

HUMAN RIGHTS WATCH

1630 Connecticut Avenue, Suite 500
Washington, DC 20009
Phone: 202-612-4321
Fax: 202-612-4333
E-mail: hrwdc@hrw.org
Website: <http://www.hrw.org>

Kenneth Roth
Executive Director
Michele Alexander
Development and Outreach Director
Carroll Bogert
Communications Director
Steve Crawshaw
London Director
John T. Green
Operations Director
Barbara Guglielmo
Finance Director
Lotte Leicht
Brussels Office Director
Iain Levine
Program Director
Tom Malinowski
Washington Advocacy Director
Rory Mungoven
Advocacy Director
Maria Pignataro Nielsen
Human Resources Director
Dinah PoKempner
General Counsel
Wilder Tayler
Legal and Policy Director
Joanna Weschler
UN Representative

DIVISION DIRECTORS

Peter Takirambudde
Africa
José Miguel Vivanco
Americas
Brad Adams
Asia
Elizabeth Andersen
Europe and Central Asia
Hanny Megally
Middle East and North Africa
Steve Goose
Arms
Lois Whitman
Children's Rights
LaShawn Jefferson
Women's Rights

BOARD OF DIRECTORS

Jonathan Fanton
Chair
Khaled Abou El Fadl
Lisa Anderson
Lloyd Axworthy
David Brown
William Carmichael
Dorothy Cullman
Irene Diamond
Edith Everett
Michael Gellert
Vartan Gregorian
Alice H. Henkin
James F. Hoge, Jr.
Stephen L. Kass
Marina Pinto Kaufman
Wendy Keys
Robert Kissane
Bruce Klatsky
Joanne Leedom -Ackerman
Josh Mailman
Joel Motley
Samuel K. Murumba
Jane Olson
Peter Osnos
Kathleen Peratis
Catherine Powell
Bruce Rabb
Sigrid Rausing
Orville Schell
Sid Sheinberg
Gary G. Sick
Domna Stanton
John J. Studzinski
Shibley Telhami
Maureen White
Maya Wiley

Robert L. Bernstein
Founding Chair



Prosecuting Iraqi War Crimes Statement by Tom Malinowski, Washington Advocacy Director Senate Governmental Affairs Committee April 10, 2003

Thank you Mr. Chairman for holding this important hearing and for giving me a chance to share my views with the Committee.

Whatever our vision for a post-war Iraq, holding Iraqi leaders accountable for past and present crimes must form a part of it. After decades of atrocities committed by the Iraqi regime, justice is a moral and legal imperative. Bringing those responsible to justice in a fair and impartial way will also be vital for practical reasons. It will bolster respect for the Geneva Conventions in future wars. And it will be indispensable to the establishment of a stable, democratic Iraq governed by the rule of law.

Human Rights Watch does not take a position for or against the war in Iraq. Rather, we have sought to monitor the conduct of all sides in this and past conflicts in that country, as well as the conduct of the Iraqi government towards its own people. We have catalogued a long and harrowing list of grave abuses that should be prosecuted. For the purposes of our discussion today, I will divide them into two categories. First, crimes committed during the present conflict. Second, crimes Saddam Hussein's regime has committed in the past against the people of Iraq. The first category involves international war crimes and other serious violations of the laws of armed conflict that might be prosecuted by coalition forces after the war. The second category involves a much wider list of offenses, including genocide and crimes against humanity, which in my view should be prosecuted by an internationally-mandated tribunal.

Iraqi Violations of the Laws of War During the Present Conflict

Perfidy: On numerous occasions, Iraqi forces have feigned civilian or noncombatant status to deceive the enemy. For example, on March 29 at a U.S. military roadblock near Najaf, an Iraqi noncommissioned officer reportedly posing as a taxi driver detonated a car bomb that killed him and four U.S. soldiers. Iraqi Vice President Taha Yassin Ramadan said at a Baghdad news conference that such attacks would become "routine military policy." The Iraqi military has also used civilian buildings to shield

itself from attack. For example, Iraqi forces reportedly fired on coalition troops from a hospital in Nasyriah. The building, in which U.S. Marines found weapons, stockpiles of ammunition, military uniforms and chemical suits and masks was clearly marked as a hospital by a flag with a Red Crescent symbol.

