

LAW opinion

Trial of Saddam Hussein: A host of complex issues involved

BARRISTER HARUN UR RASHID

THE US-picked interim Iraqi government came into existence on 28th June and the first action of the interim government within two days was to obtain the "legal custody" and not "physical custody" of the former Iraqi ruler Saddam Hussein (67) and his top lieutenants. Saddam Hussein continues to remain in the custody of the American troops.

On 1st July, former Iraqi ruler Saddam Hussein appeared before an unidentified judge of the Special Iraqi Tribunal at a secret location within a maximum-security complex to hear the outline of charges against him described by a government official as genocide, crimes against humanity and war crimes.

It is reported that Saddam Hussein was slimmer than before and arrived at the Tribunal in an armoured military bus that was escorted by four US military cars (Humvees). The last vehicle in the convoy was an ambulance.

It is reported that the specific charges against Saddam Hussein, among others are:

- Iraq's war and related crimes with Iran during 1980-88
- The use of chemical weapons in 1988 killing about 5,000 civilians including women and children
- Iraq's invasion of Kuwait in 1990
- Crimes related to the suppression of a Shi'ite uprising in 1991 in southern Iraq

At the Tribunal, Saddam Hussein was defiant and demonstrated his old fiery spirit. Insisting that he was still the President of Iraq, he questioned the jurisdiction of the Tribunal. He reportedly said: "This is all theatre. The real villain is Bush".

Reports indicate that his defiance was a surprise to the interim government and it may not bolster the standing of the interim government in the eyes of many Iraqi people. It is reported that 41% of Iraqis (mostly Sunnis) wanted him released. The poll seems to unnerve the interim government and the Bush administration. It appears that the "show" may not go the way the interim government and the US want.

