a fair trial.

If the former President of Iraq is present on the soil of another State, then it is the obligation of this State to search for him and haul him into a domestic court.

According to the Pictet Commentary, an *active* duty to search for so-called “war criminals” is imposed upon States. There is no doubt that the US is looking for Saddam Hussein, yet this could be different if he were in Syria or any other country protecting him. In the first place, these States could claim that he is not present on their territory but the commentary specifically requires forces involved in the arrest of such perpetrators to act spontaneously, without being called upon by another State. If a State were to fail to fulfil such obligation, then it could be held internationally responsible for violating the provisions of the Geneva Conventions.

Other conventions such as the Convention on the Prevention and Punishment of the Crime of Genocide do not provide an obligation to search for law-breaking individuals.

Regarding crimes against humanity, one of the main problems resides in the lack of a convention and clear-cut jurisprudence in this field. Reference can however be made to the 1973 General Assembly Resolution, a soft-law document, on international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity which provides that perpetrators of such crimes shall be traced, arrested and punished if found guilty. Yet the duty to search for perpetrators of crimes against humanity is not yet accepted by the international community.

The Convention Against Torture, on the other hand, requests States to “take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction”. Clearly, both the US and the country where Saddam Hussein might be hiding are under the duty to establish jurisdiction over torture crimes. It is submitted that the notion of “jurisdiction” entails more than mere prosecution. Jurisdiction is understood as covering not only prosecution but also the investigation of the case as well as the arrest of the alleged offender. In addition, in some countries it is simply not possible to prosecute a person *in absentia*, i.e. the alleged offender needs to be present at the trial and this clearly requires a national duty to search for the him/her.

Consequently any State where Saddam is currently residing is obliged to search for him because he has not only committed grave breaches of the Geneva Conventions but he has also acted in contravention of the Convention Against Torture.

Responsibility

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