THE IRAQI HIGH TRIBUNAL: A SQUANDERED OPPORTUNITY FOR INTERNATIONAL JUSTICE

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Introduction

A significant development in international criminal justice since the late 1990s has been the emergence of so-called “internationalised” domestic tribunals: domestic courts with some international elements, usually set up by a state with international assistance to try officials from a previous regime for international crimes. The Iraqi High Tribunal (IHT)¹ is one such tribunal. It was established following the fall of Saddam Hussein’s regime to bring to account those who had perpetrated international crimes. This article’s thesis is that the IHT is insufficiently ‘internationalised’ for this purpose. Essentially, it lacks legitimacy which could otherwise have been achieved through greater international input into its creation, staffing, jurisprudence and functioning. It represents a squandered opportunity for international criminal justice.

This article first assesses the circumstances in which international/internationalised criminal tribunals have been established and then moves to analyse several specific issues relating to the IHT. In the first section the existence of significant issues relating to the establishment of international/internationalised criminal tribunals generally is signalled. This discussion is brief and serves predominantly to demonstrate that there is no normative legal framework underlying the establishment of particular forms of international/internationalised criminal tribunals. In the second section three specific aspects of the IHT that have attracted criticism are considered: the insufficiency of the international input into the IHT; the availability of the death penalty as a punishment; and the appropriateness of the IHT as the forum for

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¹ More properly, the IHT is “The Iraqi Higher Criminal Court”: Statute of the Iraqi High Criminal Court (IHT Statute), art 1.

trying its most famous defendant, Saddam Hussein.²

A. The Establishment of International/Internationalised Courts and Tribunals

1. Background

The practice of trying the perpetrators of international crimes in front of international tribunals is a relatively recent phenomenon: the Nuremburg and Tokyo trials were the first examples of this form of international criminal justice.³ Traditionally the monopoly over prosecuting individuals for individual crimes lay with national courts. In this paper, the term “international crimes” refers to the “core” crimes of genocide, crimes against humanity and war crimes. In the language of the statute of the International Criminal Court (ICC), these are crimes which “threaten the peace, security and well-being of the world”.⁴

Since the early 1990s a number of tribunals with international components have been established to try the perpetrators of international crimes. Two factors were instrumental in this trend: the end of the cold war and with it the political deadlock on the Security Council; and an emerging international consensus on the importance of human rights and ending impunity for international crimes.⁵ The first international criminal tribunal, the International Criminal Tribunal for the Former Yugoslavia (ICTY) was created by the Security Council acting under Chapter VII of the United Nations’ (UN) Charter in May 1993. Its creation was prompted by the recent atrocities committed in Yugoslavia and the perceived inability of the local courts to conduct fair trials of the most culpable. Eighteen months later the Security Council established the International Criminal Tribunal for Rwanda (ICTR) to bring to account those responsible for the Rwandan Genocide. International lawyers and judges staff the two tribunals,

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² Saddam Hussein will be referred to as “Saddam” in this paper. See Blair Shewchuk “Saddam or Mr Hussein” CBC News Online (Canada, February 2003). <http://www.cbc.ca/news/indepth/words/saddam_hussein.html>
⁵ Cassese, above n 3, at 267.
they operate under their own rules, and their respective contributions to the corpus of international criminal law have been significant.\textsuperscript{6}

Since the late 1990s, the perpetrators of international crimes have increasingly faced ‘internationalised’ domestic tribunals, that is, domestic institutions with international components, rather than international criminal tribunals. This emphasis on local justice is part of a more general and growing trend in the international community favouring domestic over international courts to try the perpetrators of international crimes (as reflected in the complementarity principle of the ICC).\textsuperscript{7} The degree to which each tribunal is ‘internationalised’ varies greatly. For example, the Special Court for Sierra Leone (SCSL), which is often termed a ‘hybrid court’, was established by a treaty between the UN and the government of Sierra Leone in 2002. Its judges are drawn from both Sierra Leone and the international community, it is funded by voluntary contributions from UN member states, and it reports annually to both the UN Secretary-General and the government of Sierra Leone.\textsuperscript{8} At the other end of the spectrum lies the IHT, whose international component is much less significant. The IHL may be considered ‘internationalised’ in the sense that its statute and rules of procedure were formed with reference to those of the ICTY, ICTR and SCSC. Further, although its judges and prosecutors are Iraqi, they may be assisted by international experts.\textsuperscript{9} However, it should be noted that, subject to the rights of the accused, the international elements of the IHT statute are not mandated by an international agreement and so may be removed by Iraqi lawmakers.\textsuperscript{10}

\textsuperscript{6} See generally Geert-Jan Alexander Knoops \textit{An introduction to the law of international criminal tribunals} (Transnational Publishers, Ardsley, New York, 2003).

