



Category of paper: Discussion Group Summary

The Iraqi Tribunal: The Post-Saddam Cases

A Summary of the Chatham House International Law Discussion Group meeting held on 4 December 2008.

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The meeting was chaired by Elizabeth Wilmshurst. Participants included legal practitioners, academics, NGOs, and government representatives.

Speakers:

- Professor Michael Scharf, Case Western Reserve University, School of Law¹
- Salem Chalabi, Iraqi High Tribunal

Parts of the meeting, namely Salem Chalabi's presentation and his comments during the discussion, were held under the Chatham House Rule.

Introduction

The Iraqi High Tribunal (IHT) was established by the Iraqi Governing Council in 2003 to try high profile officials for war crimes, crimes against humanity and genocide committed during Saddam Hussein's regime. The first trial, Dujail, commenced in October 2005 and was the subject of intense scrutiny from the media, academics and NGO. Coverage and criticism of the IHT peaked in December 2006, when Saddam Hussein was executed, before evaporating almost immediately once the chief protagonist was gone, even though arguably more important cases had yet to be decided.

The discussion group considered the achievements and failings of the IHT to date, in particular in the trials after Saddam Hussein's execution, and the prospects for the Tribunal's future.

Professor Michael Scharf: IHT and Anfal

Due to his experience with the International Criminal Tribunals for the former Yugoslavia and for Rwanda and the Special Court for Sierra Leone, Professor Scharf had been approached to assist with the training of the IHT judges and to provide research assistance. Professor Scharf explained that initially he had had reservations about the proposal. Amongst other things he had regarded the 2003 invasion as unlawful and considered that an international rather than a domestic tribunal should have been established to try Saddam Hussein. He had eventually agreed to assist after receiving assurances that his participation would not fetter his future freedom to criticise the Tribunal.

¹ Professor Scharf is the co-author of the book "Enemy of the State" (see www.EnemyOfTheStateBook.Com) about the trial of Saddam Hussein.

The Trials

To date five cases had been brought in the IHT, of which three were complete and two were ongoing. Dujail, the first trial, had been much publicised because Saddam Hussein had been the main defendant. The trial had related to the retaliation inflicted on the town of Dujail following an assassination attempt against Saddam Hussein in 1982. Civilians were rounded up, convicted at show trials and executed and the town was bulldozed. Professor Scharf reminded the meeting of the judgment and the sentences given to the eight defendants. One defendant, a low level Baath party official, had been acquitted. Three regional Baathist officials were convicted and sentenced to 15 years imprisonment for their roles in assisting with the round-up. The former Vice-President, Taha Yassin Ramadan, was found guilty of crimes against humanity for his plan to bulldoze the town. He was initially sentenced to life imprisonment, but his sentence was increased to the death penalty by the Appeals Chamber and he was hanged in March 2007. Saddam Hussein, his half-brother, Barzan al-Tikriti, and the former chief judge of the Revolutionary Court, Awad Hamed al-Bandar, were also convicted of crimes against humanity and sentenced to death. Their death sentences were carried out in December 2006 and January 2007.

The second trial, Anfal, had commenced in June 2006. Initially Saddam Hussein had been a defendant. The Iraqi law does not, however, permit convictions in absentia so Saddam Hussein was withdrawn as a defendant after his death in December 2006, leaving six other defendants to be tried for genocide, crimes against humanity, and war crimes. The factual basis of the trial was a series of attacks in 1988 and 1989 against the Kurdish population in northern Iraq. About 180,000 people were killed, several hundred thousand people displaced and hundreds of villages destroyed. The sentences were handed down in June 2007. Charges were dropped against one defendant, Tahir Tawfiq Yousif Ali Ani. Two (Farhan Mutlak Salih Al Jibouri and Sabir Abdul Aziz Hussain Al Douri) were convicted of genocide and crimes against humanity and sentenced to life imprisonment. Ali Hassan al-Majid (aka Chemical Ali), Hussein Rashid and Sultan Hashem were convicted of genocide, crimes against humanity and war crimes and sentenced to death. The Anfal executions have not yet taken place.

The third trial had begun in August 2007 and the judgment was delivered on 1 December 2008, just a few days before the meeting. The trial had related to the brutal crushing of a Shiite rebellion in 1991. Three of the fifteen defendants were acquitted. Four defendants were sentenced to life

imprisonment, six given long prison sentences and two, Chemical Ali and Abdul-Ghani Abdul-Ghafur, were sentenced to death.