International law prohibits attacking, killing, injuring, capturing or deceiving the enemy by resorting to what is called perfidy. The essence of perfidy is an act that invites the enemy's respect or reliance on the laws of armed conflict in order to gain advantage by betraying that trust. For example, when active and hostile combatants pretend to be civilians, feign surrender or appropriate the Red Cross/Red Crescent symbol, they are abusing the protections of the law to get their opponent to let down their guard at the moment of attack.

Perfidy poses particular dangers because it blurs the distinction between enemy soldiers, who are a valid target, and civilians and other noncombatants, who are not. Soldiers fearful of perfidious attacks are more likely to fire upon civilians and surrendering soldiers, however unlawfully.

Civilian Shields: During the first Gulf War and during U.S. air strikes in 1997, Iraq compelled civilians to shield military targets; there have been reports that it has done the same in the present conflict. The use of civilians, including a state's own citizens, as human shields to protect military objectives from attack is a violation of international humanitarian law amounting to a war crime.

The Iraqi military has also used civilian buildings to shield themselves from attack (or, perhaps, to try to maximize civilian casualties). For example, Iraqi forces reportedly fired on coalition troops from a hospital in Nasyriah. The building, in which U.S. Marines found weapons, stockpiles of ammunition, military uniforms and chemical suits and masks was clearly marked as a hospital by a flag with a Red Crescent symbol.

Execution Squads: Security forces loyal to Saddam Hussein have allegedly been executing Iraqi civilians and soldiers perceived as disloyal to the regime. If true, this constitutes a war crime. Security forces have also extrajudicially executed alleged army deserters – while not a war crime, such acts are probably unlawful under Iraqi law and are clearly human rights violations.

Last week in Iraqi Kurdistan, Human Rights Watch interviewed 26 Iraqi soldiers who had deserted their units. Some said they knew of execution squads of 10-12 men drawn from regular armed forces and from Military Intelligence, though they had not seen executions themselves. One eyewitness to an execution said that on March 26, ten deserters were brought to an open field where a colonel had gathered other units to witness the execution. "This is what happens to betrayers of our nation," the colonel told the assembled troops, according to the witness. He then began shooting the alleged deserters one by one; other members of the execution squad joined in. The colonel then ordered the bodies to be dragged up onto a hillside so the soldiers would have a better view of the corpses. Some of the Iraqi soldiers described inhumane punishments including being beaten, or being forced to crawl across stones on their bare knees or backs. One showed the scars on his back from this punishment. Their officers frequently warned them that they would be executed if they tried to escape.

Abuses of Prisoner of War (POW) rights: The Iraqi government has thus far not allowed the International Committee for the Red Cross to visit American POWs – something the Geneva Conventions require. It has also filmed and interrogated POWs before cameras. According to the Third Geneva Convention of 1949, a detaining authority in wartime has a clear obligation not to parade

POWs, or allow them to be exposed to the public. The prohibition is not a blanket ban on any image whatsoever of a POW; for example, it would not extend to incidental filming of POWs, when journalists are documenting broader military operations. But a detaining authority in wartime has a clear obligation not to parade POWs, or allow them to be exposed to public curiosity.

If reports that Iraqi forces executed coalition prisoners after their capture turn out to be true, that, of course, would also constitute a war crime.

Mr. Chairman, these and other ongoing Iraqi violations lead me to two broad conclusions. First, the United States and the international community must continue to make clear that Iraqi officials and commanders will be held accountable for grave breaches and other very serious violations of the Geneva Conventions.

That may sound like a non-controversial statement. But keep in mind, there are those who believe that the Geneva Conventions and other international legal instruments have no practical impact on those, like the Iraqi regime, who disdain rules and norms of every kind. I understand their skepticism, but believe it to be wrong. Iraqi conduct could well have been far worse in this war had it not been for the existence of internationally accepted laws of armed conflict and the threat of punishment for violators.

For example, if Iraq indeed has weaponized chemical or biological arms, I think it is interesting that it has not yet used them in this conflict. Even if it hasn't fully cooperated with the International Committee for the Red Cross, it is interesting that it has permitted that organization to remain in Baghdad and other Iraqi cities. Iraqi officials may well feel that they still have an interest in appealing to public opinion in other countries; and they may well fear the possibility of prosecution. This reminds us why these norms are so important; it is why they need to be defended and enforced.

