

Forum Options for Prosecution of Iraqi Atrocity Crimes

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By

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Madame Chairman and distinguished Senators, I want to thank you for giving me this opportunity to discuss the mechanisms that might be used to investigate and prosecute atrocity crimes (genocide, crimes against humanity, and serious war crimes)¹ allegedly committed by the Iraqi regime led by Saddam Hussein since 1979, including the war crimes committed by Iraqi forces during the current military conflict.

I want to recognize the importance of Senator Specter's leadership in submitting S. Res. 101 on March 31, 2003. There is good reason for the United States and its coalition partners to prosecute by trial violators of the international law of armed conflict in connection with the current conflict in Iraq. That requirement is part of the mosaic of courts that will be required in the aftermath.

I also want to recognize the joint effort of the Iraqi Jurist Association and the Working Group on Transitional Justice of the U.S. State Department's Future of Iraq Project to produce a 700-page draft on judicial reform in Iraq. That document, as described in an April 4th briefing in Washington, demonstrates how much needs to be done to reconstitute and reform the Iraqi legal system, and it recognizes one role the U.N. Security Council can play in investigating the atrocity crimes of the Iraqi regime. I believe more than what is set out by that joint effort may be required to bring the leaders of the Iraqi regime to justice within a framework that is timely, effective, and internationally legitimate, but their work is critical for the long-term development of Iraq's justice sector.

I will focus my remarks on the merits of an international criminal tribunal for Iraq.

¹ For a discussion of "atrocity crimes," see David J. Scheffer, "The Future of Atrocity Law," XXV Suffolk Transnational Law Review 3, 389-432 (Summer 2002).

The Bush Administration's articulation of its policy on this subject at the Pentagon earlier this week, on April 7th, remains fairly abstract. But it does provide the context within which we now should examine the different forum options. Reaffirming President Bush's pledge that war criminals will be prosecuted, U.S. officials reported on April 7th that:

- a) the United States will investigate and prosecute war crimes committed against U.S. personnel during the current conflict,
- b) where feasible, the United States will seek to prosecute those who committed or ordered war crimes against U.S. personnel during the Gulf War,
- c) the United States has a range of U.S. judicial options, including court martials, military commissions, and federal district court trials, to prosecute current abuses against U.S. personnel,
- d) the United States will explore a range of options to ensure that justice is achieved for the Iraqi people,
- e) there should be accountability for past atrocities,
- f) the United States will work with the Iraqi people to create an Iraqi-led process, with some indigenous roots, that will bring justice for past atrocities,
- g) the United States is prepared to assist in any way it can by providing technical, logistical, human and financial assistance,
- h) the United States believes that members of the international community also should step forward and be prepared to assist,
- i) the United States does not view as necessary an international tribunal for the current abuses,
- j) the government of Kuwait may want to exercise jurisdiction over some war crimes prosecutions, and
- k) the range of penalties would include the death penalty.

The Administration's position thus offers considerable flexibility for the options that could be examined. It would appear that there is a heavy Administration presumption in favor of some form of domestic Iraqi courts for past crimes and some combination of U.S. courts (military and civilian) for war crimes committed against U.S. personnel during the current conflict as well as the Gulf War. However, the Administration has not ruled out an international criminal tribunal for the past quarter century of the Iraqi regime's atrocity crimes and has not ruled out the possibility that war crimes committed against Iraqi citizens in the current conflict could be prosecuted before Iraqi courts or even before an international tribunal. The briefing on April 7th appears to reject an international tribunal for current abuses against U.S. personnel, but does not necessarily reject one with respect to war crimes committed against Iraqi citizens in the past or present. Further testimony by the Administration may sharpen and clarify these points, but for the moment I would regard the Administration's flexibility as helpful in examining the overall issue of justice in Iraq.

It might be helpful to recognize the three categories of suspects from the Iraqi regime that now appears to have fallen:

Category 1: the leadership of the Iraqi regime, namely those individuals who planned and ordered the commission of atrocity crimes over the last quarter century;

Category 2: the thousands of mid and low-level officials and personnel who directed or physically committed such crimes in the field; and

Category 3: the Iraqi military officers, soldiers, and paramilitary who planned and committed war crimes against coalition forces during the current military conflict.

There will be a combination of courts required in the aftermath to investigate and prosecute the Iraqi regime's atrocity crimes. I have argued² that three major tiers of courts should be established as the most practical means of achieving credible justice:

International: an ad hoc international criminal tribunal to be established by the United Nations Security Council to investigate and prosecute Category 1 suspects;

Iraqi: special Iraqi courts to be established under newly promulgated Iraqi law and supported with international assistance to investigate and prosecute Category 2 suspects; and

Military: courts martials and military commissions established by the United States to investigate and prosecute Category 3 suspects.

