

The capture of Saddam Hussein on December 14, 2003, has prompted wide-ranging debate about where and how he should be tried. While potential venues for prosecution range across a broad spectrum, it seems likely that Hussein will be tried before a court in Iraq operating with some form of international assistance.

The International Criminal Court: Prosecutions before the year-old International Criminal Court (ICC) in The Hague are unlikely for two reasons. First, the Court has jurisdiction only with respect to crimes committed after July 1, 2002, the date that its statute entered into force.^[1] The vast majority of charges likely to be pressed against Hussein involve crimes committed before then.

Second, the Court could exercise jurisdiction over crimes committed by Hussein in Iraq only with the consent of Iraq or as a result of a referral by the UN Security Council acting under Chapter VII of the UN Charter,^[2] and neither prospect is likely. Under the State consent regime of the Rome Statute of the International Criminal Court (Rome Statute), which applies in the absence of a Security Council referral, the requisite consent must be provided by either the State where the crimes in question occurred (the territorial State) or the State of nationality of the alleged perpetrator.^[3] In respect of crimes allegedly committed by Hussein in Iraq, Iraq is of course both the territorial State and the State of nationality of the alleged perpetrator. States can provide consent to ICC jurisdiction either by adhering to the Rome Statute or by lodging a declaration accepting the Court's exercise of jurisdiction with respect to the crime in question.

^[4] Iraq is not a party to the Rome Statute and, in light of the incumbent U.S. administration's opposition to the ICC, ^[5] ad hoc consent during a U.S.-led occupation is inconceivable. Further, because most Iraqis would like to prosecute Saddam Hussein in domestic courts, Iraqi consent to ICC jurisdiction would be unlikely even if other barriers to ICC jurisdiction could be surmounted. Finally, US opposition to the ICC would also preclude Security Council referral, since the US would surely veto any such attempt.

An Ad Hoc International Court: In principle, the UN Security Council could establish an ad hoc tribunal with jurisdiction over crimes committed by the Ba'ath regime. But after a decade of lengthy and costly trials before two other courts created by the Security Council in the exercise of its powers under Chapter VII of the UN Charter — the International Criminal Tribunal for the former Yugoslavia^[6] and the International Criminal Tribunal for Rwanda^[7] — there appears to be little appetite within the Council for the creation of a third ad hoc tribunal. The United States, whose support for such action would be essential, has taken the position that Iraqi courts can and should take the lead in prosecuting Hussein-era crimes.

Hybrid Courts: A more plausible option is the creation of a hybrid court. Hybrid courts, which now operate in Kosovo, East Timor and Sierra Leone, enforce a combination of domestic and international criminal law and comprise both local and international judges, prosecutors and administrative staff.^[8] The courts in East Timor and Kosovo were established by United Nations administering authorities, while the Special Court for Sierra Leone (SCSL) was established by a treaty between the United Nations and the government of Sierra Leone.^[9] Negotiations leading to conclusion of the UN-Sierra Leone treaty were undertaken pursuant to a mandate by the UN Security Council.^[10] Based in Freetown, Sierra Leone, the SCSL has been operating since 2002. A majority of its judges and its Chief Prosecutor and Registrar were appointed by the UN Secretary-General.

The United Nations has agreed to participate in a hybrid court in Cambodia as well. While the SCSL operates outside the regular court system of Sierra Leone,^[11] the Extraordinary Chambers in the Courts of Cambodia will form part of the Cambodian judiciary. At the insistence of the Cambodian government, a majority of judges and the most senior officers of the Extraordinary Chambers will be Cambodian nationals. To address UN concerns about the impartiality of the Cambodian judiciary, a super-majority of judges must approve any verdict.^[12]

As the contrasting details of the SCSL and the proposed Cambodian court suggest, there is no single model for a hybrid court. Each has been tailor-made to address the unique imperatives of the country or region in which they operate.

Many non-Iraqis support the creation of a hybrid court for Iraq. But the Iraqi Governing Council's desire to retain the death penalty presents a significant impediment to the creation of such a hybrid court operating with UN support. Neither the United Nations nor most of the United States' European allies would participate in a court that could impose capital punishment.

Another model of hybrid court favored by some Iraqi and other jurists is a special Iraqi tribunal with jurisdiction over crimes under international law in which qualified jurists from other Arab states would participate alongside Iraqi judges.

