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War Crimes and the Trial of Saddam Hussein: To the Victor belongs the Judge's Gavel

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Global Research, November 06, 2006
The Hindu 6 November 2006

Theme: Crimes against Humanity, Law and Justice
In-depth Report: IRAQ REPORT

The show trial of Saddam Hussein was not just a violation of international legal norms by a court operating under the reality of foreign occupation but also an insult to the victims in whose name this political farce was enacted.

Throughout History, law and war have been uncomfortable companions, each acknowledging the importance of the other but unwilling to compromise on the integrity of its domain. And yet, when the scales of justice meet musket and bomb, it is usually the logic and exigencies of war that prevail over the norms of law — with the task of explication and synthesis left for future generations of generals and jurists to work out.

So it was that the horrors of World War I eventually gave rise to prohibitions on the use of chemical and poisonous weapons, and the deliberate bombing of civilians during World War II to the Geneva Conventions. International trials were conducted at Nuremberg and Tokyo and the top leadership of Nazi Germany and Imperial Japan condemned for a range of war crimes and crimes against humanity. With the atomic devastation of Japan weighing heavily on his mind, the lone Indian judge, Radha Binod Pal, gave a dissenting opinion on the Tokyo tribunal, questioning the right of victors — who were perhaps as guilty of crimes of their own — to pass judgment on the vanquished. His disquiet was unfashionable but prescient, with the evolution of international legal thinking finally validating his key concern. Sixty years after Little Boy massacred the people of Hiroshima, there is little dispute that the use of nuclear weapons is illegal and would constitute a crime against humanity.

Despite the arguable taint of victor's justice, however, there was at least one vital sense in which Nuremberg represented a significant advance in humanity's quest to subordinate war to law. The tribunal concluded that aggression was the supreme international crime, the fount of "accumulated evil" from which flowed every other violation that the world found so reprehensible about Hitler and Tojo. Though international attempts to control and punish aggression have so far proved highly elusive, the experience of the past 60 years has confirmed many times over the correctness of that important legal pronouncement.

That is why, of all the historical analogies invoked to justify the trial and sentencing to death of Saddam Hussein, perhaps none is more inappropriate than Nuremberg. For the arrest and trial of the former President of Iraq, not to speak of the death of 654,965 Iraqis who would otherwise have been alive, all flow from the U.S. government's illegal invasion of Iraq in March 2003. By any legal, political or moral yardstick, what President George W. Bush and his administration did in attacking Iraq constitutes the supreme international crime of aggression.

But if not Nuremberg, is there another reference point? During his presidency, Mr. Hussein committed numerous crimes against his own people and his neighbours. While the architecture for international criminal accountability is still evolving, the Iraqi people, as an _expression of their sovereignty, certainly have the right and duty to hold him accountable in a domestic court of law. As the culture of impunity makes way for justice, this is precisely what sovereign people are trying to do in Chile and other countries in Latin America. Though the temptation to resort to summary trial is enormous, these societies have realised the restitutive, cathartic value of respecting the rule of law, including the requirements of due process. Verdicts produced the hard way have far more value, especially in divided societies, than the easy exertions of a kangaroo court.

Unfortunately for Iraq, the Iraqi people are today not sovereign in their own land. The tribunal established by the U.S. occupation and its Iraqi surrogates is intended to serve the political purpose of legitimising a war that ought never to have happened. So outrageous has been the conduct of the Supreme Iraqi Criminal Tribunal (SICT), so biased have been its procedures and norms, that the verdict pronounced on Sunday — coincidentally timed for just before crucial mid-term polls in the U.S. — was a foregone conclusion. As pointed out by jurists at the time, the SICT's rules of procedure were rigged by U.S. advisers from the start to favour the prosecution side. Just to be on the safe side, most of the SICT judges were sent to Britain, one of the invading and occupying powers, for legal `training.'

