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RESTORING THE RULE OF LAW: LESSONS FROM IRAQ

The panel was convened at 10:45 a.m., Thursday, March 30, by its chair, Rosa Ehrenreich Brooks of the University of Virginia School of Law, who introduced the panelists: Mark Drumbl of the Washington & Lee University School of Law; Greg Kehoe, Advisor to the Iraqi Special Tribunal; and Outi Korhonen of the Université Libre de Bruxelles.*

THE IRAQI HIGH TRIBUNAL AND RULE OF LAW: CHALLENGES

By Mark A. Drumbl[†]

My remarks address challenges faced by the Iraqi High Tribunal (or Iraqi High Criminal Court, depending on the translation—I will stick with tribunal). I locate these challenges in the tribunal's prosecution of Saddam Hussein. However, they spill over to other defendants and to transitional justice/rule of law initiatives in Iraq at large. Some of these challenges are general to all prosecutions of leaders and senior officials for atrocity; some are specific to the situation in Iraq. All challenges remain fluid, insofar as the tribunal has just begun its work.

The tribunal was established on December 10, 2003, and approved by the Iraqi Transitional National Assembly on August 11, 2005. Its purpose is to prosecute high-level members of the former Iraqi regime. The tribunal's statute, drafted in 2003, was amended in 2005 and approved in October 2005.¹ The tribunal is empowered to prosecute genocide, crimes against humanity, war crimes, and certain violations of Iraqi law committed between July 17, 1968, and May 1, 2003. It adheres to a civil law model with investigative judges. The tribunal is to have primacy over all other Iraqi courts with respect to the extraordinary international crimes within its jurisdiction. Its personnel are Iraqi. In its interpretation of the crimes within its jurisdiction, the tribunal may resort to relevant decisions of international criminal courts.² The tribunal shall also turn for guidance to the sentences of international criminal courts when it comes to affixing punishment for the extraordinary international crimes within its jurisdiction.³ In addition to sentences previously issued by other international courts, the tribunal is to take into account factors such as the gravity of the crime and the individual circumstances of the convicted person. However, punishment is that prescribed by domestic Iraqi law, which includes the death penalty. The tribunal's Rules of Procedure and Evidence permit guilty pleas. The rules mandate the trial chamber when sentencing offenders to take into consideration aggravating and mitigating circumstances. Only one specific example is given, this being a mitigating factor: substantial cooperation.⁴

Why prosecute and punish perpetrators of mass atrocity? A review of the criminology and penology of international criminal law suggests that prosecution and punishment satisfies a number of aspirations, including: retribution, general deterrence, reconciliation, the expression of the importance of law, and the authentication of a historical narrative. The October 2005

* Mr. Kehoe and Professor Korhonen did not submit remarks.

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¹ Law No. 102005, Law of the Iraqi Higher Criminal Court (Oct. 9, 2005), Official Gazette of the Republic of Iraq, No. 4006 (Oct. 18, 2005).

² *Id.*, Art. 17.

³ *Id.*, Art. 24.

⁴ On guilty pleas and mitigating/aggravating factors, see generally *Rules of Procedure and Evidence of the Iraqi Special Tribunal*, THE OFFICIAL GAZETTE OF THE REPUBLIC OF IRAQ, No. 4006, Rules 37, 65 (Oct. 18, 2005).

version of the Statute of the Iraqi High Tribunal identifies its “justifying reasons” in a postscript as follows:

- to expose the crimes committed in Iraq;
- to lay down rules and punishments to condemn the perpetrators after a fair trial;
- to form a high criminal court;
- to reveal the truth, agonies, and injustice;
- to protect the rights of Iraqis; and
- “alleviating injustice and for demonstrating heaven’s justice as envisaged by the Almighty God.”

The “justifying reasons” therefore encompass all the goals generally placed upon the shoulders of atrocity trials, although lean more toward truth-telling, capacity-building, and expressivism than is the case with other institutions.