My second conclusion flows from the first: Because the Geneva Conventions are such a useful tool in stigmatizing and deterring atrocities, the United States has an interest in upholding them in its own conduct. The extraordinary power and influence of America's armed forces means that every action they take in the field sets a standard that others will emulate. I believe the United States must set a gold standard when it comes to compliance with the laws of war. That is the best way to ensure compliance by others, and to preserve America's authority to complain when its adversaries don't play by the rules.

In Iraq, that means U.S. and coalition forces must be proactive in preventing the media from filming Iraqi POWs in intrusive ways. It means refraining from attacking civilians and civilian objects even for the purpose of affecting morale, taking all feasible precautions to minimize incidental harm to civilians and civilian objects in attacks on military targets, and avoiding the use of weapons, like cluster munitions, that pose the risk of excessive civilian injury and death, especially near populated areas. It means according POW rights to captured Iraqi combatants unless a competent tribunal determines they are not entitled to POW status (as coalition forces are doing, rightly, in Iraq, but did not do in Afghanistan). It means ensuring that allied forces inside Iraq, such as Kurdish and other opposition militia, treat prisoners humanely and afford them full POW rights. And it means providing security for civilians in all areas occupied by coalition forces. Should evidence arise of war crimes or serious violations of the laws of war by any U.S. or allied personnel, those should, of course, be investigated and, if appropriate, prosecuted vigorously as well.

Past Iraqi Crimes

Under the leadership of President Saddam Hussein, who seized power in 1979, the Iraqi government has committed a vast number of crimes against the Iraqi people and others. The victims of such crimes include up to 290,000 persons who have been “disappeared” since the late 1970s, many of whom we believe have been killed.

Human rights organizations and independent monitors have had almost no access to government-controlled areas of Iraq. However, the evidence that has been gathered about some of the crimes—particularly the “Anfal campaign” against the Kurds – is of sufficient quality to stand up in legal proceedings.

Following the post-Gulf War Kurdish uprising, and the withdrawal of the Iraqi military from northern Iraq in October 1991, Human Rights Watch investigators traveled to the region to document Saddam's crimes. Some 350 witnesses and survivors were interviewed. Mass graves were exhumed. And Kurdish rebels were convinced to hand over some 18 tons of documents that they had seized from Iraqi police stations. These documents were airlifted to the United States. They contain a treasure trove of information that will be invaluable in any future trials of the Iraqi leadership.

Although existing evidence about other serious human rights crimes and violations such as those ongoing against the Marsh Arabs and southern Shi`a populations is more limited, indications are that these campaigns have been similarly centrally organized. A change in government in Iraq will hopefully give access to a vast amount of information about those crimes as well.

Attacks against the Iraqi Kurds: The government’s notorious attacks on the Iraqi Kurds have come in phases. Between 1977 and 1987, some 4,500-5,000 Kurdish villages were systematically destroyed and their inhabitants forcibly removed and made to live in “resettlement camps.” Commencing in the spring of 1987, thousands of Iraqi Kurds were killed during chemical and conventional bombardments.

From February to September 1988, the Iraqi government launched the official “Anfal” campaign, during which Iraqi troops swept through the highlands of Iraqi Kurdistan rounding up everyone who remained in government-declared “prohibited zones.” More than 100,000 Kurds, mostly men and boys, were trucked to remote sites and executed. These killings constitute acts of genocide. The killings, forcible and arbitrary transfer of populations, and chemical weapons attacks amount to crimes against humanity.

There is voluminous evidence of the Iraqi government’s responsibility for these crimes in the documents seized in northern Iraq after the first Gulf War. Perhaps most dramatic are audio tapes of remarks by Ali Hassan al-Majid, also known as “Chemical Ali,” the Iraqi official in charge of the campaign against the Kurds, from a number of meetings with senior Ba'ath Party officials in 1988 and 1989. In one segment he exclaims: “I will kill them all with chemical weapons! Who is going to say anything? The international community? *#*@ them! The international community and those who listen to them.”

Repression of the Marsh Arabs and other Shi`a: During the early years of the Iran-Iraq war, the Iraqi government arrested thousands of Shi`a Muslims on the charge of supporting the 1979 revolution in Iran. Many have “disappeared” or remain unaccounted for; others died under torture or were

executed. This campaign was followed by the forced expulsion of over half a million Shi`a during the 1980s to Iran, after the separation out of many male family members. Some 50,000 – 70,000 men and boys were arrested and imprisoned indefinitely without charge; most remain unaccounted for.