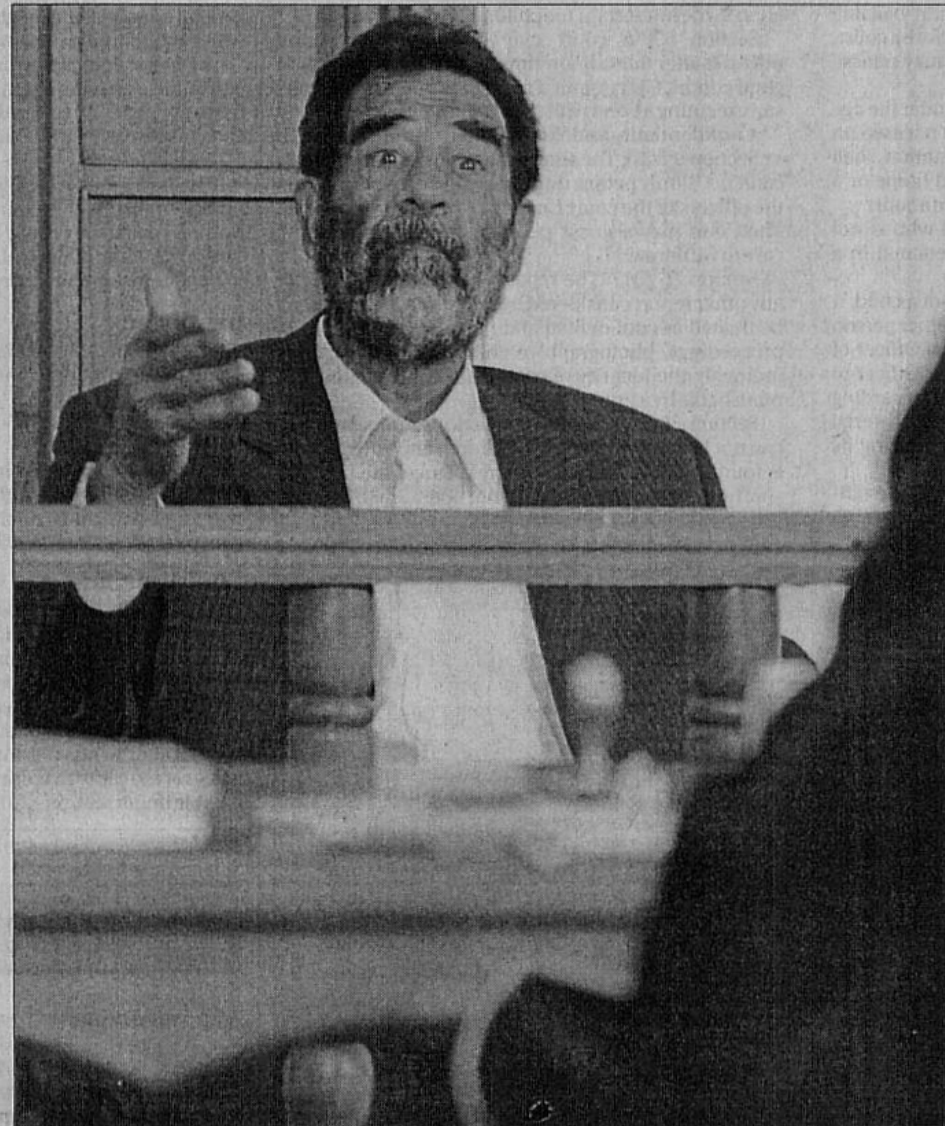
Trial of Saddam Hussein

The trial of Saddam Hussein will be the "mother of all trials" from legal points of view. There are host of issues that need to be considered. Many are legal and some are quasi-political. Below are some of the issues that are likely to come up during the trial that may possibly take place in the next year.

Why the charges are being laid out against Saddam Hussein at this point of time by the interim government?

For the interim government of Iraq, the first priority is security and not to outline the charges against Saddam Hussein. However there is a speculation that the interim government at the instance of the Bush administration wants to put Saddam Hussein in the picture across the world. This is because the Iraqi war was launched on the plea of the existence of banned weapons of mass destruction and there were no weapons of mass destruction in Iraq. So captured Saddam Hussein appears to get all the attention to divert people from the publicly stated reasons for war in Iraq.

The Bush administration wants that the war, without the approval of the UN, to be justified by highlighting that Saddam Hussein has been deposed and a trial has begun of an 'evil' dictator. This seems to be taking place, entirely to shore up the decline of popularity of President Bush among the Americans who are increasingly at unease and unhappy with the Iraqi war. More importantly the appearance of Saddam Hussein before the Iraqi Special Tribunal was timed in such a way that it coincided with morning TV news shows in America, so that all Americans can



watch the "show" and credit President Bush for the war, although the war caused death of 860 American lives and 11,000 Iraqis, let alone thousands wounded.

Legitimacy of the Iraqi war

The first legal issue appears to be the legality of the Iraqi war by the US-Britain. All wars are banned under the UN Charter except (a) for defensive purposes or (b) have been authorized by the UN Security Council under Chapter VII of the Charter. Until this date, two wars were approved by the Security Council: one in 1950 against North Korea for invasion of South Korea and the other against Iraq in 1990 for invading Kuwait. In view of the clear provisions of the UN Charter, it may be argued very strongly that the Iraqi war is illegal, unlawful and contrary to the UN Charter and international law.

Furthermore, the reason for invading Iraq was ostensibly to destroy the banned weapons of mass destruction and for breaches of the Security Council resolutions. At the time the neither the US nor Britain canvassed that the war was launched to remove the dictator Saddam Hussein for his brutalities in the country, otherwise known for humanitarian considerations. Virtually every reason President Bush and Prime Minister Blair gave for going to war has been discredited.

If the above argument is pursued, then it is contended that the overthrow of the Iraqi leader is illegal. No country has a right to invade a country because it does not like the regime. If it is held, it is a re-introduction of jungle law at the 21st century. There are many countries in which the leaders are

conducting themselves as despots and logic follows that they too should be overthrown. The US wants a regime change in Cuba for the last 46 years but it has not attacked the communist country. Only sanctions have been imposed by the US on Cuba. One should not be selective in waging a war to remove a dictator.