\textsuperscript{7} See Sylvia de Bertodano “Were there more acceptable alternatives to the Iraqi High Tribunal?” (2007) 5 J Int’l Crim Just 294 at 296.


\textsuperscript{9} The ability to appoint international experts to assist the IHT under art 7 of the IHT statute has been under-utilised. Michael Scharf “The Iraqi High Tribunal – A Viable Experiment in International Justice?” (2007) 5 J Int’l Crim Just 258 at 259. See de Bertodano, above n 7, at 299-300.

2. A Normative Framework?

Antonio Cassese posits that an international criminal tribunal is an option where the relevant national legal system cannot be relied upon to administer justice and where there is the political will in the international community to establish and fund such a tribunal.\footnote{Antonio Cassese “The establishment and practice of internationalised courts” (Speech to the Conference on Internationalised Criminal Courts and Tribunals: Practice and Prospects, Royal Netherlands Academy of Arts and Sciences, Amsterdam, 25 August 2002). <http://www.radioradicalet.ital/scheda/191538/nwjp-amsterdams-conference-i-day>.
} However, the immense operating costs and long delays encountered in the ICTY and ICTR make it unlikely the Security Council will establish such pure international criminal tribunals again, and indeed it may be argued that that form of tribunal has been rendered obsolete with the advent of the ICC.\footnote{However, the ICC may only try individuals for crimes committed after 1 July 2002.}

Cassese contends that where national courts are unwilling or unable to try the perpetrators of international crimes, internationalised domestic tribunals may present a viable alternative to going before the ICC, subject to the condition that they are closely supervised by the ICC.\footnote{Cassese, above n 11. See also Laura Dickinson “The Promise of Hybrid Courts” (2003) 97 AJIL 295 at 308. Dickinson notes that the appropriate role for internationalised domestic tribunals may lie in trying low-profile cases, while the senior leaders appear before the ICC.
} According to Cassese, an internationalised domestic tribunal may be appropriate where the national judiciary can be relied upon to some extent to administer justice and where the local authorities and population are unwilling to transfer the administration of justice to international authorities.\footnote{Cassese, above n 11.}

Although Cassese is able to identify the circumstances in which particular forms of tribunal or court seem likely to arise, the decision in each case was highly contextual. Further, there are numerous examples of situations that fit within the circumstances in which at least an internationalised domestic tribunal could be established, but where this has not occurred. The case of Hissène Habré, the dictator of Chad from 1982-1990, accused of numerous crimes against humanity, is illustrative.\footnote{Human Rights Watch notes that Habré’s regime is accused of some 40,000 political murders and systematic torture. Human Rights Watch “The Case against Hissène Habré, an ‘African Pinochet’” (August 2010)
notable mainly for their absence. This unwillingness is in no way related to the seriousness of the crimes for which he stands accused, but rather reflects the complex political environment of the region. Plans for an internationalised domestic tribunal in Senegal, where he currently resides, appear to have collapsed. Instead, after years of prevarication on the part of the Senagalese government, it seems that Habré may finally be tried by the national courts of Senegal. Whether those courts have adequate resources and expertise to conduct a trial meeting international standards remains to be seen.

Cassese identifies situations that may give rise to a particular form of tribunal, but there is no framework to establish whether or what type of a tribunal should be established, according to principles of international criminal justice. That is, there is no normative legal framework as to when the international community ought to support a particular form of tribunal to try the perpetrators of international crimes and when those international crimes should be left to be dealt with by national courts. Rather, it seems the answers to the more practical questions of politics and funding are the determinative factors. As Richard Falk has noted, international institutions like the United Nations reflect the prevailing patterns of geopolitics, and so it is unsurprising that the decision to establish a particular tribunal is taken based less on legal considerations and more on geopolitical realities. Such decisions are almost certainly taken within (and so confined by) the realist paradigm of international relations, the default theoretical position of most international actors. Although there are many varieties of realism, all share a common description of international relations as characterised by power-relations between states in an anarchic international system. Outside the narrow confines of the ICC’s jurisdiction, such thinking

<http://www.hrw.org/en/habre-case>

16 Ibid. It should be noted that Habré has been sentenced to death in absentia in Chad: BBC News “Chad ex-leader sentenced to death” (15 August 2008) <http://news.bbc.co.uk/2/hi/africa/7563881.stm>

