LAW *network*

Venues for prosecuting Saddam Hussein: The legal framework

DIANE F. ORENTLICHER

THE capture of Saddam Hussein on December 14, 2003, has prompted wide-ranging debate about where and how he should be tried. While In fact, potential venues for prosecution range across a broad spectrum, it seems likely that Hussein will be tried before a court in Iraq operating with some form of international assistance.

Before International Criminal Court (ICC)

Prosecutions before the year old International Criminal Court (ICC) in The ague are unlikely for two reasons. First, the Court has jurisdiction only with espect to crimes committed after July 1, 2002, the date that its statute entered into force. The vast majority of charges likely to be pressed against Hussein involve crimes committed before then.

Second, the Court could exercise jurisdiction over crimes committed by Hussein in Iraq only with the consent of Iraq or as a result of a referral by the UN Security Council acting under Chapter VII of the UN Charter and neither prospect is likely. Under the State consent regime of the Rome Statute of the International Criminal Court (Rome Statute), which applies in the absence of a Security Council referral, the requisite consent must be provided by either the State where the crimes in question occurred (the territorial State) or the State of nationality of the alleged perpetrator.

In respect of crimes allegedly committed by Hussein in Iraq, Iraq is of course both the territorial State and the State of nationality of the alleged perpetrator. States can provide consent to ICC jurisdiction either by adhering to the Rome Statute or by lodging a declaration accepting the Court's exercise of jurisdiction with respect to the crime in question. Iraq is not a party to the Rome Statute and, in light of the incumbent US administration's opposition to the ICC, ad hoc consent during a US-led occupation is inconceivable. Further, because most Iraqis would like to prosecute Saddam Hussein in domestic courts, Iraqi consent to ICC jurisdiction would be unlikely even if other barriers to ICC jurisdiction could be surmounted. Finally, US opposition to the ICC would also preclude Security Council referral, since the US would surely veto any such attempt.

An ad hoc international court

In principle, the UN Security Council could establish an ad hoc tribunal with urisdiction over crimes committed by the Ba'ath regime. But after a decade f lengthy and costly trials before two other courts created by the Security Council in the exercise of its powers under Chapter VII of the UN Charter - the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda - there appears to be little appetite within the Council for the creation of a third ad hoc tribunal. The United States, whose support for such action would be essential, has taken the position that Iraqi courts can and should take the lead in prosecuting Hussein-era crimes.

Hybrid courts

A more plausible option is the creation of a hybrid court. Hybrid courts, which now operate in Kosovo, East Timor and Sierra Leone, enforce a combination of domestic and international criminal law and comprise both local and international judges, prosecutors and administrative staff. The courts in East Timor and Kosovo were established by United Nations administering authorities, while the Special Court for Sierra Leone (SCSL) was established by a treaty between the United Nations and the government of Sierra Leone. Negotiations leading to conclusion of the UN-Sierra Leone treaty were undertaken pursuant to a mandate by the UN Security Council.

Based in Freetown, Sierra Leone, the SCSL has been operatingsince 2002. A majority of its judges and its Chief Prosecutor and Registrar were appointed by the UN Secretary-General.

The United Nations has agreed to participate in a hybrid court in Cambodia as well. While the SCSL operates outside the regular court system of Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia will form part of the Cambodian judiciary. At the insistence of the Cambodian government, a majority of judges and the most senior officers of the Extraordinary Chambers will be Cambodian nationals. To address UN concerns about the impartiality of the Cambodian judiciary, a super-majority of judges must approve any verdict.

As the contrasting details of the SCSL and the proposed Cambodian court suggest, there is no single model for a hybrid court. Each has been tailor-made to address the unique imperatives of the country or region in which they operate.

Many non-Iraqis support the creation of a hybrid court for Iraq. But the Iraqi Governing Council's desire to retain the death penalty presents a significant impediment to the creation of such a hybrid court operating with UN support. Neither the United Nations nor most of the United States' European allies would participate in a court that could impose capital punishment.

Another model of hybrid court favoured by some Iraqi and other jurists is a special Iraqi tribunal with jurisdiction over crimes under international law in which qualified jurists from other Arab states would participate alongside Iraqi judges.

Domestic trials

The option favoured by members of Iraq's Governing Council and by the United States government is trial before reconstituted Iraqi courts, purged of judges loyal to Saddam Hussein. One potential venue for prosecution of Hussein is the "Iraqi Special Tribunal for Crimes Against Humanity," whose statute was adopted by the Iraqi Governing Council on December 10, 2003. The statute confers jurisdiction over Iraqi nationals and residents accused of specified crimes committed between July 16, 1968 and May 1, 2003.