After the Gulf War, in southern Iraq, members of the Shi`a majority rose up in revolt against the Iraqi leadership. In response, thousands of Shi`a were imprisoned without charge or “disappeared” in state custody. Hundreds were summarily executed. Many Shi`a shrines and institutions were demolished by government forces. In the southeast, after tens of thousands of Shi`a Muslim civilians, army deserters, and rebels sought precarious shelter in remote areas of the marshes that straddle the Iranian border, Iraq’s military and security forces shelled and launched military raids against them. Systematic bombardment of villages, widespread arbitrary arrests, torture, “disappearances,” summary executions, and forced displacement reduced the Marsh Arabs from more than 250,000 to as few as 40,000. Large-scale government drainage projects virtually wiped out the Marsh Arab economy and, along with severe repression, forced the displacement of at least 100,000 of the Marsh Arabs inside Iraq. More than 40,000 others fled to Iran.

Forced expulsion of ethnic minorities from Kirkuk: Since 1991, Iraqi authorities have forcibly expelled over 120,000 Kurds, Turcomans and Assyrians from their homes in the oil-rich region of Kirkuk and neighboring towns and villages. The systematic forcible transfer of the population—a process referred to by the authorities as “Arabization”—has been accompanied by the resettling of Arab families brought from southern Iraq to replace those evicted.

General repression, large-scale “disappearances,” and other crimes: In addition to abuses particularly aimed at the Kurds and Shi`a Muslims, the Iraqi people under Saddam Hussein have suffered a consistent pattern of gross violations of internationally recognized human rights, including political imprisonment, torture, and summary and arbitrary executions. In addition, a ubiquitous network of security services and informants has suppressed independent civilian institutions and terrorized the Iraqi population into virtual silence. Torture techniques have included hangings, beatings, rape, and burning suspects alive. Thousands of political detainees have died under torture. There have also been a staggering number of “disappearances. In addition to the Shi`a and Kurdish cases described above, “disappearances” have included: an estimated 8,000 Barzani males removed from resettlement camps in Iraqi Kurdistan in 1983; 10,000 or more males said to have been separated from Feyli Kurdish families deported to Iran during the 1980s; Shi`a Muslim clerics and their students from al-Najaf and Karbala; over 600 Kuwaitis and third country nationals who disappeared after their arrest during the occupation of Kuwait; members of other targeted groups, including communist and other leftist groups; Kurdish, Assyrian, and Turcoman opposition groups; out-of-favor Ba'athists; and the relatives of persons in these groups.

The use of chemical weapons during the Iran-Iraq war: Iraq used chemical weapons extensively, starting in 1983-1984, during the Iran-Iraq war. It is estimated that some twenty thousand Iranians were killed by mustard gas, and the nerve agents tabun and sarin. Both Iran (1929) and Iraq (1931) are parties to the Geneva Protocol that prohibits the use of asphyxiating, poisonous, or other gases, and of all analogous liquids, materials, or devices, as well as the use of bacteriological methods of warfare. The use of asphyxiating, poisonous, and other prohibited gases is a war crime.

Occupation of Kuwait and related abuses: During Iraq’s occupation of Kuwait in 1990-1991, Iraqi forces committed systematic and gross abuses of human rights. During the initial takeover of Kuwait, hundreds of persons were killed or wounded and thousands detained. Iraqi soldiers and militia

committed countless acts of theft, rape and assault on civilians, as well as summary executions, “disappearances,” and torture. Human Rights Watch believes that many acts committed by Iraqi agents during Iraq’s occupation of Kuwait constitute war crimes and crimes against humanity.

There is clearly a need for justice for atrocities committed by the Iraqi authorities in Iraq and neighboring countries. Countless Iraqis have lost loved ones to these crimes; many have no information about how their relatives perished. When Saddam’s regime falls, they will demand answers, and they will demand accountability. If they cannot get answers and accountability under the law, they may well take the law into their own hands. The stability of a post-war Iraq thus depends on a credible process for bringing to justice those responsible for past crimes.

Such a process will also be vital to creating a culture of respect for the rule of law in a post-war Iraq. It will be a wonderful thing for Iraqis to see the surviving leaders of Saddam Hussein’s regime, men who were once untouchable and all-powerful, humbled before the law, and confronted by their victims, in a fair and open trial. If such people are punished in a summary, extra-judicial way – or, at the other extreme, permitted to remain in positions of authority -- then in a real sense nothing will have changed in Iraq.