Two trials for crimes against humanity were still in progress as at the date of the meeting. One related to the execution of dozens of merchants who were accused of raising their prices during the period when UN sanctions had been imposed against Iraq. The other was for the executions of citizens who had protested after the assassination of a cleric in 1999. Professor Scharf expected that at least two further trials would be brought before the IHT.

The Anfal Trial

Professor Scharf provided further insight into the Anfal trial. The Anfal prosecution had adduced both oral and written evidence. Professor Scharf reported that 77 witnesses had given oral evidence, some of whom had crawled out of the mass graves just before the bulldozers had buried their relatives and friends. Further evidence had been provided in the form of tape recordings of the defendants' conversations in 1988 and 1989. With respect to documentation, Professor Scharf recalled five documents that had been key to the prosecution case. First, in a decree of 29 March 2007 Saddam Hussein had given Chemical Ali complete authority over the region and its problems. In orders of 3 June, 20 June and 22 June 2007 Chemical Ali had first commanded that supplies of food, livestock and fuel be stopped from reaching the Kurdish villages, then ordered that every person between the ages of 15 to 70 and every animal be killed, and finally that all prisoners were to be beheaded after interrogation. The prosecutors had also produced a letter of 23 June 1987 directing the destruction of towns and crops.

One of the criticisms of the IHT process had been that, although the defendants had confessed their guilt during interrogation, information obtained under coercion was not excluded under the IHT evidential rules. At the trial the judges had invited the defendants either to comment on their confessions or have them incorporated into the record. Faced with this choice the defendants had decided to forgo the right to silence, but in so doing had, in fact, incriminated themselves further.

Another criticism of the Anfal trial was that in late 2006 the Iraqi Prime Minister had removed the presiding judge because he had stated that Saddam Hussein "was not a dictator." Professor Scharf had understood that this remark had been intended to convey the fact that Saddam Hussein was innocent until proven guilty, but others had inferred bias towards Saddam Hussein.

Under Article 5 of the original IHT Statute judges could only be removed for cause by a decision of the IHT. However, the Statute was amended by the Iraqi National Assembly with the result that the judges could be removed by the Iraqi Prime Minister at any time for any reason. Professor Scharf reminded the meeting that some of the Dujail judges had also been replaced. Presiding Judge Rizgar Amin was pressured to resign in early 2006 as he was regarded as too weak and another judge was removed during the deliberation phase reportedly because of his opposition to the death penalty. He noted that Eric Blinderman of the Regime Crimes Liaison Office had considered that this provision was the source of the demise of the legitimacy of the IHT project.

Professor Scharf then discussed two legal issues material to the Anfal case. The first issue was whether the doctrine of joint criminal enterprise formed part of customary international law in 1988. Under this form of liability where a group acts under a joint plan each individual is responsible for the reasonably foreseeable acts of the others, even if he did not know of or sanction the actual acts. Liability for a joint criminal enterprise had been recognised to form part of customary international law by the International Criminal Tribunal for the former Yugoslavia in *Tadic* in 1999. However, Professor Scharf noted that many commentators had criticised the Appeals Chamber's findings in *Tadic* as a misreading of the jurisprudence of the Nuremberg trials. The IHT concluded that joint criminal enterprise had been customary international law since Nuremberg and that application of the doctrine to events occurring in 1988 was therefore valid. Professor Scharf noted that the Cambodia Genocide Tribunal will soon be ruling on a similar issue, namely whether the joint criminal enterprise doctrine was part of customary international law in 1976-1979 when the Khmer Rouge committed atrocities in Cambodia..

Secondly, the *mens rea* element of the crime of genocide had been raised as an issue, namely whether a specific intent to commit genocide had been proved. (The defendants had argued that they had attacked and relocated the northern Kurds not because they were Kurds but because they were siding with the enemy in the Iran/Iraq war and lived in the oil-rich region.) The IHT found, however, that mixed motives do not negate intent for the purposes of genocide. The Iraqi troops had prevented escaping Kurds from reaching Turkey and prevented aid agencies from providing assistance. This, together with statements from the defendants encouraging the eradication of all Kurds and medals of honour being awarded to participants, had provided sufficient evidence of intent.

