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The Trial of the Tribunal: An Evaluation of the History of Iraq and the Iraqi Special Tribunal

KIRAN SATISH¹

ABSTRACT

This paper attempts to examine the trial of Saddam Hussein pointedly, who was a tyrannical dictator of Iraq and, in brief, the events leading to the rise of his tyrannical dictatorship. Not only is the dictator a sadistic tyrant, but has he also been reported to have conducted torture chambers conducting experiments on the dissidents of the government. The paper also examines the charges that were brought against Saddam Hussein and how the coalition forces captured and put an end to the oppression of the Iraqi people. The author seeks to find how the Iraqi Special Tribunal (IST) was set up and the criticisms the tribunal received from the international community. It is imperative to understand the political situations of Iraq before Saddam Hussein and the wars fought by Iraq under his reign with its neighbours resulting in an eventual intervention by Coalition Forces that marked the doom of Saddam's rule.

Keywords: *Gulf War, Saddam Hussein, Iraqi Special Tribunal, War Crimes, War on Terror, Operation Iraqi Freedom.*

I. INTRODUCTION

The 41st President of the United States of America, George H.W Bush, once said “We know what works: Freedom works. We know what's right: Freedom is right. We know how to secure a more just and prosperous life for man on Earth: through free markets, free speech, free elections, and the exercise of free will unhampered by the state.” In a civilised society, it is essential that the citizens of a State shall enjoy freedom and liberty without much interference from the State. It has become one of the basic prerequisites for any nation around the world to prosper politically, economically, and technologically. History has taught us time and again that tyrants and dictators beg to differ on the concept of freedom and liberty. It is evident from history that the world has witnessed and experienced the rule under a variety of tyrants. An assortment of torturing techniques was mastered and used to exterminate masses that did not

¹ Author is a student at School of Law, Lovely Professional University, India.

fall in line with the tyrants' agendas became a characteristic of regions. It is crucial to comprehend that most commit atrocities in the name of religion or to yield power, or even both. From Attila, the Hun and Genghis Khan to Adolf Hitler and Idi Amin, history has taught us that they were the top contenders for being the most ruthless dictators in their respective timelines. Among them is a barbarous tyrant that caused one of the worst forms of crimes against humanity in the middle-east- Saddam Hussein. The rise of Saddam Hussein through the chain of command in Iraq has been phenomenal, and this sudden rise to the top will be carefully examined. Iraq was considered to be an unstable country since its independence in 1918. Since then, coups and civil unrest have become a run of the mill. The country witnessed various leaders being ousted and assassinated on the behest of power-mongering opposition. In the crosshair of this power struggle are the citizens of Iraq who experienced the wrath of each leader that has ruled them and left them with nothing but poverty and the death of their dear and near ones.

Among various war crime allegations against Saddam Hussein, the one that stood out was the crimes against humanity charge, which was examined by the Iraqi Special Tribunal. In 1982, in the town of Dujail, which was almost 60Km away from Baghdad, Saddam Hussein ordered the execution of at least 150 people, including children and more than 1500 residents were illegally detained and tortured and sent to desert camps in response to a failed assassination attempt.² Even though there are other serious charges against him like the mass killings of Shi'ites in 1991, the reason why this incident stuck out like a sore thumb was because it was only a few of the instances where the witnesses survived to tell their account of the incident.³ Along with Saddam Hussein, seven other of his confidants were also charged with the massacre in Dujail.

II. BACKGROUND ON IRAQ

(A) Formation

To understand the story of Saddam Hussein's rise to power, it is imperative to study the formation of the country. In 1918, the British defeated the Ottoman Empire and formed the Kingdom of Iraq. The British and French took it upon themselves to install monarchies in regions under the Ottoman Empire, and the British decided to install Faisal I of Iraq as their puppet ruler. Despite being a Shia majority country, the British decided to appoint people from

² David C. Morrison, *U.S. Intelligence Reform* GREAT DECISIONS. 9, 11-12 (2005)

³ THE INDIAN EXPRESS, <http://archive.indianexpress.com/news/the-dujail-massacre-/19772/> (last visited Dec. 20, 2021)

the Sunni minority to perform governmental functions. Oil was found in Iraq in 1927, and the country started getting the big bucks from the oil fields. The Anglo-Iraqi Treaty was signed between Iraq and the United Kingdom in 1930, which stated that the Iraqis should allow the Britishers unrestricted access to set up airfields and military bases in Iraq and effectively allow the Britishers to control the petroleum resources in Iraq. At the request of the Head of the State, Faisal I, the British gave independence to the Kingdom of Iraq, and an independent Iraq was born in the year 1932.