Bearing in mind the important work of the Iraqi exiles mentioned earlier, it will be important for the United States, Iraqi society, and the international community to bear the following in mind regarding the investigation and prosecution of atrocity crimes in the aftermath of Saddam Hussein's rule:

Assuming that a fair number of the leaders of the Iraqi regime survive Operation Iraqi Freedom, there would be ample justification for the establishment of an international criminal tribunal by the United Nations Security Council acting under its Chapter VII enforcement authority. The enormity of the atrocity crimes committed over the last quarter century, against not only the Iraqi people but also against Iranians, Kuwaitis, and coalition forces in the Gulf War and the current conflict, and the responsibility of the Iraqi regime for those crimes point to the imperative need for accountability and punishment. During much of the Clinton Administration, the official policy of the U.S. Government—one that I spent much of my time advancing—was to support the gathering of evidence of the Iraqi regime's atrocity crimes and to seek the

² See David J. Scheffer, "Justice in the Aftermath," *The Washington Post*, March 26, 2003, p. A17, col. 5. Also see David J. Scheffer, "Try Him for His Crimes," *The Washington Post*, September 12, 2002, p. A23, col. 2.

ultimate establishment of an ad hoc international criminal tribunal on Iraq.³ The need for such a tribunal was self-evident and the grave risk of perpetual impunity for the Iraqi regime's leadership was real and growing.

Although the success of Operation Iraqi Freedom will present the opportunity for Iraqi society to reconstruct and reform its domestic judicial system—a new reality that did not present itself during the Clinton Administration—that fact alone by no means excludes all of the advantages, during the immediate aftermath of Saddam Hussein's tyranny, of an international criminal tribunal for Iraq. Indeed, there may be even more reason and practicality now to establish such a tribunal.

1. An international criminal tribunal established by the U.N. Security Council—with the required support or acquiescence of France, China, and Russia-- should be perceived in the Arab world and globally as a manifestly legitimate court of law before which to prosecute the Iraqi regime's leadership. The prior experiences of legitimacy relating to the International Criminal Tribunals for the former Yugoslavia and Rwanda, despite the painful growing pains experienced by each, are precedents that fortify the international legitimacy of a similar exercise for Iraq. The U.N. General Assembly could select judges from a representative cross-section of the legal systems globally, including Islamic law. The Prosecutor's office also could include legal expertise from the Arab world and even from the post-Saddam Iraqi legal community. International standards of due process can be guaranteed in an international criminal tribunal, thus reinforcing its legitimacy, whereas the Iraqi legal system will require substantial reform over a number of years and significant foreign assistance to achieve those standards. The legitimacy of a U.S.-orchestrated court structure and prosecution effort in the post-Saddam Iraq would be held in serious doubt by much of the world community. And it is not certain that many within Iraqi society would embrace a domestic court technically led by Iraqis but in critical respects informed and financed by the U.S. Government.
2. The diplomatic meltdown in the U.N. Security Council preceding the coalition military intervention into Iraq last month poses many challenges for future cooperation among Security Council members during the aftermath. With the demise of the Iraqi regime and the removal of incentives the Council as a body or any Council member individually may have had in prior years to sustain a cooperative relationship with the regime, there should be common cause, at long last, to achieve international justice. No Council member would want to be associated with impunity for the surviving leaders of the Iraqi regime. Security Council approval of a resolution establishing an international criminal tribunal for Iraq would be a practical first step in repairing relations among Council members on an issue that should be non-

³ See the compilation of speeches and reports on Iraq from the Office of War Crimes Issues, U.S. Department of State, 1997-2001, at www.state.gov/www/global/swci/index.html.

controversial. Such action should help pave the way for other cooperative ventures for the reconstruction of Iraq.