Professor Scharf concluded that the Anfal case had been an important precedent in terms of the crime of genocide. It was the first time that the IHT had dealt with genocide and it was the first Middle East genocide conviction. The 900 page judgment provided a definitive account of the Anfal campaign which could be read by Arabic speakers. It was also significant because the trial had run smoothly once Saddam Hussein was no longer a defendant. Professor Scharf rued that had the international media continued to cover the proceedings of the IHT they would have seen a more competently run trial. Iraqi television had, however, broadcast the trial and it had been watched by millions of Iraqis.

Political Interference

Professor Scharf had concluded that the biggest flaw of the IHT had been the outside influence of the Prime Minister and the Presidential Council. This was particularly regrettable as it had discredited the judicial process when the evidence in the trials spoke for itself.

Another participant pointed out that the United States had also interfered with the process. A prime example of such interference was the postponement of the three Anfal executions. The US Embassy had sought to stop the execution of Rashid, a respected soldier, in part due to concerns that his death would anger the Sunnis whose cooperation the US needed in the fight against Al Qaeda. It was noted that the US had put pressure on the Presidential Council to refrain from approving the executions. President Jalal Talabani had excused himself from the decision on the grounds that he was against the death penalty and left the two Vice Presidents to decide the issue. (Due to his personal views on the death penalty, President Talabani had refused to endorse all the death sentences that had been given by the IHT and, in order not to thwart the judicial process, delegated his authority to the Vice Presidents. Using this delegated authority the execution of at least five people, including Saddam Hussein, had been approved.) The Vice Presidents (one Shiite, the other Sunni) had approved Chemical Ali's execution for the Anfal campaign but the fate of the others has not been resolved. The Iraqi Prime Minister was however, pressing for the sentences to be carried out, as was the Kurdish population.

It would clearly be unacceptable to execute two Anfal defendants (Chemical Ali and Sultan Hashem) but to spare Rashid. One participant noted that the very recent judgement in the Shiite rebellion trial offered a solution to this problem. On 2 December 2008 Chemical Ali was sentenced to death for his role in crushing the rebellion, whilst Hashem and Rashid received prison

sentences. A neat political compromise might therefore be reached by executing Chemical Ali pursuant to the Shiite rebellion judgment and quietly ignoring the Anfal sentences.

The Nature of the IHT

Several participants expressed their regret that an international criminal tribunal for Iraq had not been established. International participation had proved impossible because the international community would not cooperate where the death penalty was an available sanction, yet the Iraqis had refused to proceed with a tribunal that did not have the power to hand down a death sentence.

One participant queried the rationale of the all-or-nothing stance of the international community. He noted, for example, that the United Nations did not adopt a similar approach to providing aid to States that had not abolished the death penalty. Another participant commented that the Iraqis' position on the death penalty was, in fact, very moderate when compared with the extreme propositions that some had originally posited in 2003. These had included seizing and executing (without trial) all key officials who were held in US custody. Indeed some Iraqis had criticised the IHT Statute for conferring too many rights on the defendants (in particular Saddam Hussein).

The IHT was a hybrid mix of international tribunal and domestic Iraqi court. The IHT Statute had originally been modelled on those of the international criminal tribunals and the International Criminal Court. This had meant that the IHT trials were for international crimes, hence there was no question of Saddam Hussein having immunity. In the end, many believe the final version of the IHT Statute had proved not to be robust enough to ensure fair and dignified trials in a State which lacked the rule of law. For example, the world had seen the havoc caused by Saddam Hussein's hijacking of the Dujail and Anfal trials for his own political propaganda. It was conceded that no one had anticipated the prolonged internal conflict when the IHT had been established. With hindsight it was evident that a State which could not protect the judges, witnesses or interpreters could not provide a forum for a fair trial.

One participant said that some of the criticisms of the IHT were unfounded. For example, the IHT standard of proof, "to the satisfaction of the judges", had been attacked on the grounds that it did not provide the same protections as "beyond reasonable doubt". He noted that in fact the two terms equated to

the same standard in practice. The IHT judges had, however, eventually adopted the language of “beyond reasonable doubt” in order to avoid further criticisms. The participant reminded the meeting that the Iraqis were merely used to different legal system and asked the meeting for whom the trials had been intended. This should have been taken into account when the world had seen rants and emotional outbursts in court. He noted that support from the Iraqi population had really only begun once the judge had shouted Saddam Hussein down. He explained that it was difficult for non-Iraqis to understand Iraqi sentiments towards the IHT and their position as victims of the former regime.