The trial for the massacre of 148 people at al-Dujail village in 1982 began in October 2005 and ended in June this year when the presiding judge, Raouf Rasheed Abdel-Rahman, abruptly terminated the defence side's arguments and presentation of witnesses. Mr. Abdel-Rahman had been carefully handpicked to run the court. An earlier presiding judge, Rizgar Mohammed Amin, was forced to resign after pressure from the puppet Iraqi authorities that he was too lenient on the former President.

U.N. Working Group's opinion

Mr. Hussein may appeal to the special Cassation Panel but the rules of the SICT state there is no further possibility for appeal or pardon and that the death warrant must be executed within 30 days of his appeal's disposition.

On September 1, 2006, concerned at the accumulating evidence of bias in the SICT's proceedings, the United Nations' Working Group on Arbitrary Detention (WGAD) called for the trial to be replaced by an international tribunal. Established by the U.N. Commission on Human Rights in 1991, the Working Group's mandate is defined both by the U.N. General Assembly and the new U.N. Human Rights Council, which the Bush administration itself rooted for. In its final opinion on September 1, the Working Group concluded: "The deprivation of liberty of Mr. Saddam Hussein is arbitrary, being in contravention of Article 14 of the International Covenant on Civil and Political Rights (ICCPR), to which Iraq and the US are parties."

The U.N. Working Group described Mr. Hussein's detention and trial as a "Category III" case under its mandate, defined as a situation where "the complete or partial non-observance of the relevant international standards set forth in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned relating to the right to a fair trial is of such gravity as to confer on the deprivation of liberty, of whatever kind, an arbitrary character."

Among the issues highlighted in the Working Group's opinion was the serious and repeated violation of Article 14 of the ICCPR, which concerns a detainee's right to a defence and a fair trial. More specifically, the WGAD found that Mr. Hussein did not enjoy the right to be tried by an independent and impartial tribunal as required by Article 14(1) of the ICCPR. "The presiding judge of the chamber trying Saddam Hussein changed twice, as the result of political pressure. The current presiding judge is reported to have made statements incompatible with impartiality and the presumption of innocence enshrined in Article 14(2) of the ICCPR. The known circumstances surrounding the changes of the presiding judge of the trial chamber render the fact that the identities of the other judges composing the chamber are not known all the more preoccupying… Neither the defendants nor the public are in a position to verify whether these judges meet the requirements for judicial office, whether they are affiliated with political forces, whether their impartiality and independence is otherwise undermined."

The U.N. Working Group also concluded that Mr. Hussein "did not get adequate time and facilities for the preparation of his defence," as mandated by Article 14(3) of the ICCPR. "The severe restriction on access to top lawyers of his own choosing and the presence of US officials at such meetings violated his right to communicate with counsel. The assassination of two of his counsel during the course of his trial, Mr. Sadoun al-Janabi on 20 October 2005 and Mr. Khamis el-Obeidi on 21 June 2006 seriously undermined his right to defend himself through counsel of his own choosing."

Finally, Mr. Hussein, according to WGAD, did not enjoy the possibility to "obtain the attendance and examination of witnesses on his behalf under the same condition as witnesses against him," as required by Article 14(3)(e) of the ICCPR. "This guarantee was undermined by the failure to adequately disclose prosecution evidence to the defendants, the reading into the record of affidavits without an adequate possibility for the defence to challenge them and the sudden decision of the presiding judge to cut short the defence case on 13 June 2006."

So pitiable has been the legal procedure that the defence was not even afforded the chance of making its final written submissions to the court, as specified by the SICT's own rules. In their final plea, on the eve of the pronouncement of Sunday's verdict, Mr. Hussein's defence team argued that at the very least the court should comply with this legal requirement. But their plea fell on deaf ears because justice and law is not what the trial and tribunal are all about. Whatever his own sins, Mr. Hussein is being hanged to expiate for the transgressions of those who defied international law, world opinion, and common sense to invade and occupy Iraq in 2003. For them, sadly, there is no court where they could be arraigned. At least not today.

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