Legitimacy of the Iraqi interim government

The interim-government of Iraq is not representative of the Iraqi people. They have not been elected by the people of Iraq. They are chosen by the US authority. The legality of the interim government is on serious doubt. Both the interim President and the Prime Minister have been in exile for a long time and very close to the American and British intelligence agencies.

One may argue that the interim government has no legal standing to put on process the trial of Saddam Hussein. Only the constitutionally-elected Iraqi government is competent to put on trial Saddam Hussein. The UN resolution 1546 of 8th June envisaged that the constitutionally elected government would be in place by 31 December, 2005. Prior to that a permanent constitution for the country was to be adopted.

Judicial independence of the Special Iraqi Tribunal is in question

The charges against Saddam Hussein are very serious and all of them are crimes under international law. Genocide, crimes against humanity and war crimes are not confined to national laws.

In the past, it has been seen that persons charged with such heinous crimes are tried by

international criminal courts. Former Yugoslav's President Milosevic is being tried by an ad-hoc international criminal court in The Hague. For Rwandan genocide in 1994, an ad-hoc international criminal tribunal in Tanzania has been set up and the accused persons are being tried by that tribunal. Following the Second World War, the German and Japanese military and civilian leaders were put on trial by the victors of the war (US, Britain and former Soviet Union) before international criminal tribunals at Nuremberg and Tokyo.

Many international law experts hold the view that Saddam Hussein should be put on trial at the existing International Criminal Court at The Hague that came into existence on 1st July, 2002, or before an international tribunal because both the US and Iraq are not parties to the International Criminal Court. Some say that at least, a mixed tribunal, consisting of independent foreign and Iraqi judges, should hear the Saddam Hussein's case. This procedure is being followed in Sierra Leone for trial of military and civil leaders accused of genocide, crimes against humanity and war crimes.

Another reason for an international tribunal is that one of the charges against Saddam Hussein is launching wars against Iran and Kuwait. Therefore Iran and Kuwait must present their side of story to a trial. This can only occur at an international criminal tribunal and not at the Iraqi Special Criminal Tribunal.

The Special Iraqi Tribunal is being questioned for its judicial independence. Many believe that it is difficult for most Iraqi judges to be impartial to the case because most of the Iraqis including the judges are affected directly or indirectly by the brutal activities of the former dictator. Furthermore, the independence of judiciary in Iraq under Saddam Hussein disappeared totally. For the last three decades, Iraqi judges were told by the government what they should do in matters before them and consequently a culture of subservience to government dictates has developed among the judiciary in Iraq. The culture does not suddenly disappear from the Iraqi judiciary.

In the light of the situation, many law experts doubt whether the members of the Iraqi Special Tribunal are independent and impartial enough to hear the Saddam Hussein's case and do justice to him. There is a maxim that "justice must not only be done but seen to be done". The spirit of the dictum appears to be absent if the trial is held by the Iraqi Special Tribunal. It is reported that Saddam Hussein's French lawyer Emmanuel Ludot (one of a 20-strong team appointed by Saddam Hussein's wife) told France Info radio that any judge sitting in the Iraqi Special Tribunal would be under immense pressure to find Saddam Hussein guilty. It is reported that the request for foreign lawyers has yet to be granted by the interim Iraqi government.

New Iraq and the rule of law

Iraq has been paraded as the "New Iraq". If this is the case, it means rule of law is to be adhered strictly by all organs of the state. The new Iraq should not follow the arbitrary path of the former dictator, although there is a temptation for it. The trial must not be seen as a vengeance or settling old scores with Saddam Hussein for his brutalities.