I would like to present and discuss four challenges faced by the tribunal in attaining these ambitious goals. These are: (1) timing; (2) retrospective justice and prospective politics; (3) trial narratives—namely, the stories that the trials are telling; and (4) faith in the potential of rule of law.

TIMING: PROSECUTING DURING PERVASIVE INSECURITY

This concern is somewhat self-evident. The choice to prosecute Saddam Hussein and to showcase his trial as an instrument for transitional justice was made at a time of *ex ante* optimism about the ability to maintain security in Iraq. At present, however, Iraq is wrought with insecurity. There are daily reports of bombings, death, and sectarian violence.

The tribunal itself has been plagued by violence. Since the proceedings opened on October 19, 2005, one judge has been killed, along with a court employee and two defense lawyers. Other personnel have fled the country. Plots against the tribunal have been uncovered, including to fire rockets at the courtroom itself.

The question, then, is one of sequencing: can trials can be effective, or functional, amid such instability? I am doubtful. There must be some sort of security in order for a trial to be effective. On the ground research, such as that undertaken by Nehal Bhuta and Cherif Bassiouni, reveals that the depth of violence prevalent in the country renders Iraqis ambivalent about the work of the tribunal. Moreover, interviews with Iraqis suggest frustration that there is such a focus on historical crimes—and concomitant allocation of resources—while there is impunity for gruesome crimes committed today.

It may well be deflating, but perhaps the time has come for a serious discussion of moving trials out of Iraq. The initial choice to site the proceedings in Iraq and place them under Iraqi control was laudable insofar as it pushed against the externalization of justice that has plagued other international criminal justice institutions, such as the ICTR. However, there are advantages to international proceedings. These include greater security for all trial participants and staffing by officials less vulnerable to national political pressures.

RETROSPECTIVE TRIALS AND PROSPECTIVE ALLOCATION OF POLITICAL POWER

The tribunal must be placed within the broader nexus of Iraqi politics. This is a politics of sectarian claims, entitlements, and setbacks. The tribunal is a chit in the internal politics of the prospective division of powers among the Kurd, Shiite, and Sunni groups. The work

of other transitional justice institutions, such as the De-Ba'athification Commission, also must be placed within the context of sectarian conflict emblematic of Iraqi politics.

One of the major dynamics of Iraqi politics is that Sunnis see their influence dissolving. Sunni identity politics are not related to the resuscitation, rehabilitation, or restoration of the Saddam regime. Accordingly, the success of the tribunal's work should not be evaluated from the perspective whether it changes Sunni perceptions about the prior regime. Rather, the tribunal's central challenge is to allay fears that the trials are a mechanism of ethnic and religious differentiation and subordination. It is unclear whether fastidious adherence to internationalized norms of due process will suffice to allay these fears. Many Sunnis see only a tribunal presided by a Kurdish judge redressing the suffering of Shiite and Kurdish victims.

Admittedly, transitional justice largely is intergenerational. The process must be assessed longitudinally. German public opinion, initially negative toward Nuremberg, changed over time. Eventually, the IMT at Nuremberg judgment and even Control Council Law proceedings became a template for Germans to discuss and consider their involvement in atrocity. Might this happen in Iraq? Possibly, but it simply is unrealistic to expect it to happen quickly.

In terms of outreach to the Iraqi population, another glaring gap is the invisibility of women at the tribunal in any capacity other than as victims.

TRIAL NARRATIVES

In response to the shortcomings of the omnibus (and now terminated) Milošević proceedings, the tribunal's work has become operationalized through a series of up to a dozen mini-trials, each keyed to a specific incident. The first mini-trial involves the killing of 148 individuals in the Shiite village of Dujail. These individuals had been sentenced to death by the Revolutionary Court in 1984 following a failed assassination attempt on Saddam in Dujail in 1982. Many individuals died under torture before they could be executed.

