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Saddam Hussein and the *Iraqi Special Tribunal*

Replies and Comments

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On the Web

<http://www.ifhv.de>

Focus

Statute of the *Iraqi Special Tribunal*

http://www.cpa-iraq.org/human_rights/Statute.htm

Human Rights Watch Memorandum on the IST

<http://www.hrw.org/backgrounder/mena/iraq121703.htm>

Article 1 IST-Statute

a) A Tribunal is hereby established and shall be known as The Iraqi Special Tribunal (the "Tribunal"). The jurisdiction and functioning of the Tribunal and its associated bodies as defined in Article 3 below shall be governed by the provisions of this Statute. The Tribunal shall be an independent entity and not associated with any Iraqi government departments.

b) The Tribunal shall have jurisdiction over any Iraqi national or resident of Iraq accused of the crimes listed in Articles 11 to 14 below, committed since July 17, 1968 and up until and including May 1, 2003, in the territory of the Republic of Iraq or elsewhere, including crimes committed in connection with Iraq's wars against the Islamic Republic of Iran and the State of Kuwait. This includes jurisdiction over crimes listed in Articles 12 and 13 committed against the people of Iraq (including its Arabs, Kurds, Turcomans, Assyrians and other ethnic groups, and its Shi'ites and Sunnis) whether or not committed in armed conflict.

c) The Tribunal shall only have jurisdiction over natural persons.

On 30 June 2004, Saddam Hussein was formally handed over to the newly created Iraqi government, although factually he still remains in American custody. One day later, the former Iraqi dictator had to face the main charges of the indictment, which will be brought against him before the *Iraqi Special Tribunal* (IST). The 30-minute hearing took place in a regular Iraqi court, since the IST was not ready due to a delay in appointing the judges. The preliminary charges included the accusation of using chemical weapons during the attack against the Kurds in Halabja, killing the Kurdish Barzani clan in 1983, killing members of political parties in the last 30 years, the 1986-88 "Anfal" campaign of displacing Kurds, the suppression of the 1991 uprisings by Kurds and Shiites and the 1990 invasion of Kuwait. Using a similar strategy as Slobodan Milosevic in the ICTY, Saddam Hussein defied the authority of the IST, referring to his position as "president of Iraq" and refusing to sign the list of charges unless he had a legal counsel. The trial is not expected to start before 2005.

With this initial hearing, focus has been drawn again on the newly established IST. The IST is another attempt to try massive violations of human rights and international humanitarian law before an international criminal tribunal after the ICTY, the ICTR, the ICC, the Special Court for Sierra Leone, the Special Panels in East Timor and the Extraordinary Chambers in Cambodia have started this mission. However, it is probably not absolutely correct to include the IST in this list of international or "internationalised" criminal tribunals (ICTs). The main reason for this is that the IST must be seen as a mainly *domestic*, although "special", criminal court, since the Statute has been created by the provisional Iraqi Governing Council and the staff is supposed to consist of Iraqi judges and prosecutors, who are to be appointed by the Government.

Nevertheless, the IST does have some similarities compared to the other ICTs. The statute includes the three "core" crimes of international criminal law, genocide (article 11 IST), crimes against humanity (article 12 IST) and war crimes (article 13 IST). It is interesting to note that the definition of these crimes is almost taken verbatim from articles 6-8 of the ICC statute. Although this seems to be a positive aspect at first sight, it provokes the question if the prohibition of retroactive legislation (and the principle of *nullum crimen sine lege*) has not been violated. According to article 1 IST the Tribunal has jurisdiction over crimes committed since 17 July 1968 and up until and including 1 May 2003. However, until the beginning of the 1990s, even the ICRC doubted whether war crimes in non-international armed conflicts were criminalized.

Another remarkable point is the fact that article 14 (c), which deals with violations of stipulated Iraqi Laws, also includes 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". This seems to be the first time since the war crime trials at Nuremberg and Tokyo that the "crime against peace", which is now called "aggression", has been included in a Statute (the respective provision in the ICC-Statute being not effective yet). Not surprisingly the jurisdiction has been restricted on Iraqi actions against their Arab neighbours. Therefore, there is no danger that the Tribunal will judge the U.S. invasion of the country. This possibility is already excluded by the fact that the Tribunal only has jurisdiction "over any Iraqi national or resident of Iraq". U.S. troops obviously will not fall under this provision.

There is another aspect, however, which makes it possible to compare the IST with "internationalised" tribunals like the Special Court in Sierra Leone. According to article 4 (d) the Government "if it deems necessary, can appoint *non-Iraqi judges*" to the Trial Chamber (consisting of 5 judges) and the Appeals Chamber (consisting of 9 judges). Furthermore, it is possible to appoint non-Iraqi *advisors* to assist the investigative judges and the prosecutors of the Tribunal. Bearing in mind the complexity of the case, the extensive evidence and the prospective duration of the trial, many NGOs urge the Tribunal to make use of this provision.

Some commentators are of the opinion that the Tribunal is by far not international enough. They see the danger that the international community and even the Iraqi people will perceive the IST as a "kangaroo court", being under heavy influence of the U.S. and facing the reproach of "victor's justice". At the moment, it is too early to give a final verdict. Much will depend on the way the trial will be conducted, and whether the rights of the accused will be safeguarded according to international standards. Finally, one should not forget that the principle of complementarity as it has been formulated by the ICC-Statute gives the States the primary responsibility to try war criminals. It is yet to be seen if the newly established Iraqi administration is willing and able to do this. However, this has become even more doubtful now after the news has been circulated that on 8 August 2004, an indictment was issued against Salem Chalabi, the designated President of the IST, charging him with murder of an Iraqi government official.

Responsibility

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