Pursuant to this statute, the Iraqi tribunal's subject matter jurisdiction would comprise a blend of domestic and international crimes. The latter include the international crimes of genocide, crimes against humanity and war crimes, while the former include the following offenses under Iraqi penal law:

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.16

As adopted on December 10, 2003, the statute for the Iraq tribunal makes only limited provision for international participation. Article 28 provides: "The judges, investigative judges, prosecutors and the Director of the Administration Department shall be Iraqi nationals." But in an apparent concession to foreign concerns, Article 4(d) provides: "The Governing Council, if it deems necessary, can appoint non-Iraqi judges who have experience in the crimes encompassed in this statute, and who shall be persons of high moral character, impartiality and integrity. "Other provisions require the appointment of non-Iraqi nationals "to act in advisory capacities or as observers."

Some commentators have raised concerns about whether the Iraqi Governing Council, whose members were appointed by the Coalition Provisional Authority (CPA), may lawfully create such a court. Their concerns apparently derive from provisions of the Geneva Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War restricting permissible changes to the penal law of occupied territories by Occupying Powers.

The Geneva Convention (No. III) Relative to the Treatment of Prisoners of War may also have implications for how Saddam Hussein, who remains in US custody, may be tried. As the government official who was ultimately in control, commander in chief of the deposed regime's armed forces, Hussein is entitled to prisoner-of-war status. As a prisoner of war, he can be tried by the Detaining Power-in this case the United States- "only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war."

Moreover, "[i]n no circumstances whatsoever shall a prisoner of war be tried by a court of any kind which does not offer . . . essential guarantees of independence and impartiality."

Since these provisions are designed to ensure that prisoners of war receive specified protections if they are tried by a Detaining Power, it is not clear whether or under what circumstances US authorities could surrender Hussein for prosecution by Iraqi courts without circumventing its own obligations under the Third Geneva Convention.

Trials by third states

The governments of both Iran and Kuwait have indicated that they may bring charges against Hussein for crimes committed against their nationals by Iraqi armed forces. It is also conceivable that Iraqi officials other than Hussein may be prosecuted in third states exercising universal jurisdiction. In November 2002, Danish authorities placed an Iraqi defector, General Nizar al-Khazraji, under house arrest in connection with accusations relating to Iraq's use of poison gas against Kurds in northern Iraq in 1988. Al-Khazraji disappeared from his home in Soroe, Denmark on March 17, 2003 and reportedly fled to the United Arab Emirates.

Trials by the United States

The United States could bring charges against Hussein in relation to alleged war crimes committed against members of the US armed forces during the 1991 Persian Gulf War and the current conflict in Iraq. In April 2003, US officials stated that they were investigating possible war crimes committed against American soldiers during the current conflict for possible prosecution. Following the capture of Hussein, a senior State Department official said that the United States "reserves the right" to try Hussein for crimes Against US citizens.

Concluding remarks

At this writing, the question of where and how Saddam Hussein will be prosecuted remains in play. Although the US government has repeatedly expressed support for prosecution of Ba'ath-era crimes in Iraqi courts, the Bush administration has not yet endorsed the Governing Council's desire to prosecute Hussein before the Special Iraqi Tribunal. Human rights organisatins have pressed the Governing Council to consider amending the Statute of the Special Iraqi Tribunal to provide for greater international participation-effectively transforming the tribunal into a hybrid court-and to ensure greater protection for the rights of defendants. As noted, however, Iraqi insistence on retaining the death penalty would foreclose participation in a hybrid court by many other countries and by the United Nations.

Diane F. Orentlicher is Professor of International Law and faculty director of the War Crimes Research Office at American University in Washington, D.C.

LAW *opinion*

Struggling against impunity to protect human rights

JUSTICE K.M. HASAN

IMPUNITY, in the human rights context, means lack of accountability for human rights violations committed, or condoned, by different agents of the state.

Impunity, in any form, is a violation of human rights, as well as a direct threat to the rule of law which is the necessary basis for democracy. A state has the obligation to both respect and promote human rights. But impunity encourages human rights violations and thus it is a violation of the state obligations. Such state obligations are made specific provisions of the Constitution of many countries of the world.

The Bangladesh Constitution guarantees right to life, property, equality before law, food and security as fundamental rights. Article 11 of the Constitution is explicit in declaring that the state shall be a democracy, in which fundamental human rights and freedom and respect for the dignity and worth of human person shall be guaranteed. In this connection Article 15 (provision for basic necessities) Article 19 (1) (equality of opportunity), Article 20 (work as a right and duty), Article 27 (equality before law), Article 28 (1) (no discrimination), Article 41 (freedom of religion) and article 42 (right to property) deserve to be mentioned.

The aforementioned constitutional provisions and obligations, no doubt, put the light on the state and its Constitution. But lets not forgot that human rights are also vested in individuals. They are inherent in a human person by dint of his or her being born human. Therefore, these rights are not derived only from the benevolent acquiescence of state but they also stem from a higher natural legal order.