Dujail was selected as the first mini-trial owing to perceptions it provided a water-tight case. Subsequent mini-trials involve a higher-stakes context. This is the case with proceedings related to the Anfal campaign which resulted in the killing of 50,000 Kurdish civilians in 1988, including by chemical weapons. Indictments have been issued against seven defendants, including Saddam, on charges of genocide and crimes against humanity. At the time of writing, it is anticipated that the Anfal campaign will constitute the second mini-trial. Other potential upcoming mini-trials would be centered around fiery accusations, including draining of the marshes and crushing of the 1991 Shiite uprising in the south by Sunni tribes of the west (allegedly under Saddam's order, which led to 150,000 deaths).

The prosecution case with regard to the Dujail violence is nearly closed. Things have been proceeding apace for the prosecutor. Documentary evidence was proffered and admitted by the tribunal that implicates Saddam, as well as the Revolutionary Court, in sentencing and ordering executions of Shiites not plausibly connected to any assassination attempt against him. Prosecutors did an effective job displaying these signed documents in the courtroom through audiovisual technology. These documents corroborate the often moving victim testimony.

However, and not to minimize the suffering of victims, Dujail remains a relatively minor thread in a broader tapestry of violence. The performativity of the Dujail proceedings is of relatively modest value; other than the fact that—like the *Altstoetter* (jurists) trial by the U.S. Military Commission at Nuremberg—Dujail permits the opportunity to judge the Revolutionary Court as a whole for applying the law in the service of oppression.

Although the Iraqi High Tribunal is moving toward the adduction of evidence regarding the Anfal campaign, at the time of writing it remains unclear whether verdict and sentence (as well as possible execution of sentence) regarding Dujail would be pronounced during the Anfal (or further) proceedings. In a broader expressivist sense: if a low-stakes conviction were to overshadow the remainder of the charges, then the tribunal would, in the name of conservatism, have forsaken the opportunity to make a hardier historical footprint. The subsequent proceedings, with greater narrative potential, might become anticlimactic owing to deliberate sequencing decisions.

However, even if the legal technicalities are ironed out (as they likely will be), a paradox remains. The iterated vignettes of atrocity planned by the Saddam trial may create a situation where the sum of the vignettes may not add up to the normative force of an omnibus conviction. There is a trade-off between risk management and narrative potential. The tribunal will have to consider how to balance this trade-off and work hard to ensure that the sum of the trial parts adds up to, and perhaps exceeds, the whole. Let us recall that the overarching nature of patterns of criminality that the one joint trial by the IMT at Nuremberg revealed about the Nazis yielded tremendously powerful narratives and authenticated the full force of Nazi aggression.

On a related note: to what extent might the narrow truth and artificial reductionism of the criminal trial (i.e., binary categories of guilt or innocence) shield much deeper inquiries? Such inquiries might include international and foreign complicity in Saddam's abuses, such as the selling of weapons (some of which has come to light in alternate proceedings, such as the verdict in the Netherlands against Frans van Aaraat)⁵; the role of the United States in providing financial support and material assistance to aid the Ba'athist war against Iran; the complicity and involvement by ordinary Iraqis in totalitarianism; the U.S. exhortation of uprising in 1991 and subsequent failure to support those who rose up; the toll UN sanctions took on ordinary Iraqis and how these sanctions may have paradoxically strengthened Saddam's control by weakening his opposition; and the legality of Operation Iraqi Freedom.

I do not raise these as *tu quoque* ("you too") defenses. Nor do these actually bear on determinations of the individual guilt of defendants before the tribunal. Admittedly, defendants may well exploit these issues to embarrass the tribunal. Nonetheless, these are historical realities that may be squeezed out by application of the modern rules of evidence and, therefore, fail to appear on the pages and transcripts of judicialized truths, notwithstanding the fact that they form an important part of Iraqis' perceptions of their current reality and of the very legitimacy of the tribunal in the first place.