(B) World War II

By 1937, British troops in Iraq left the country and left the matter of security to the Iraqi government. With the onset of World War II, the Iraqi government decided to suspend any communications whatsoever with Nazi Germany, and the Britishers wanted Iraq to join them in the war by officially declaring war against Nazi Germany. Anti-British and pro-Axis political figures like Rashid Ali al-Gaylani contacted Nazi Germany in secret in 1940 by replacing then Prime Minister Nuri as-Said. Almost a year after the war broke out, Italy decided to join the Axis, and Iraq did not break off diplomatic channels with Italy as it did with Germany. This resulted in the dissemination of anti-Allied propaganda, especially against the Britishers in Iraq by the Italians.

(C) Golden Square and the Coup of 1941

Rashid Ali al-Gaylani had to resign in 1941 following a political disability in Iraq. He was replaced by Taha al-Hashimi. People of Iraq were displeased to be ruled under the Hashemite monarchy, and in 1941, the Golden Square, a group of high-ranking armed forces officials who are anti-British and pro-Axis during World War II, staged a coup d'état and the Regent to King Faisal II fled the country upon receiving information of a plot to arrest him and depose Taha al-Hashimi. The Golden Square installed Rashid Ali al-Gaylani again as the Prime Minister. The new Prime Minister ordered the arrests of British sympathizers, including citizens and politicians.

(D) Anglo-Iraqi War

The Britishers were displeased with the decision of the new leaders to disallow troop movements through Iraq and not to participate in the war with the United Kingdom which was in clear violation of the Anglo-Iraqi Treaty of 1930. Efforts were made through diplomatic channels to persuade the newly formed “National Defence Government” to deescalate tension between the two nations. But the efforts went in vain and marked the outbreak of the Anglo-Iraqi War.

The Rashid Ali al-Gaylani led “National Defence Government” fell after an extensive war of one month. The British were successful in capturing the capital city Baghdad and an armistice was signed. Rashid Ali al-Gaylani and the members of the “National Defence Government” fled the country and ended up in Berlin, Germany where Hitler welcomed them and considered them to be the Iraqi government-in-exile. The members continued to carry out propaganda messages against the United Kingdom from Berlin. Meanwhile, in Iraq, the Britishers reinstated the monarchy and a pro-British government led by Jamil al-Midfai was set up. Special emphasis has to be laid on the fact that these incidents created an image of Iraq being a highly unstable nation and coups and assassinations will follow in its time to come.

(E) Revolution of 1968

Abd al-Salim Arif became the President of Iraq and Ahmed Hassan al-Bakr, who led the Ba’ath Party from the beginning and the co-conspirator of the Ramadan Revolution, became the Prime Minister and Vice President in the newly formed government. Tension between the Ba’ath Party and the President began on various grounds. Abd al-Salim Arif sought the support of the armed forces and used them to suppress Ba’athist dissensions to his authority. He arrested some and send most of the members of the Party to the underground. In 1964, the Ba’ath Party unsuccessfully tried to seize power which resulted in the imprisonment of Ahmed Hassan al-Bakr. In 1966, Abd al-Salim Arif was killed in a helicopter crash. His brother, Abd al-Rahman Arif took the reigns as the President. Ahmed Hassan al-Bakr and other members of the Ba’ath Party conspired with high-ranking military officials and conducted a bloodless coup.

The Ba’ath Party led government decided to form the Revolutionary Command Council (RCC) which is the ultimate decision-making body. The RCC decided to elect Ahmed Hassan al-Bakr as the President and directed Colonel Abd al-Razzaq al-Nayif, one of the military-figures whose assistance Ahmed Hassan al-Bakr sought to overthrow Abd al-Rahman Arif, to establish a cabinet. Soon after the formation of the new government, tension arose between the Ba’athist faction and the Nayif faction arose. He was arrested and forced to go into exile. With the other faction out of the picture, Ba’ath Party controlled the government functions and arrested anyone that opposed to their way of functioning.

III. BACKGROUND ON SADDAM HUSSEIN

Saddam Hussein Abd al-Majid al-Tikriti was born in 28 April 1937 in a small village without any basic amenities which is almost 8Km away from the town of Tikrit in a poverty-stricken family. Saddam’s father and his brother died months before his birth and his mother Subha Tulfah al-Mussallat who considered her unborn child to be the reason of their deaths. She even

considered aborting the child. He was rejected by his mother and was sent to live with his maternal uncle and future father-in-law Khairallah Talfah in Baghdad. Khairallah Talfah was an Anglo-Iraqi war veteran, a Nazi sympathizer, and an Arab nationalist, had significant effect on Saddam's upbringing.⁴ He also authored a pamphlet titled "Three Whom God Should Not Have Created: Persians, Jews, and Flies" was published in the year 1981. No doubt that the anti-Semitic values was instilled into the young Saddam by none other than his uncle itself.⁵ Emphasis has to be given on the fact that the psychological effect that Saddam has had when he was rejected by his mother at such a tender age and was taught anti-Semitic values throughout his upbringing by his uncle can be the reason why he turned into such a megalomaniac.