Criminal trial is a judicial process where all rules of fairness and impartiality are to be scrupulously observed. It is in the interest of new Iraq that the trial of Saddam Hussein should not be perceived as one by a "kangaroo court". The world must acknowledge that a fair trial has occurred for the dictator and that will enhance the standing of the new Iraq. Both the interim government and its mentor, the Bush administration, may ensure that the trial of the century may be conducted in a fair and impartial manner and must provide Saddam Hussein all the rights including the choice of his lawyers, even from foreign countries, to appear at the criminal trial.

It is alarming that the interim-government is proposing to re-introduce death penalty. Whether or not death penalty in Iraq should be re-introduced should be left to the constitutionally elected Iraqi Parliament and government. Many argue that it is not the business of the interim-government to re-introduce death penalty. Under the UN resolution, the principal purpose of the interim government is to hold a direct democratic election to a Transitional National Assembly by 31 December 2004 and to draft a permanent constitution for the country.

Even British leaders are not comfortable with the re-introduction of death penalty in Iraq. (Death penalty is abolished in all the countries of the European Union). May European leaders believe that the new Iraq should follow the provisions of the 1950 European Convention on Human Rights and Fundamental Freedoms.

Proof of Chain of Command

At the trial, it must be shown that Saddam Hussein personally gave the orders of commission of genocide, crimes against humanity and war crimes. It must be convincingly proved that local commanders committed the atrocities under the orders of the Iraqi leader. Often it is difficult to pin down by documentary evidence the chain of command for such orders to the top. Enough evidence must be gathered, collated and examined so as to prove that the order for such heinous crimes emanated right from the top. It must be proved beyond reasonable doubt that Saddam in fact was either responsible for or knew of the commission of the atrocities including mass murders by chemical weapons.

Who supplied the weapons of mass destruction to Iraq?

It is a common knowledge that Iraq did not produce weapons of mass destruction on its own. It acquired from foreign countries. Many European companies including US companies (with the approval of their governments) have provided the weapons of mass destruction to Iraq at the time of Iraq-Iran war (1980-88). The Western countries did not approve the Islamic revolution in Iran in 1979 because their "puppet" ruler Shah of Iran was deposed and Islamic Iran did not "dance" on the wishes of the Western powers.

Iraq was perceived as a counter-weight by the West to Iran in the Middle East and Saddam Hussein was the man they did business with. Many believe that weapons of mass destruction were supplied to Iraq with the knowledge that they would be used by Saddam Hussein against his enemies.

When chemical weapons were used against Iraqi Kurds in Halabja in March 1988 and against Iranian troops, there were no protests from the Western countries. In February, 1989, 11 months after Halabja massacre, the US Assistant Secretary of State (John Kelly) reportedly flew to Baghdad to tell Saddam Hussein that "You are a source for moderation in the region and the US wants to broaden her relationship with Iraq." (The Australian, July 22, 2002).

The visit was interpreted as condoning the use of chemical weapons by Saddam Hussein. Furthermore, it is reported that the present Defence Secretary Donald Rumsfeld met Saddam Hussein in 1983 as a special envoy and sought cooperation from him on Israeli-Palestinian conflict. After 20 years, the same Rumsfeld is now believed to be one of the principal architects of Iraqi war, overthrowing Saddam Hussein.

It may be argued that the Western countries including the US are vicariously responsible for the commission of brutalities in Iraq and those responsible must be held to account. If a person gives a knife to another, knowing that the person will kill an individual, both are responsible for the crime of murder. The same logic applies in the case of Saddam Hussein and the providers of weapons of mass destruction.

Use of Chemical weapons in Vietnam and Iraq

Iraq's Saddam Hussein is not the only person to use chemical weapons. During the Vietnam war in the 70s, the US used it against Vietnamese. Even today in Vietnam, many suffer from the devastating effects of chemical weapons. Hardly any US military or civil leader has been put on trial. Why? Simply because strong powers make up all the rules and impose them on other countries.

