Case No. 189, Iraq, The Trial of Saddam Hussein

A. Iraq: Law of Occupation

[Source: House of Commons Library, Research Paper 03/51, "Iraq: Law of Occupation", 3 June 2003, online: http://www.parliament.uk/topics/International-law.htm]

This paper discusses some legal issues surrounding the occupation of Iraq during and after Operation *Iraqi Freedom* in spring 2003. It gives an account of UN Security Council Resolution 1483, of 22 May 2003. [...]

Summary of main points

- The USA and the UK have the status of occupying powers in Iraq.
- This started as soon as they took control of portions of Iraqi territory. The status of occupying power is a matter of *de facto* control. It does not matter whether their military campaign was lawful.
- The main laws on occupation are in The Hague Regulations of 1907 and the fourth Geneva Convention of 1949. Other laws are relevant as well.
- Occupying powers have a duty to maintain public order and safety. They have the right to protect themselves. They do not take over sovereignty.
- Occupying powers may make limited changes to institutions, laws and other arrangements, but these must serve the general purposes of maintaining order, safety and security. [...]
- The UN Security Council passed Resolution 1483 on 22 May 2003. This recognises the role of the USA and the UK and calls on them to administer Iraq effectively in order to benefit the Iraqi people. It allows the creation of an interim administration, to be run by Iraqis, until a new government is formed.
- Security Council Resolution 1483 sets up a post of UN Secretary-General's Special Representative for Iraq. Sergio Vieira de Mello, UN High Commissioner for Human Rights, has been appointed. He will coordinate UN activities and liaise with the occupying powers.

[...]

IV. Justice

The Saddam Hussein regime was accused of many very serious crimes. These included systematic and widespread torture, arbitrary justice, extrajudicial killing and "disappearances." Crimes against humanity, and possibly genocide, were committed during campaigns against the Kurds, in particular the Anfal campaign of the late 1980s, and against the Marsh Arabs, in particular in the early 1990s. War crimes were

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committed during the Iran-Iraq War, and during the invasion, occupation and resistance to the liberation of Kuwait. The brutality of the regime was regarded as a key factor in its survival, and reportedly this plays strongly still in the minds of Iraqis today. There are suggestions that the business of reconstruction may itself be hampered by fear among Iraqis, who have yet to see conclusive proof that the previous regime is wholly unable to return. Justice is likely to be an important issue in practical as well as moral and emotional terms.

Security Council Resolution 1483 [*See* Case No. 188, Iraq, Occupation and Peacebuilding] does not make detailed provision for the administration of justice. [...]

In the Preamble the Security Council affirms "the need for accountability for crimes and atrocities committed by the previous Iraqi regime." In Paragraph 3 it appeals to Member States to deny safe haven to those members of the previous Iraqi regime who are alleged to be responsible for crimes and atrocities and to support actions to bring them to justice. It does not define the membership of "the previous Iraqi regime."

A. Options

a. Geneva provisions

Geneva Convention IV covers the legal system in Articles 64 to 77. These provisions are not aimed primarily at the trial of serious international offences, but they would apply if members of the previous regime were tried in Iraq by the occupying powers.

The existing penal laws should remain in force, unless they constitute a threat to the security of the occupying power or an obstacle to the application of the Convention itself. In these two cases, the laws of the occupied territory may be repealed or suspended by the occupying power. The occupying power may also introduce new laws if these are essential to enable it to fulfil its obligations under the Convention, to maintain order, and to maintain its own security.

It might appear that the maintenance of existing laws would create the absurdity of coalition forces in Iraq having to uphold the oppressive laws and penalties of the Saddam Hussein regime. However, the provision that they may be varied if they present an obstacle to the application of the Convention would seem to circumvent this difficulty. Beyond this, the occupying powers are bound by their other legal obligations, for instance, for the UK, those arising from the *Rome Statute of the International Criminal Court* 1998, and the strict application of existing law could conflict with these. Equally, as mentioned above, there is a precedent in the case of Nazi Germany for existing laws to be set aside on the grounds of their manifest inhumanity.

Under Article 66 the occupying power may establish "non-political military courts" to try offences against the laws it has promulgated. Under Article 68 it may impose the death penalty for these offences, but only in cases of espionage, serious sabotage against its military installations or intentional acts causing death, and only if these were capital offences in the territory concerned before the occupation.

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