In spite of these the brutality or frequency of criminal activity and the impunity have not abated. Our law provided protection. But there are allegations that these are flouted and more often than not they are misused and arbitrary arrests are made. This is what lends legitimacy to our concern and to our protest when they are violated. Our introspection needs to be directed at to what extent we have been able to promote these rights in our society, to what extent the state has been able to protect the rights of every citizen, specially the more vulnerable groups, and to what extent we have been able to build institutional mechanism to redress the violation of the rights of an individual.

The denial of human rights and fundamental freedom not only is an individual and personal tragedy, but also creates conditions of social and political unrest, sowing the seeds of violence and conflict. Resulting breakdown in rule of law or a partisan application of laws may be attributed to the followings:

Like most of the third world developing countries, politics has often resulted in a deprivation of citizens' human rights and violation of constitutional privileges in our country. The raising incidents of violence speaks of a culture of violence and intolerance being created and nurtured in the society more often than not by the nature of our national politics. Unfortunately, politics in our country is increasingly acquiring a non democratic and aggressive force, with violence becoming endemic.

The transitional nature of political and economic development of Bangladesh can be ascribed as one of the reasons of the lapses in observances of constitutional and human rights. Though parliament is meant to represent plural interest, Bangladesh politics being confrontational and inimical to reform, it has become less effective than it is supposed to be. Little or no debate on important legislation or other matters of national concern take place in the parliament. As a result, the overburdened court has become one of the main institutional through which channels have been kept open for a meaningful communication with the deprived citizens.

Corruption in all spheres of life go unpunished and the country and its citizens pay a heavy price through increased cost and impaired development.

Powerful economic interests are at play in Bangladesh which are beginning to demand a price at the expense of the citizens rights and to participate in decision making that effect their lives.

More unfortunate is the size of black money i.e. ill gotten money in the hands of few who are increasingly undermining the efforts and works of some of the agencies including the law enforcing agencies.

When systemic corruption grips the country, it creates a complementary chain that perpetuates a vicious circle of malpractice. To reverse the drift that allows in human wrongs becoming a natural feature of our culture, drastic actions to assure all, that no person is above the law are necessary. Every person should have recourse to protection under the law, to equal protection against discrimination of his or her fundamental human rights and justice in seeking juridical remedies under the law. But this has not yet been attained and the evil impunity persists.

Though the primary responsibility to ensure and protect human rights rests with the government but it is increasingly accepted that a broader range of actors, such as the judiciary should assume responsibility to ensure that complicity in human rights violation is avoided. But to do so, acts of corruption and their impunity need to be brought into notice of the court. Because of ignorance of law, the economic condition of the ordinary people, and fear of reprisal in many cases, victims do not take resort to court and offense go unpunished. Towards this end, no doubt, the national courts are given primary jurisdiction. But it is not so easy for the overburdened court to keep track of all corrupt practices and take suo moto notice though there are instances, very few in number, where notices have been taken because of media report and approach by NGOs.

The courts in the recent past are forced, more and more with the task of affirming the constitutional principal of people's rights as citizens have challenged constitutional violations by the executive through judicial intervention. But success of any judicial system remains dependent on the promulgation, interpretation, application and enforcement of the law. Put tersely the inability of rule of law rests largely on the non availability of these legal processes. In fact, the reasons for slow judicial progress have been the inadequacy of the legal system. There is a need for new process to deal with gross violations.

Not only that judiciary shall have to have higher standards in themselves for which more exposure to other systems, more education in human rights and their violation, more training and more awareness and motivation of judges are necessary along with necessary facilities which the courts lack extremely.

The availability under law of various accountability mechanism for bringing alleged perpetrators to justice is a must for the success of the court in its fight against the impunity of human rights violations. Prescription for justice should be the overriding guidelines for and considerations of law and policy.

In the event that fundamental human rights of a person are violated, there remains the overarching right to justice. Conditions that tolerate impunity are personal, they centre on the victim and demonstrate the powerless side of victimization and helpless feeling of ever obtaining justice. These may be lessened to a certain extent by ensuring rehabilitation, restitution of the victims and compensation by making effective provisions in the law.

In deserving cases extra-penal methods may also be adopted. Serious efforts must be made to mitigate the pain and emotional suffering of victims and their families by taking measures that address the psychological aspects of human rights violations and the inability to return to the human situation before the violations were perpetrated.

Let us join

The struggle against impunity is an essential part of the struggle for human rights. There will always be overwhelming array of obstacles to the efforts, but time alone will tell whether Bangladesh is making the right choice about priorities and tactics in response to those obstacles.

Justice K.M. Hasan, the Chief Justice of Bangladesh, presented this paper in a discussion meeting on impunity organised by Odhikar, a human rights organisation.