American reporter and columnist, Christopher Hitchens in his book "The Trial of Henry Kissinger" (2001) argued that Kissinger was a war criminal. Kissinger, according to Hitchens, conducted aggressive war in Vietnam and ordered the deliberate bombing of civilians in South Vietnam. Later Kissinger started the aerial bombardment of the Ho Chi Minh trail in Cambodia and Laos, resulting in the deaths of 600,000 and 350,000 people respectively in those countries. Kissinger remains free in the US although it appears that he has stopped traveling overseas because of fear that a warrant of arrest may be issued against him by the families of the victims of war.

Detainees at Guantanamo Bay in Cuba vs Saddam Hussein

It is noted that about 600 detainees from Afghanistan have been languishing in camp for more than two years with no charges laid against them. The Bush administration calls them "enemy combatants" and they can be detained as long as the administration deems fit. But the recent US Supreme Court decision declares that the President has no unfettered power to keep them without due process of law and the detainees come within the jurisdiction of American civil courts, although they are held outside the US.

It could be argued that the Bush administration has pursued a double-standard policy for the detainees and another for Iraqi leaders. If Saddam Hussein and 11 of his close aides are being charged with crimes after seven months in detention, why are the detainees are not being charged even after more than two years? Justice, it is argued, is universal and applies to all individuals. However this standard does not seem to apply in the eyes of the Bush administration. The lawyers for Saddam Hussein may argue that the trial of Saddam Hussein is political, engineered by the US administration and pushed by US-picked interim government. It is reported in the media that by September the details of atrocities carried by Saddam Hussein will gradually be publicized just in time prior to US Presidential election so that President Bush is able to claim that war in Iraq was justified and is re-elected in November.

Conclusion

Saddam Hussein must be put on trial for his alleged brutalities. There is no question about it. However the trial must be fair and impartial by a court that enjoys judicial independence. It is appropriate that he should be put on trial before the international criminal court so that the judicial process is transparent and just.

Criminals are also human beings and they have a right to a proper judicial process. Article 11 (1) of the 1948 Universal Declaration of Human Rights provides that "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence". The Iraqi interim government together with the Bush administration will gain worldwide commendation for the proper judicial process consistent with the Human Right Declaration. History will judge whether the US and the new Iraq have done the right thing.

Barrister Harun ur Rashid is a Former Bangladesh Ambassador to the UN, Geneva.

Star LAW analysis

Immigration law practice labyrinth in Bangladesh

MUFSILL M M ISLAM

OVER the years, Immigration Law has developed rapidly and has interacted tremendously with International Conventions to such an extent that it has become a major area of legal complexity in the practice of law. Domestic Rules and Regulations, International Conventions and Treaties and Human Rights and Ethical issues have affected Immigration Rules immensely touching human society beyond borders.

Europe has emerged to be land of trying to face the conflicts between human rights issues and Immigration Regulations of different countries which are signatory to various conventions which have immense regulatory authorities on the legal aspects in the signatory countries. Europe is growing in European Union size, materialising the dream of a European citizenship.

US on the other hand has opened has been compromising with North American Free Trade Agreement which has opened up free border movements between US, Canada and USA.

Where does Asia stand? Many of us are still so much lost in the dream of migrating that we often fall victim to serious error in judgments relating to seeking out honest, reliable and effective assistances from experts providing services for migration and multinational trade issues.

What is the regulatory body for immigration consultants coming to Bangladesh for advising our citizens even on their laws? Who can and who

cannot advise immigration issues in Bangladesh is another largely unexplored issue. Any person who is not an advocate with the Bangladesh Bar Council is not licensed to advise on any legal issues and charge fees for the same. The rule should be applicable for foreign lawyers coming to our country even for a brief period to advise people although for apparently free seminars arranged by certain immigration consultancy firms in Bangladesh as there are always a financial benefit for the foreign lawyers in the long run. The temporary business or pleasure visas to Bangladesh should not be allowing a foreign lawyers to advise clients or people in Bangladesh even on the laws of their country. Appropriate short work visas or investors visas should be sought and they should seek enlistment with the Bangladesh Bar Council as a Foreign Legal Consultant with supervisory and partnership agreements with a Bangladeshi law firm. If Bangladesh Bar Council does not work as the regulatory body for the foreign lawyers, there will be immense possibilities of people being misled and trapped. Any foreign lawyer must have assistance in partnership with a Bangladeshi law firm so that they do not break any rules of the country while advising the citizens of the country. Bangladesh government will be losing huge revenues otherwise.