3. The subject matter jurisdiction of an international criminal tribunal would clearly pertain to the specific, properly defined atrocity crimes—genocide, crimes against humanity (which includes torture), and serious war crimes--that require prosecution of the Iraqi regime's leadership, whereas Iraqi law may not be comprehensive enough to facilitate truly efficient prosecution of such crimes. Even if Iraqi law were to be amended essentially to modernize it with the law of international criminal tribunals today, whether such law could be applied retroactively is an important issue to resolve.
4. Although one would have to wait for the outcome of Operation Iraqi Freedom to make this judgment, surviving members of the Iraqi regime may find refuge in foreign jurisdictions if they escape capture on Iraqi territory. The U.N. Charter Chapter VII enforcement authority of an international criminal tribunal would require every government to cooperate in the apprehension and surrender to the tribunal of any indicted fugitives, wherever they may seek refuge in the world. A domestic Iraqi court would never have that power. There may well be other instances where documentation and witnesses pertaining to Iraqi atrocity crimes would be found in foreign jurisdictions and the international tribunal's authority under its Security Council mandate would require that such information or individuals be made available to the tribunal in its investigative or prosecutorial work. An enormous amount of evidence gathered since the late 1980's and processed by the U.S., British, Kuwaiti and other governments and by non-governmental organizations would be immediately available to a U.N. ad hoc international criminal tribunal, but not necessarily to a domestic Iraqi court.
5. The Iraqi regime committed international crimes of great magnitude and of international significance during its quarter century in power. The victims of the Iraqi regime's atrocity crimes extend beyond Iraq's borders to include the military personnel, civilians, and property of other countries, including Iran, Kuwait, Saudi Arabia, the United Kingdom, and the United States. An international criminal tribunal can ensure that the interests of those victims are addressed in legal proceedings, whereas an Iraqi domestic court cobbled together in the aftermath of a war and a corrupt regime may not enable those foreign interests to be adequately satisfied.
6. In contrast to the situation prevailing during Saddam Hussein's rule of Iraq, when an international criminal tribunal would have been blocked from seeking documents, witnesses, and suspects on Iraqi territory, now that access is available and thus the practicality of an international tribunal is greatly enhanced. Indeed, the tribunal can serve as a credible means to ensure the preservation and use of evidence pertaining to the Iraqi regime's atrocity crimes rather than risk its dispersal within and outside Iraq and its possible

misuse by a domestic court system struggling to emerge from the regime's iron grip of the last quarter century.

7. The international community, through assessments levied by the United Nations, would share the funding requirements of an international criminal tribunal. In the absence of such an international tribunal, the U.S. Government probably would be compelled to shoulder almost the entire cost of building domestic Iraqi courts competent and efficient enough to investigate and prosecute atrocity crimes. Considerable cost efficiencies could be achieved if the international tribunal were to be located in The Hague and associated with the existing International Criminal Tribunal for the former Yugoslavia (ICTY). While it would be critically important to ensure that the ICTY does not suffer any diminution in financial or political support as a consequence of any shared operations with an international criminal tribunal for Iraq, the relatively limited personal jurisdiction of the latter (namely, a total suspect list of perhaps less than 50 surviving senior leaders of the Iraqi regime) should point to the merit of shared and reasonably expanded facilities and staffing to accommodate the Iraqi prosecutions.
8. Contrary to some popular speculation, the U.N. Security Council could approve and stand up an international tribunal for Iraq within a relatively short period of time. Past experience points the way to rapid preparation of the requisite Security Council resolution and the statute and rules of procedure and evidence of the tribunal, the collection of funds through assessments and voluntary contributions from U.N. member states, the timely selection of judges by the U.N. General Assembly and a prosecutor by the Security Council, and the immediate production of the enormous amount of evidence globally that already has been gathered and organized and that will make the prosecutor's task far easier in this undertaking than was the case with the ICTY or the International Criminal Tribunal for Rwanda. In contrast, the time required to create a properly constituted domestic special court under Iraqi law, which itself would require amendment by a newly-elected Iraqi parliament, and to staff it with competent and untainted judges and prosecutors of high integrity, almost certainly would be much longer.

It may well be the case that the new Iraqi leadership as it emerges in coming months, as well as many in Iraqi society, will seek an international criminal tribunal to investigate and prosecute the surviving leaders of Saddam Hussein's regime. During my term of office in the Clinton Administration and as late as last October, the Iraqi opposition strongly supported the establishment of an international criminal tribunal for Iraq. In fact, that support was a critical validation for the U.S. policy on accountability for the Iraqi regime while I was in office. I have difficulty believing that strong views held for so many years on the issue of international criminal justice being applied to the Iraqi regime's leadership will so quickly evaporate. I would hope that in coming weeks emerging Iraqi leaders and the Iraqi public would be given the opportunity to make the

case for an international criminal tribunal if they believe in its merits. Many Iraqis may ask why the international community saw fit to establish and finance courts of international criminal justice in the Balkans and in Rwanda, and to support the establishment of a permanent international criminal court in recent years, and yet there now appears to be some reluctance, particularly by the U.S. Government under the current administration, to accord similar priority to Iraq and the overwhelming need for credible prosecution of the horrendous crimes that occurred there under Saddam Hussein.