Is there a relationship between the tribunal's control over the trial process and the legitimacy of the narratives produced by this process? The current chief judge, Judge Rahman, has been praised for his tight control over the courtroom, in contradistinction to Judge Rizgar, his predecessor, who was subject to considerable criticism from politicians for having accorded Hussein too much leeway (some say he in fact had lost control over the courtroom). On the one hand, tight control is necessary for managerial and bureaucratic reasons, to streamline

⁵ In December 2005 the Hague District Court found Frans van Anraat guilty of complicity in war crimes in Iraq and sentenced him to 15 years' imprisonment. Van Anraat is a Dutch businessman who supplied raw materials to the government of Iraq that were used for the development of mustard gas and chemical weapons which were later used to attack the Kurdish population of Halabja in 1988 (part of the Anfal campaign)—attacks the Dutch court deemed to rise to the level of genocide (Van Anraat was acquitted of genocide insofar as the court did not find sufficient evidence of his knowledge of the genocidal intent of the Iraqi government). It is unclear whether the Iraqi High Tribunal would be influenced by the legal findings of the Dutch court on the question of genocide. There is some indication, however, that the tribunal would access the evidence made available to the Dutch court and the testimony. Sameer N. Yacoub, *Saddam Charged With Gassing Kurds in '80s*, WASH. POST (Apr. 4, 2006).

process, dissipate inflammatory controversy, and preserve the authority of the tribunal. The need for such control arises from defendants' antics, designed to turn the proceedings into farce. These include outbursts, taking prayer breaks during witness testimony, hunger strike, a brawl, dismissal of defense attorneys, and Saddam's chief of intelligence (and half-brother) appearing in pajamas.

However, there is a cost to managerial effectiveness in terms of the resonance of the trial to wider audiences in Iraq and whether the full story of how Saddam consolidated power and the multi-causal origins of this power is told. In particular, by thus far refusing to respond to defense motions that pertain to the tribunal's jurisdiction and the legality of its creation, the tribunal may weaken its own credibility. Whereas debate over the formation of the tribunal may be unnecessary, embarrassing, or technical to U.S. officials, this debate may be constructed differently by Iraqis insofar as it goes to the heart of the U.S. occupation and continuing U.S. control over important political decisions in Iraq,⁶ including the decision to put Saddam on trial and invest large sums of money to that end. This presents a contrast with the ICTY, whose decision in the *Tadić* matter—flaws notwithstanding—grappled with important issues of legitimacy. I'm not sure what convincing rationalization the tribunal can proffer regarding the legitimacy of its own creation, but engaging with the issue is preferable to leaving it as the elephant on the table.

TOO MUCH FAITH?

The tribunal was constituted amid a sense of giddiness. However, criminal trials of massive human rights abusers can only do so much to restore rule of law, and restoring rule of law can only do so much to promote a sense of justice, and justice can only do so much to promote peace. There is a need for modesty with regard to pronouncements of the value of the prosecution of a handful of people for systematic criminality and of the transformative potential of such prosecutions. Overly ambitious and unrealistic expectations of the benefits the prosecution would bring may now be returning to deflate the tribunal, leaving trial audiences with a sense of relative disappointment.

In conclusion, there also is need for some modesty, or at least circumspection, with regard to broader simplifications of the transformative potential of rule of law generally. The United States places considerable hope in democratization—not just in Iraq, but also generally, given the extent to which goals of democratization are laced throughout the 2006 U.S. National Security Strategy. Yet democratization is not a panacea. In fact, in the short-term it may create gut-wrenching instability and polarization in multi-ethnic states, such as Iraq.

⁶ See, e.g., Edward Wong, *Shiites Say U.S. Is Pressuring Iraqi Leader to Step Aside*, N.Y. TIMES (Mar. 28, 2006) (noting that “[s]enior Shiite politicians said [. . .] that the American ambassador [Zalmay Khalilzad] has told Shiite leaders to inform the Iraqi prime minister that the Bush administration does not want him to remain the leader of Iraq in the next government.”).