We have serious lack of true experts in the area of Immigration Law in Bangladesh as our idea of Immigration Law is still apparently confined to filling-up DV forms. But it should be noted that

even by applying for DV forms for US lottery programs and by applying for US visas and providing fingerprints for that, a person may compromise with his rights to anonymity and rights to privacy if not done properly which may have long after effects in his/her life.

All the leading and developed countries of the world have their Bar Councils and Law Societies setting strict rules for foreign lawyers to render services even on the laws of their native land. Law Societies of England and Wales and also that of

New Zealand have set provisions for registered foreign lawyers and US States have provisions for Certified Foreign Legal Consultants which are few to be mentioned here.

What we need are expert Bangladeshi lawyers to have wings in their chambers to advise on global immigration laws. There are a number of Bangladeshi lawyers abroad who has experience in working as clerks and consultants or even as partners and practitioners in foreign law firms, and these advocates should be the best options as they are accountable to Bangladesh Bar Council.

Working for any foreign mission in Bangladesh should not be and cannot be an automatic privilege to claim as an expert in that particular country's immigration issues as the missions or consulates are merely the first stage of immigration relating issues and not the ultimate Immigration and Naturalization office which is based in the consulate's homeland. But if any Bangladeshi lawyer has

any experience of working at a foreign consulate office, he can be treated as an expert to a certain degree.

Many areas of immigration laws remain an area unexplored, for our citizens. For example, a student going abroad, should have assistance as to the documents which may be required from them for the visa application and the student should also know of her rights and obligations in a foreign country before even flying to that country. Students, visitors and even business people from Bangladesh are often lost and baffled about regulations in a foreign country. Assistance from an expert immigration lawyer from Bangladesh with foreign training and experience would save many from harassments and our image will definitely be enhanced abroad.

The investors from abroad are much more cautious about immigration rules relating to business ventures in Bangladesh because of their high respects for law and therefore, when they do not find any reliable experts in that area of practice i.e., experts on Bangladesh Immigration Rules, they often decide not to venture to invest largest sums.

Professional jealousy often works amongst certain lawyers in Bangladesh who resent to recognise this new area of legal practice branding the field to be mere clerical works for filling up forms and their tendency emanates from their own lacking of experience in the area.

In foreign countries, law societies or Bar Councils have strict regulations to have different

bank accounts for client's matters. A law firm must have an Client Account and an Office Account and this way the client's money never gets misused by the lawyers and immigration consultants with the executive of expenditure and a lawyer or law firm will touch the free-money only when the work has been delivered and until then they would spend from Office Account which will have money paid and agreed by the client as non-refundable administrative fee.

We have SAARC as our South Asian zone for cooperation. We should have expertise charting legal drafts for expected migration of experts between us in expected areas so that all countries benefit from it and none has the opportunity to abuse the opportunity for lack of rules.

The visa issuing officers in Bangladesh consults abroad and lawyers should attend seminars abroad to get the desired expertise and the relevant information can be obtained via internet easily.

Universities should recognise Immigration Law as a major area of law as human souls are very much affected by it, especially when we being the people of the poorer nations pick-up the bills to apply for migration and rich foreign countries profit.

Enough abuses have occurred in this area of law and it is about time we should heed to the wake-up call.

Mufsil M M Islam Ex-Foreign Law Consultant, Neil Weinrb, PC Attorney At Law, USA.