17 See Frédéric Mégret “In Defense of Hybridity” (2005) 38 Cornell Int’l JI 275 for a perspective on what a normative framework might look like. Mégret notes at 276 that scholarship in this area is “overwhelmingly descriptive in scope and in particular fails to link up with scholarship of a more normative nature on the fundamental nature of international criminal justice.”

effectively precludes supranational criminal justice.\textsuperscript{19}

While the increasing number of leaders being held accountable for international crimes is a laudable outcome, without addressing this matter further, it is my opinion that the inconsistent commitment of the international community to trying the perpetrators of international crimes in appropriate fora undermines any attempt to give meaning to the idea of international criminal justice. If internationalised domestic tribunals are to continue to play an important role in bringing the perpetrators of international crimes to justice, a mechanism to ensure some consistency in the establishment and funding of such tribunals is required.

\section*{B. The Iraqi High Tribunal}

\subsection*{1. A General Background to the IHT}

In mid-2002, prior to the United States’ (US) led invasion of Iraq, a working group of US State Department officials and Iraqi exiles began to meet to consider how to establish the rule of law in a post-Saddam Iraq. In their final report they endorsed a war crimes tribunal to try the regime’s leaders, but did not advance any particular model.\textsuperscript{20} After the fall of the regime, in July 2003 the Coalition Provisional Authority (CPA) created the Iraqi Governing Council (IGC), which established a four-person commission to plan for the trials of prominent members of the former regime. The work of the State Department working group was disregarded and in December 2003 the CPA delegated legislative authority to the IGC to create the Iraqi Special Tribunal, a court with the power to try Iraqis for international crimes and several lesser existing Iraqi crimes.\textsuperscript{21} There was little consultation with international

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\item See Anne-Marie Slaughter, Andrew S Tulumello “International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship” (1998) 92 AJIL 367. See also Falk, above n 18: [G]overnments are dominated by realist modes of thinking, and this orientation is transferred to most of the personnel working on behalf of international institutions. Any discourse examining the prospects for international justice is treated by most realists as a waste of energy – or worse, a diverting manifestation of naïve or utopian thinking.
\item See International Centre for Transitional Justice Briefing Paper Creation and First Trials of the Supreme Iraqi Criminal Tribunal (October 2005) at 5.
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or Iraqi experts and the general lack of transparency in the process did not engender international confidence in its outcome. The tribunal’s statute was repromulgated by the transitional Iraqi government in October 2005 with significant amendments, including the removal of the provision allowing for the appointment of international judges (the tribunal’s name was also changed, rendering it ‘the Iraqi High Tribunal’ in English). The elements that lend the IHT an international character are: the nature of the acts prosecuted, the source of funding, the possible appointment of non-Iraqi advisors, and the possibility of prosecution for international crimes conducted outside Iraq.

The IHT had controversial beginnings. Given Iraq’s status as an occupied state in July 2003, the legality of the IHT’s creation is questionable as its statute purported to alter existing Iraqi law, possibly in contravention of the law of occupation. As Michael Newton has said, “[a]ll of the procedural and substantive components of the IHT function in the shadow cast by its inception during the Coalition occupation.” Unlike the ICTY in Tadi, the IHT has avoided examining the question of the legitimacy of its establishment. This section will explore the main aspects of three significant problems with the IHT: insufficient international input into its creation and operation; the availability of the death penalty as a punishment; and the choice of a national court to try Saddam.

<http://www.ictj.org/images/content/1/2/123.pdf.>


23 However, the discretion to appoint international judges was retained where a state is one of the parties to the complaint: IHT statute, art 1. See generally Guénaël Mettraux “The 2005 Revision of the Statute of the Iraqi Special Tribunal” (2007) 5 JICL 287.


26 Newton, above n 25, at 414.

27 Dužko Tadić 105 ILR 457.

There are a number of other significant problems with the IHT that this article will not explore, many of which raise important questions of international law. I shall do no more than signal their existence. The status of Iraq as an occupied territory at the time of the IHT’s creation is one such issue. Similarly, the revocation of immunities conferred on Ba’athist officials by the previous Iraqi constitution, a perceived lack of judicial independence and the failure of trials to meet international fair-trial standards are contentious issues. More practical problems have also presented themselves. For example: the inadequate provision of security to defence counsel and the limited legal aid available to defendants. Finally, it should be noted that although this issue has not yet arisen in relation to the IHT, the crucial problem Cassese has identified with internationalised domestic tribunals generally is that they have no mechanism to enforce co-operation from other countries in handing over witnesses, suspects or the accused. Such tribunals also tend to be insufficiently funded and under-resourced.