Madame Chairman,

Despite the efficiencies that may result in establishing an international criminal tribunal for Iraq in The Hague, the unique circumstances of Iraq may point to actual operation of all or even part of such tribunal's work (such as the Office of the Prosecutor and eventually some or all of the trials) on Iraqi territory. Depending on how Iraqi society emerges from Saddam Hussein's regime, it may prove possible to physically locate the tribunal, in whole or in part, in Iraq and thus bring the full weight of international justice to bear on the Iraqi public eager to share in the process. Iraqi jurists untainted by Saddam Hussein's regime could be candidates for the tribunal's bench and prosecutor's office. However, there may prove to be considerable advantage in having the leading indicted defendants of the Iraqi regime incarcerated outside of Iraq, unable to effectively influence, if only by their proximate presence, contentious political efforts that will unfold to forge a democracy there.

There doubtless will be discussion in coming days about the prospect of "hybrid" special courts in Iraq that would presumably be courts established under new domestic Iraqi law but with significant international support and participation so as to ensure compliance with international standards of due process, assistance by well-trained legal practitioners of criminal law and international law, and the provision of international financial and in-kind resources for the operation of such special courts. Comparisons will be made with the Special Court for Sierra Leone, which in fact is a treaty-based court established by the Government of Sierra Leone and the United Nations, and the Extraordinary Chambers of Cambodia, which are newly-legislated domestic courts about which the Royal Government of Cambodia and the United Nations have initialed a cooperation agreement that, if ratified by the Cambodian Government and the U.N. General Assembly, will mandate significant international participation in the operation of the Extraordinary Chambers. These comparisons likely will try to make the case against an international criminal tribunal in favor of a similar hybrid structure in Iraq.

I caution that such comparisons may underestimate or overlook the unique circumstances of each jurisdiction, the character of crimes committed, the level of support the international community is prepared to provide, and the long delays that can result if negotiations between the United Nations and the new Iraqi government as well as reform of Iraqi law and actions by a newly-formed Iraqi parliament are first required. Hybrid courts are exceptionally difficult to negotiate, a fact that does not detract from their value or legitimacy. I was deeply engaged in and strongly support the hybrid courts established for Sierra Leone and Cambodia. But in the case of Iraq, when so much has

been done to collect evidence over the years, the enormity of the crimes against both Iraqis and foreigners and the importance of accountability for them are so well understood, particularly by the Iraqi opposition for so many years, it would be unfortunate if the cause of justice is delayed and potentially diminished as a result of long negotiations within Iraq and between Iraqi authorities and the United Nations or foreign governments about the character of some newly-conceived hybrid court. Just the task of reforming Iraq's legal system to credibly investigate and prosecute mid and low-level perpetrators of atrocity crimes will be an enormous challenge in the coming years.

I should note that the Canadian Government recently decided to lead an effort at the United Nations to create an international criminal tribunal for Iraq. Also, in addition to S. Res. 101 introduced by Senator Specter, a bipartisan group of 46 Members of Congress co-sponsored H. Res. 118 on February 27, 2003, urging President Bush "to call upon the United Nations to establish an international criminal tribunal for the purpose of indicting, prosecuting, and imprisoning Saddam Hussein and other Iraqi officials who are responsible for crimes against humanity, genocide, and other criminal violations of international law." This action was consistent with Section 301 of the Foreign Relations Authorization Act, Fiscal Years 1992 and 1993 (Public Law 102-128), House Concurrent Resolution 137, 105th Congress (approved by the House of Representatives on November 13, 1997), and Senate Concurrent Resolution 78, 105th Congress (approved by the Senate on March 13, 1998). The substantial financial assistance provided by the Congress during the last decade for investigation into the Iraqi regime's atrocity crimes reflects a deep commitment to the principle of accountability.

Madame Chairman,

I believe a wide range of support could be found within the U.N. Security Council for an international tribunal for Iraq. Such an initiative not only would begin to rebuild our relations with Council members, but also would be the kind of legitimizing action that would enhance the support of other governments for the full range of reconstruction requirements in Iraq, including for the justice sector. The other courts that would need to be established and function, both domestically and under military law, are no less important. My experience tells me this will be a very long process, but it is one that is essential to the future of Iraq and for the international rule of law.

Thank you.

