

## **“The Saddam Trial: Was Justice Served?”**

A Talk by Professor Nehal Bhuta

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Prof. Nehal Bhuta authored the Human Rights Watch Report, [\*Judging Dujail: The First Trial Before the Iraqi High Tribunal\*](#). Prof. Bhuta has been studying justice issues in Iraq since 2003, and has spent 4 weeks in Iraq observing trials and researching the Iraqi Special Tribunal. Prof. Bhuta is currently Assistant Professor of Law, teaching courses in international human rights law at the [University of Toronto](#). Previously, he was the Arthur Helton Fellow in the International Justice Program at Human Rights Watch, and was a consultant with the International Center for Transitional Justice in New York.

### **Prof. Payam Akhavan delivered the Introduction:**

- General introduction
- Akhavan first met Bhuta at a conference at the University of Texas when Bhuta was at the Center for Transitional Justice
- There was a debate about local vs. global justice
- International tribunals were criticized for their remoteness and the argument was made that local justice might be more appropriate
- The question arose again in the context of Saddam Hussein’s trial – specifically whether justice for Saddam Hussein should be based on international standards
- The Hussein trial again raised the question of at which end of the spectrum of local vs. global justice should this particular experiment be situated

### **Prof. Nehal Bhuta delivered the Keynote address:**

- Was justice served? In short, no – Hussein’s trial did not meet international standards

#### *Context*

- The history of the emergence of the Iraqi Tribunal that tried Hussein is an interesting one and help us understand how we ended up with the situation that we did
- By the end of the 1990s, there was a robust debate about local vs. global justice
- A compromise was reached to have a mixture -- such as is the case in Sierra Leone and in Cambodia
- Mixed model was advocated for Iraq but was rejected by the United States
- The US approach to the creation of the court – mirrored its occupation of Iraq – in other words, it wanted to ensure that it had ultimate control over the legal process that would be applied to the members of the former regime
- Why was the US concerned with controlling the process?
  1. An ideological opposition to internationalized court – they wanted to make an ideological stance that international courts were not necessary to deal with these types crimes, and that they could be dealt locally with a helping international hand.
  2. Second reason was a concern as to the independence of the court – trial might have brought out information that would have been embarrassing to the US.
- These two reasons are why the US was adamant that a mixed international court be the policy. The irony was that while the US was opposed to the policy, it didn’t have an alternative policy of its own – it has absolutely no strategy. For example, it did not have a policy of how to preserve mass graves, how to excavate them.

- The US policy in Iraq was to kick the United Nations out of the process and a lot of the process was delegated to Iraqi proxies. Ultimately, this meant that there was no mechanism as to how to deal with the former Iraqi regime.
- In the end The Iraqi Governing Council (a US appointed consultative body) created judicial committee out of which a statute was written for the Iraqi High Tribunal. The statute was not written by a criminal lawyer (in fact it was written by a commercial lawyer)
- This context is important to keep in mind as to how the court functioned later -- the court was poorly designed

#### *The Iraqi High Tribunal*

- The statute of the Iraqi High Tribunal brought up a number of questions – namely, can an occupying power under the Geneva Conventions create a court and change existing Iraqi law?
- In addition, the court was designed in a peculiar way – specifically, it was a court made up of Iraqis, but applying international criminal law.
- Overall, there was common agreement that there was an absence of legal and forensic capacity on the Iraqis' part. The substantive law was completely foreign to them. The court in Sierra Leone, by contrast, had an internationalized administration. In the case of Iraq there were international advisors that provide non-binding advice.

#### *The American Role*

- This was the model that was opted for – it was an untested model – having an international advisory committee was unprecedented. But international advisors were basically American
- The US bankrolled the court – other international contributions were negligible. One of the reasons for this was the death penalty. This meant that many European countries were unwilling to support the court. There was also bad blood created between the US and the UN because of this. The Secretary-General of the UN forbade UN staff from supporting the Court.
- The Regime Crimes Liaison Office was another manifestation of the American influence. It consisted of between 60-80 Americans – lawyers, FBI investigators – and they constituted the investigative core of the day-to-day operation of the court
- The court that emerged therefore was justifiably perceived as an American dominated court. On the outside, the court was an Iraqi court, but on the inside, it was conducted by the RCLO (ie: the Americans). The actual operations of the court, the place was managed by the US.
- This created a situation in which it is perceived as an American-dominated court and few people wanted to provide advice to the court because in essence one would have to work to for the American embassy. American dominance perpetuated the problem of the absence of any other kind of advisors.

#### *Functioning of the Iraq High Tribunal*

- The court did not function well. Basic elements of court procedure were not present (ie: sending documents and making sure that they arrived to the court – officers of the court were obliged to hand documents physically in to make sure that they arrived)
- So the court administratively did not create the structures necessary to address the complex nature of the trial
- An ordinary criminal trial in Iraq lasted about 20-25minutes. It was a truncated version of a civil trial. Procedures that guaranteed a fair trial in Iraq had fallen into disuse during Hussein's reign
- The Iraqi High Tribunal statute, by contrast, set out an adversarial process which was unfamiliar to the lawyers who were meant to apply it.
- In principle this was supposed to be corrected through a process of capacity building carried out by the US. But this was an incredibly tall order to go from no experience to one in which you would be meeting international standards. The result was manifest in the difficulties that the prosecution and defence had in applying the law.