2. A Domestic Court with International Components

(a) Insufficient international input

The decision to establish a domestic tribunal with some international components to try members of the former regime for international crimes was taken by the CPA and IGC prior to Saddam’s capture. From the outset the US preference was for an “Iraqi-led” process and it is clear this idea was supported by the Iraqi population in the main. Additionally, part of the reason why an international tribunal was never seriously contemplated was because both the US government and Iraqi law favoured the death penalty as a permissible punishment – one which would never be available in an international criminal tribunal.

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29 See Newton, above n 25, at 406.
31 Cassese, above n 11.
32 See Knoops, above n 6, at 11-17.
33 ICTJ Human Rights Center, University of California (Berkeley), Iraqi Voices: Attitudes Toward Transitional Justice and Social Reconstruction (May 2004) at 31.
Further, the lack of UN authorisation for the invasion of Iraq, the continuing division within the international community over the merits of the invasion, and the signalled desire to permit the death penalty as a punishment effectively precluded co-operation with the UN over the creation of the IHT. At no stage was a separate forum to try Saddam or other high-ranking Ba’athists considered.

Sylvia de Bertodano has argued that a domestic court like the IHT was the only realistic option in post-war Iraq. However, this is not an inevitable conclusion. No effort was made to explore other options and although it seems unlikely that an international criminal tribunal could have been established, a ‘hybrid’ court like that in Sierra Leone may have been a possibility had US officials been willing to attempt to engage with the UN over the issue and reach agreement on the availability of the death penalty. Further, despite a general wariness of international institutions like the UN amongst the Iraqi population, on the whole it appears Iraqis did support a degree of international assistance with the trials. Given the serious issues that have arisen in the IHT’s operation and the general derision directed at its proceedings by the international media, such a ‘hybrid’ court could hardly have been worse than the IHT and indeed, with the international community taking a stake in its establishment and operation, the onus of reaching international standards would fall on more than just the over-burdened Iraqi state.

Significant ‘internationalisation’ of the court could have had several other significant benefits. First, the appointment of international judges, as envisaged by the original Special Tribunal statute, would have improved the chances of the court consistently and scrupulously respecting international fair-trial standards. The addition of international judges would also have prevented, or at least blunted, criticism of the court as subject to undue political influence and bias. Secondly, the court could have drawn upon more diverse sources of funding and expertise. For example, a significant outreach

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35 De Bertodano, above n 7, at 299.
36 *Iraqi Voices*, above n 33, at 33.
37 See comments of the Executive Director of Human Rights Watch, Kenneth Roth, quoted in de Bertodano, above n 7, at 297.
38 See ICTJ Briefing Paper *Trial and Error*, above n 30, at 6.
39 Apart from US funding for the IHT, the US Regime Crimes Liaison Office (RCLO)
programme modelled on that of the SCSL, although an unlikely prospect in the current security environment, might have addressed some of the ambivalence and mistrust the IHT has encountered regarding its work amongst the Iraqi population. Additionally, diversity of funding and expertise would have gone some way to countering local and international perceptions of the IHT as delivering ‘victors’ justice’. Thirdly, the legitimacy of the court as an instrument for trying significant international crimes would have been greatly enhanced in international eyes by the presence of international judges and experts. Ultimately, it seems that a court more ‘internationalised’ than the IHT would have better used the opportunity to develop international criminal law and render justice in Iraq.

(b) The death penalty

The controversy over the availability of the death penalty as a punishment for international crimes deserves brief consideration. At customary international law, most international jurists accept that there is an emerging norm generally prohibiting the death penalty. Reflecting this emerging norm, the death penalty is not available as a punishment at the ICC, the ICTY or the ICTR. Jens David Ohlin has argued that the scope of the emerging norm may not include genocide, but this is far from settled. If internationalised domestic tribunals are to serve a role in bringing international criminals to account, the merging of international precedents for establishing the elements of international crimes with domestic laws that allow for capital punishment is inevitable. It is also regrettable, as it lends provided logistical and advisory support in its establishment and continues to support the IHT’s functions. ICTJ Briefing Paper Creation and First Trials, above n 21, at 5.

40 For example, many Sunnis perceive the IHT as a mechanism for redressing the suffering of only Shiites and Kurdish victims of the regime: Drumbl, above n 28. See also Mettraux, above n 23, at 289. Mettraux notes that the appointment of international judges to the State Court of Bosnia and Herzegovina has helped to build trust in the judicial system.

41 See comments of the Executive Director of Human Rights Watch, Kenneth Roth, quoted in de Bertodano, above n 7, at 297.