One participant reminded the meeting that, in any event, even if an international tribunal had been established it would not have been designed to hear all the cases of crimes that had been committed during the former regime. For example, the Special Court for Sierra Leone was only intended to try a limited number of high profile defendants. It was noted that the Iraqi Central Criminal Court had jurisdiction to try a range of crimes, including insurrection and had given death sentences on many occasions.

Investigations

The meeting discussed the investigation process. Investigative judges had been assigned different cases, the first chief investigative judge being Ra'id Juhi Hamadi Al-Sa'edi, who had since moved to Cornell University. It was noted that Dujail had been the first trial to commence simply because it was the first investigation to have been completed. Though it turned out that there was a great deal of documentary evidence proving Saddam's involvement in the crimes against the people of Dujail, many commentators had been surprised that Saddam Hussein had been indicted as a defendant in the first case as it had been expected the Tribunal would have started with lower ranking officials and then build upwards. The Prime Minister had, however, wanted Saddam Hussein to be brought to court and there had been pressure on the judiciary to indict him. In particular, the Shiite alliance had wanted an indictment so it could be seen to have made progress before the December 2005 elections.

Administration of the IHT

Initially the IHT had been financed and set up by the United States. For example, the US had paid for the building, the US Regime Crimes Liaison Office (RCLO) had led the administration, maintained the evidence, and all defendants had been kept in US custody. The IHT was now, however,

funded by the Iraq government. Furthermore the RCLO had been gradually handing over responsibility, so that an initial RCLO staff of 100 had been reduced to two. The US had also transferred the last of the defendants into Iraqi custody in November 2008. (This had removed a significant opportunity for US influence/interference, as the US would not longer be able to threaten that it would not deliver defendants to the trial on any given day. One participant regretted that the director of the RCLO who had been in office at the time the judges had been removed had not used this tactic to indicate his disapproval of the Iraqi executive's interference.)

The IHT handover complemented the progress that had been made outside the IHT. For example, that Iraq and the US had recently concluded a Status of Forces Agreement (SOFA) to govern the continued US presence in Iraq and provide for the gradual withdrawal of US troops from January 2009 to 2011. It was noted, however, that the SOFA Agreement required that it be approved by referendum within six months. In practice this might turn out to be a poisoned pill as it was unlikely that the majority of Iraqis would approve the agreement.

The Future of the IHT

It was expected that at least two further trials would be heard by the IHT. The meeting briefly discussed the prospect of trials for crimes committed against Kuwait and Iran, the latter State having recently announced that it wanted compensation from Iraq for previous war crimes. It was agreed that it was very unlikely that there would ever be a trial for crimes committed against Kuwaitis unless Kuwait forgave Iraq its debts. A trial for war crimes against Iran was even more improbable, in particular because of US opposition.

The future trials were also discussed with reference to the wider issue of the internal peace process. Whilst a significant section of the population did not yet feel vindicated for the crimes of the former regime, one participant emphasised that the prospect of further trials should be considered in the context of political reconciliation. By reviving the past, he opined, the IHT trials were obstacles to future reconciliation. He therefore called for the remaining cases to be brought efficiently so that the IHT could be dissolved before long.

The discussion group also considered the future of the IHT judges and staff. It was noted that the judges did not want the Tribunal to be wound up. Although there were security risks, the judges were well paid and had a certain status after which most judicial positions available would be a

demotion. One participant commented that already the judges were raising issues about what would happen once the IHT was wound up, in particular in terms of their financial and physical security.

The meeting concluded by discussing the possibility of Iraq ratifying the ICC Statute. Because the ICC does not have jurisdiction to prosecute for crimes committed prior to its foundation in 2002, ICC ratification would not be intended to bring further officials of the former regime to account. It was clear that some Iraqis hoped that ratification would lead to trials for post-2003 international crimes, such as those committed in Abu Ghraib and the ethnic cleansing that had been carried out by all the major sectarian groups. One participant queried whether, if Iraq did ratify the ICC Statute, it would try to ensure that ICC jurisdiction had retroactive effect for crimes committed since 2002.

The potential significance of ICC ratification for the future peace of Iraq was noted. There was a risk that further atrocities would be committed once the US withdrew. It was hoped that this might be avoided if potential perpetrators knew that at some point they might be held accountable. There was a general consensus, however, that ratification would not occur unless other States encouraged and supported Iraq through the ratification process.