Domestic Trials: The option favored by members of Iraq's Governing Council and by the United States government is trial before reconstituted Iraqi courts, purged of judges loyal to Saddam Hussein. One potential venue for prosecution of Hussein is the — Iraqi Special Tribunal for Crimes Against Humanity, — whose statute was adopted by the Iraqi Governing Council on December 10, 2003.^[13] The statute confers jurisdiction over Iraqi nationals and residents accused of specified crimes committed between July 16, 1968 and May 1, 2003.^[14]

Pursuant to this statute, the Iraqi tribunal's subject matter jurisdiction would comprise a blend of domestic and international crimes. The latter include the international crimes of genocide, crimes against humanity and war crimes,^[15] while the former include the following offenses under Iraqi penal law:

- a) For those outside the judiciary, the attempt to manipulate the judiciary or involvement in the functions of the judiciary, in violation, inter alia, of the Iraqi interim constitution of 1970, as amended;
- b) The wastage of national resources and the squandering of public assets and funds, pursuant to, inter alia, Article 2(g) of Law Number 7 of 1958, as amended; and
- c) The abuse of position and the pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country, in accordance with Article 1 of Law Number 7 of 1958, as amended.^[16]

As adopted on December 10, 2003, the statute for the Iraq tribunal makes only limited provision for international participation. Article 28 provides: □The judges, investigative judges, prosecutors and the Director of the Administration Department shall be Iraqi nationals.□ But in an apparent concession to foreign concerns, Article 4(d) provides: □The Governing Council, if it deems necessary, can appoint non-Iraqi judges who have experience in the crimes encompassed in this statute, and who shall be persons of high moral character, impartiality and integrity.□

Other provisions require the appointment of non-Iraqi nationals □to act in advisory capacities or as observers.□^[17]

Some commentators have raised concerns about whether the Iraqi Governing Council, whose members were appointed by the Coalition Provisional Authority (CPA), may lawfully create such a court.^[18] Their concerns apparently derive from provisions of the Geneva Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War.^[19] restricting permissible changes to the penal law of occupied territories by Occupying Powers.^[20]

The Geneva Convention (No. III) Relative to the Treatment of Prisoners of War.^[21] may also have implications for how Saddam Hussein, who remains in US custody, may be tried. As the government official who was ultimately in control of the deposed regime□s armed forces, Hussein is entitled to prisoner-of-war status.^[22] As a prisoner of war, he can be tried by the Detaining Power□in this case the United States□□only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war.□^[23] Moreover, □[i]n no circumstances whatsoever shall a prisoner of war be tried by a court of any kind which does not offer . . . essential guarantees of independence and impartiality.□^[24]

Since these provisions are designed to ensure that prisoners of war receive specified protections if they are tried by a Detaining Power, it is not clear whether or under what circumstances US authorities could surrender Hussein for prosecution by Iraqi courts without circumventing its own obligations under the Third Geneva Convention.

*[Author's update: On January 8, 2004, the Pentagon announced that it had determined Saddam Hussein to be a prisoner of war. According to an Associated Press account published in the wake of this announcement, a spokesman for the International Committee of the Red Cross "said handing Saddam over to the Iraqis for trial wouldn't necessarily conflict with the 1949 Geneva Conventions on the conduct of warfare, as long as he is granted due process. It is up to the United States, as Iraq's occupier, to determine how Saddam is to be tried." War Crimes Trial for Saddam Is Possible, AP, Jan. 10, 2004.]

Trials by Third States: The governments of both Iran and Kuwait have indicated that they may bring charges against Hussein for crimes committed against their nationals by Iraqi armed forces. It is also conceivable that Iraqi officials other than Hussein may be prosecuted in third states exercising universal jurisdiction. In November 2002, Danish authorities placed an Iraqi defector, General Nizar al-Khazraji, under house arrest in connection with accusations relating to Iraq□s use of poison gas against Kurds in northern Iraq in 1988. Al-Khazraji disappeared from his home in Soroe, Denmark on March 17, 2003 and reportedly fled to the United Arab Emirates.^[25]

Trials by the United States Government: The United States could bring charges against Hussein in relation to alleged war crimes committed against members of the US armed forces during the 1991 Persian Gulf War and the current conflict in Iraq. In April 2003, US officials stated that they were investigating possible war crimes committed against American soldiers during the current conflict for possible prosecution.^[26] Following the capture of Hussein, a senior State Department official said that the United States □reserves the right□ to try Hussein for crimes against US citizens.^[27]

Conclusion: At this writing, the question of where and how Saddam Hussein will be prosecuted remains in play. Although the US government has repeatedly expressed support for prosecution of BA□ath-era crimes in Iraqi courts, the Bush administration has not yet endorsed the Governing Council□s desire to prosecute Hussein before the Special Iraqi Tribunal.^[28] Human rights organizations have pressed the Governing Council to consider amending the Statute of the Special Iraqi Tribunal to provide for greater international participation□effectively transforming the tribunal into a hybrid court□and to ensure greater protection for the rights of defendants.^[29] As noted, however, Iraqi insistence on retaining the death penalty would foreclose participation in a hybrid court by many other countries and by the United Nations.

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[1]. Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (1998), as corrected by the *procès-verbaux* of November 10, 1998 and July 12, 1999, art. 11.