43 This prohibition was especially controversial in relation to the ICTR because the death penalty is available within Rwanda and has been applied to people convicted there for the genocide. See Schabas, above n 43, at 249-50

44 David Ohlin, above n 34.
support to the minority view that international crimes should warrant the death penalty at international law.

The availability and use of capital punishment has certainly contributed to international scepticism of the IHT. The inherently inhumane nature of the death penalty aside, criticism has focused on the punishment being imposed without due process, and the Iraqi people being deprived of important information about past atrocities through the swift executions of leaders of the former regime. The latter is especially relevant in relation to the execution of Saddam. Without minimising the victims’ suffering in Dujail, the episode of violence for which Saddam was executed was in the words of one commentator “a relatively minor thread in a broader tapestry of violence.” As Mark Drumbl notes, “there is a need for modesty with regard to pronouncements of the value of prosecution of a handful of people for systematic criminality and of the transformative potential of such prosecutions”. However, the systemic nature of Saddam’s crimes failed to be considered at all in the Dujail trial and any opportunity for transformative justice was lost with his execution, itself a side-show to the violence engulfing contemporary Iraqi society. The picture of the deposed leader being hanged amid taunts from onlookers less than two months after his shambolic trial in the IHT concluded did not resemble any conception of international criminal justice.

(c) Trying Saddam before a national court

There are a number of reasons why an international court, or at least a “hybrid” court like that in Sierra Leone, would have been a more appropriate forum than the IHT to try Saddam and perhaps several other high-ranking Ba’athists, including the enhanced possibility of a fair trial, meeting international standards. The most significant reason

45 United Nations “Special Rapporteur on the Independence of Judges and Lawyers calls for halt in application of death penalty in Iraq” (press release, 19 June 2007). Additionally, in contrast to general Iraqi law, a person convicted by the IHT cannot seek a pardon or mitigation of his or her sentence. IHT Statute, art 27. See: Mettraux, above n 23, at 289-290.
46 Convicted individuals are executed while other charges are pending against them. Human Rights Watch, above n 22.
47 Drumbl, above n 28.
48 Ibid.
49 See ICTJ Briefing Paper Trial and Error, above n 30.
however, relates to the nature and extent of Saddam’s crimes. If the goal of international criminal justice is to repress international criminals, adopting a functionalist view, it does not matter whether that goal is achieved through domestic or international courts.\(^\text{50}\) However, as Frédéric Mégret has argued, a trial before an international court “sends a strong signal that the international community is ultimately the community of reference for international crimes, the yardstick of universalized understanding of the abominable”.\(^\text{51}\) While Saddam’s crimes were in the main perpetrated against the Iraqi people, he also stood accused of numerous atrocities against the people of other nations, most notably Iran and Kuwait, and was frequently the subject of international opprobrium. His crimes were against humanity as a whole and to confine them to the jurisdiction of a national court, arguably operating with no more than the façade of internationalisation, risks “completely defrauding history of at least an attempt at a specifically universalizing narrative of the events at stake”.\(^\text{52}\)

3. General Comments

In my view, a court in the mould of the SCSL, lacking the death penalty as a permissible punishment, and with a significant number of international judges and personnel, and sufficient resources to conduct trials meeting international standards, would have been a more appropriate forum than the IHT to try members of the former regime for international crimes. Certainly such a court would have been appropriate for at least the most senior members of the former regime. This conclusion naturally attracts the criticism that such a court would be “neocolonism wrapped in judicial robes”.\(^\text{53}\) There is some merit in that argument, but there are also at least two responses: first, the IHT itself is subject to that same criticism;\(^\text{54}\) and secondly, as this article has demonstrated, if the idea of international criminal justice is to be taken seriously, a court more ‘internationalised’ than the IHT is what it demands for Iraq.

\(^\text{50}\) Mégret, above n 17, at 742
\(^\text{51}\) Ibid 744.
\(^\text{52}\) Ibid 740.
\(^\text{53}\) Newton, above 25, at 407.
\(^\text{54}\) See Beth Dougherty “Victims’ justice, victors’ justice: Iraq’s flawed tribunal” (2004) 11.2 Middle East Policy 61. It should also be noted that the only non-Iraqis subject to the IHT’s jurisdiction are those resident in Iraq: IHT Statute, art 1.
Conclusion

This article has not attempted to propose a normative legal framework for the creation of international/internationalised criminal tribunals, but rather has considered the background to the establishment of such tribunals and examined three aspects of the IHT that have attracted criticism. Its thesis has been that the IHT is insufficiently ‘internationalised’ for its purpose, that is, to bring members of the former Iraqi regime to account for their international crimes. This is a situation born of the circumstances of its creation and perpetuated through the intransigence of both the US administration and the international community.