- Only two international lawyers were involved. All the defendants though were largely dependant on Iraqi lawyers who had no training in conducting a trial of this nature. The capacity-building ambitions of the court were not realized and this contributed unfair trial procedures.
- A large amount of evidence was not handed to the defence until it was presented in court – overall, there was no regularity in the presentation in evidence. The defence had no opportunity to test the evidence that was being used against them and did not have access to the security and logistical support that the prosecution did (through American support.)
- The court fell into a habit of not responding to procedural requests – which would raise the question of the legality of the trial – the tendency of the court was to accept them, but never to answer them
- As a result, even if the defence had international criminal law training, their requests (procedural) fell on deaf years
- Reasons that court did not respond to procedural motions:
  1. The judges were overwhelmed;
  2. The problem of independence – Iraqi government put pressure on the court to speed up the trial and to be harsh on the accused – this took place publically and privately. This accentuated a problem with the court – in fact, among the Iraqi population – this was a foreign court effectively – it was lengthier, it was complex, it involved law that was not normally applied in Iraq – this led to outrage in Iraq – why is Saddam being treated so leniently? Why is the trial taking so long? The nature of the trial was hard to understand and hard to follow for the public. ALSO there was no outreach program implemented to decipher the nature of the proceedings for the public. In addition, there was some indication that judges were being threatened by the Iraqi government privately. Overall, therefore, a lack of capacity and a pressurized political context threatened the independence of the court
  3. Third important factor affecting the court: de-baathification. The De-Baathification commission was rapidly criticized and dominated by Shiite parties and turned into a mechanism in which political vendettas were settled and acted to remove people from the court in an arbitrary and un-transparent manner – this was another way in which the tenure of judges was threatened
- This is a basic sketch of structural problems that affected courts
- Ultimately in HRW's view, the presiding judge lost his impartiality (insulted defendants, insulted their lawyers, refused to entertain applications to continue the defence's case) – this was in part due to a climate of pressure

#### *Establishing a case for crimes against humanity*

- Overall, this is not a process that could not be called a fair trial under international standards
- One argument that was made was that the flaws of the trial were merely imperfections and that some truths were obtained with regard to the atrocities that were committed during Hussein's reign
- However, they are not mere technicalities, they were fundamental guarantees that were breached – these problems also affected the nature of the fact-finding
- Prosecution failed to pay attention to key things that needed to be proved to make a case of crimes against humanity
- Dujail – in aftermath of the attempted assassination on Saddam, many were tortured, sentenced to death, detained, exiled, etc. Clearly facts were established that there was a crime against humanity, but it is rare that the person on trial is actually the one who did the killing. If trying to establish responsibility at that level – need to establish necessary criminal intention and knowledge. One of the ways you prove this is to recreate the political structure that existed at the time in order to establish the requisite level of knowledge. Unfortunately, this process was not conducted and this evidence was not presented and therefore it is suspect whether these individuals (including Hussein) could be found

as guilty. In the absence of that information, it is actually quite hard to make the charge stick. Therefore, the record created by the court is incomplete

- Fundamentally these were unfair trials, but the substance of the trials were also defective

#### *The End Result*

- Nov. 5, 2006, verdicts handed down, but judgement was not completed by that point
- Nov. 22, a written judgement produced -- defence had 13 days therefore to read decision and provide their response (not 30 days as required by law)
- Dec. 26 – response by the court to the appeal which was cursory and full of errors of law
- Appeals chamber is even more politicized than the trial chamber. No public hearing, therefore less transparency and much easier for there to be other forms of external interference
- The execution itself was a disaster as a matter of law and of politics
- Iraqi High Tribunal is incapable of meeting fair trial standards
- Senior defendant was executed despite other trials still going – once he was executed, the charges against him are dropped
- In the political sense, the broader concern is hard to separate the functioning of the court from the sectarian politics of Iraq – it's difficult to see the court more than just an exercise of sectarian vengeance
- In many ways, this process has not only not contributed to even-handed justice, but it is also seen as making it worse
- This is a terrible missed opportunity – these were crimes of an serious, international character
- In 1990s, one of the cause celebre was the prosecution of Saddam
- Instead we got a defective process, its fairness is questionable and its contribution to current Iraqi politics was negative
- Process was a victim of ideology and short-sightedness on the part of the American administration

#### **Questions**

Akhavan: suppose we lived in a HRW utopia, what would the trial have looked like? What is the legacy of the trial?

- A full internationalized tribunal would have preferential
- At the time, HRW suggested a mixed tribunal
- Advantage an internationalized court would have had was an internationalized registry
- But there were security problems
- Having an international court would have insulated it from political pressure
- In the end security would still have been an immense – but integrity of the proceedings would have been much higher

Legacy:

- Unfortunately, the legacy will be an overwhelmingly negative one – perceived as an American dominated one, which it was, lacked credibility, and hard to make a case to say that it had credibility

Process of the execution:

- Ratification of the death sentence is for the presidency council – this cannot be delegated
- Presidency council refused to sign it
- The fact that the Prime Minister signed the sentence was clearly unconstitutional
- It raises real questions of the general state of legality in Iraq outside of Hussein's trial

- Execution was in violation of international human rights law – against ICCPR, in the aftermath of an unfair trial, done not in accord with Iraqi law

Akhavan: “The most important part is not the punishment, but the process.”

Notes courtesy of Balkees Jarrah (McGill Law II).