That is why, to the greatest extent feasible, coalition forces must act now to secure prisons, police stations and other government facilities that may contain documents that will shed light on the fate of the missing and on who is responsible. That hasn’t always happened – in Basra this week, for example, Iraqi civilians looted a prison and carted off documents themselves in search for their disappeared loved ones. The international community will also have to act quickly in the days after the war to establish a tribunal to prosecute these crimes that will be seen as independent, credible, and fair.

What is the Proper Forum for Justice?

Bush administration officials have said that crimes committed during the present conflict against coalition forces may be tried by those forces themselves. The United States may try Iraqis responsible for these crimes in civilian courts, military courts martial, or military commissions so long as trials respect basic standards of due process, including a right to appeal. One caveat is that under the Geneva Conventions, Iraqi prisoners of war suspected of war crimes are entitled to be tried in the same courts the United States would use to prosecute its own service personnel. This should rule out the use of military commissions for Iraqi POWs.

As for past crimes, Bush administration officials have said they should be prosecuted exclusively by the Iraqi Interim Authority, which the United States plans to install when Saddam Hussein’s regime falls. In practice, this means turning the process of accountability over to a new government dominated by Iraqi exiles chosen by the United States. The administration appears to have rejected the option of convening a United Nations tribunal, such as the International Criminal Tribunal for the former Yugoslavia. It has even rejected the possibility of a mixed national-international tribunal, in which Iraqi and international jurists would serve together. I believe this is a grave mistake.

I understand and appreciate the administration’s desire to give Iraqis ownership of the process. Unfortunately, there are now only two broad groups of Iraqis from which the judges and prosecutors of a war crimes court could be drawn.

They could be drawn from the Iraqi opposition, which lacks democratic legitimacy in most of Iraq, and will continue to lack it until it earns it through free and fair elections. Or, they could be drawn from the existing Iraqi judicial system, which has been thoroughly compromised by years of totalitarian rule.

The Iraqi Revolutionary Court, State Security Court, and Special Provisional Court, in particular, have been instruments of repression. The state also interfered with the remaining civil and criminal courts. While it may be possible to identify individual judges who have remained untainted by over thirty years of Ba'athism, the number of such judges and the extent of their preparedness remain unclear. Thus, even after vetting and re-training, it could be difficult to select qualified judges and prosecutors for the kind of especially sensitive trials involved.

A trial of senior Iraqi official, especially if Saddam Hussein or his sons are captured alive, will be watched intensely by every Iraqi citizen and by people in every part of the world. There is an overwhelming need to establish a process that will be widely seen as impartial and fair. There will be no excuse for a process that is less than 100 percent credible inside and outside Iraq.

Trials conducted without U.N. authority by Iraqi jurists selected by the United States will widely be seen as American trials. Indeed, they will smack of victor's justice. They will not have credibility with many Iraqis. They will certainly have little credibility with most people in the Arab world. They are unlikely to receive significant financial and logistical support from U.S. allies in Europe and elsewhere.

If judges are selected exclusively from the exile community, or communities that have suffered harsh repression under the Ba'ath Party, such judges would not appear impartial in judging Ba'ath Party crimes. Nor could they be credibly expected to investigate, and, if necessary to prosecute, crimes committed by figures associated with the Iraqi opposition. One such figure, Nizar al-Khazraji, former chief of staff of Iraq's armed forces, has been indicted in Denmark for his suspected involvement in war crimes perpetrated in Iraq against Kurdish civilians during the 1980-1988 Iran-Iraq war.

Instead of producing verdicts that establish for all people beyond doubt that Saddam Hussein's regime was a nightmare for innocent Iraqis, such trials would leave a lingering sense of doubt among the very people most in need of convincing. They would represent, in short, an historic missed opportunity.

A stand-alone international tribunal, or a mixed tribunal composed of both Iraqi and international judges, would be a far better option. Such a court would enjoy tremendous legitimacy, particularly if draws its authority from the United Nations and many of its judges from the Arab world. It is clearly the option preferred by America's British allies. It is the goal the U.S. Senate embraced in 1998 when it adopted your resolution, Mr. Chairman, calling for the establishment of a U.N. tribunal, and reaffirmed last week when it appropriated \$10 million in the war supplemental for the establishment of an international war crimes tribunal for Iraq. Fifty-seven members of the House of Representatives, Republicans and Democrats, have cosponsored H. Res. 118, calling for such a tribunal. I sincerely hope the administration will listen.