[2]. See *id.*, art. 13(b).

[3]. *Id.*, art. 12(2).

[4]. *Id.*, art. 12.

[5]. On May 6, 2002, the Bush administration notified the United Nations that the United States does not intend to become a party to the Rome Statute, which President Clinton had signed on December 31, 2000. US opposition to the Rome Statute is also embodied in the American Servicemembers□ Protection Act, Pub. L. No. 107-206, 116 Stat. 820 (2002). Despite its general thrust, this law authorizes the United States to render □assistance to international efforts to bring to justice Saddam Hussein□ and several other named individuals □accused of genocide, war crimes or crimes against humanity.□ *Id.*, § 2015.

[6]. This tribunal was established by SC Res. 827, UN Doc. S/RES/827 (1993).

[7]. This tribunal was established by SC Res. 955, UN Doc. S/RES/955 (1994).

[8]. See generally Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM.J. INT□L L. 295 (2003).

- [9]. Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, available at <http://www.sierra-leone.org/specialcourtagreement.html>.
- [10]. SC Res. 1315, para. 1, UN Doc. S/RES/1315 (2000).
- [11]. See *Report of the Secretary-general on the establishment of a Special Court for Sierra Leone*, UN Doc. S/2000/915, para. 39 (2000); Special Court Agreement 20002, Ratification Act 2002, art. 11(2).
- [12]. See *Report of the Secretary-general on Khmer Rouge Trials*, UN Doc. A/57/769 (2003).
- [13]. The Statute of the Iraqi Special Tribunal, available at http://www.cpa-iraq.org/audio/20031210_Dec10_Special_Tribunal.htm.
- [14]. *Id.*, arts. 2(b) and 10.
- [15]. *Id.*, arts. 10-13. In interpreting the provisions concerning crimes under international law, the Trial Chambers and the Appellate Chamber may resort to the relevant decisions of international courts or tribunals as persuasive authority for their decisions. *Id.*, art. 17(b).
- [16]. *Id.*, art. 14.
- [17]. *Id.*, arts. 6(b), 7(n) and 8(j).
- [18]. See, e.g., Hanny Megally and Paul van Zyl, *US Justice with an Iraqi Face? A Special Tribunal*, Int'l Herald Trib., Dec. 4, 2003; Human Rights Watch, Memorandum to the Iraqi Governing Council on The Statute of the Iraqi Special Tribunal, Dec. 17, 2003, available at <http://www.hrw.org/background/mena/iraq121703.htm>.
- [19]. Concluded at Geneva Aug. 12, 1949; entered into force Oct. 21, 1950, 75 U.N.T.S. 287.
- [20]. See *id.*, Art. 64.
- [21]. Concluded at Geneva Aug. 12, 1949; entered into force Oct. 21, 1950, 75 U.N.T.S. 135.
- [22]. See *id.*, Art. 4(1). Soon after Hussein's capture the US Secretary of Defense stated that, although Hussein was being accorded the protections of the Third Geneva Convention, Pentagon lawyers were assessing whether Hussein should be legally recognized as a prisoner of war. The International Committee of the Red Cross has taken the position that Hussein prima facie qualifies as a prisoner of war. See Jonathan Fowler, *Red Cross Wants Right to Visit Saddam*, AP, Dec. 15, 2003.
- [23]. *Id.*, art. 84. See also *id.*, Art. 102. The War Crimes Act of 1996, Pub. L. 104-192, § 2(a), Aug. 21, 1996, 110 Stat. 2104, allows members of the US armed forces to be prosecuted for war crimes in civilian courts under specified conditions. Thus, in accordance with Article 84 of the Third Geneva Convention, Iraqi prisoners of war theoretically could be prosecuted for war crimes before a civilian US court, although prosecution before an American military court would be more likely.
- [24]. *Id.*, art. 84.
- [25]. Rawya Rageh, *Iraqi Ex-Commander Who Fled Denmark Found*, AP, Oct. 28, 2003.
- [26]. Jeff Sallot, *US Plans Own War-Crimes Trials*, The Globe and Mail (Toronto), Apr. 8, 2003; Jim Mannion, *US Drawing Up Plans for US, Iraq-led War Crimes Trials*, Agence France Presse, Apr. 7, 2003.
- [27]. Timothy M. Phelps and Mohamad Bazzi, *Who'll Try Saddam? As Iraqis demand swift trial, US says it may want him, too*, Newsday, Dec. 16, 2003.
- [28]. See Peter Slevin, *Iraqi Governing Council Says It Wants to Try Hussein*, Wash. Post, Dec. 15, 2003.
- [29]. See, e.g., Human Rights Watch, Memorandum to the Iraqi Governing Council on The Statute of the Iraqi Special Tribunal, *supra* note 18.