Saddam joined the Ba'ath Party in 1957 at the age of 20.⁶ He joined the Ba'ath Party mainly because of the party value that promoted Arabic nationalism and anti-British sentiments. In 1958, General Abd al-Karim Qasim became the Prime Minister of Iraq. The Ba'ath Party was conspiring to assassinate the military dictator and the Party turned towards a group of people who are nothing but street thugs including Saddam. His fondness for violence made him one of the go-to guys for the Party to eliminate any threats that obstructs the Party agenda. On October 1959, Saddam along with his fellow hitmen attempted to assassinate the Prime Minister. The plan failed and Saddam was shot in the leg by a friendly fire. He fled to Egypt after the failed assassination attempt.

In 1963, General Abd al-Karim Qasim was assassinated by the Ba'ath party with the help of Abd al-Salim Arif. Saddam returned to Iraq from his run from the attempted assassination and was eager for a political position in the newly formed government. Members of the Ba'ath Party was sceptical of giving a position in the new government because of his inexperience and the brand that he was nothing more than a thug. Despite being a junior member of the Party, he was assigned to work with the peasants. Unfortunately, the Ba'ath Party itself was subjected to a coup by of Abd al-Salim Arif who arrested and forced many of the members of the Party to go underground. Saddam was one of many that was arrested and jailed.⁷ Under the leadership of Ahmed Hassan al-Bakr, in 1968, the Ba'ath Party was effective in performing a coup that deposed Abd al-Rahman Arif. Ahmed Hassan al-Bakr was a distant relative of Saddam and he looked up to Ahmed Hassan al-Bakr for inspiration. The Ba'ath Party formed a government

⁴ GOOGLE INFO, <https://amp.en.google-info.in/1912380/1/khairallah-talfah.html> (last visited Dec. 20, 2021)

⁵ LA TIMES, <https://www.latimes.com/archives/la-xpm-2010-oct-31-la-fg-iraq-museum-20101031-story.html> (last visited Dec. 21, 2021)

⁶ PBS, https://web.archive.org/web/20030625145156/http://www.pbs.org/newshour/bb/middle_east/iraq/war/player1.html (last visited Dec. 21, 2021)

⁷ RADIO FREE EUROPE RADIO LIBERTY, <https://www.rferl.org/a/1102909.html> (last visited Dec. 21, 2021)

where Ahmed Hassan al-Bakr became the Prime Minister and appointed Saddam as the Head of Security Services that oversaw dissidents of the regime and prevent further coups from happening. This involves working with the law enforcement and the military to track down any individual that raises their voice against the Party. Again, the senior members of the Party were sceptical of Saddam's ability to perform such work. In fact, he was in a position where he can showcase his talents as a master torturer.

He took great pleasure in torturing inmates to retrieve information and came up with numerous techniques of torturing by experimenting on hundreds of people. Despite being in such a high post in the government, he did not delegate the work of torturing people. In fact, he took pleasure in the pain and suffering of people. Accounts of victims and witnesses stated that he was an absolute sadist. Ahmed Hassan al-Bakr was oblivious that he gave total control to a maniac that thrives in seeing others suffer.⁸

Often times Saddam recruited youngsters from villages to be his personal hit squads who were trained and rewarded handsomely for which he received a nickname among them- 'The Great Uncle'. His time as the Head of the Security made him infamous for being the most ruthless person ever. In the next decade he perfected various torture techniques like electrocuting, hanging people from the ceiling and lashing them, immersing one's head into a bucket of water, burning the eyes of the prisoner with lit cigarette, and dropping acids on the body are few of the torture techniques he experimented with. For his efficiency in his work, he was promoted to be the right hand of Ahmed Hassan al-Bakr. Saddam became Vice President of Iraq at the age of 31 in 1968. This significant rise in power allowed him to reach to the full potential of how ruthless he can be.

In the wake of the six-day war between Syria and Egypt against Israel, the Jewish community in Iraq were deeply tormented by the Iraqi government and majority of the Iraqis. In order to gain popular support, one of the first act of the newly appointed Vice President in 1969 was to round up 14 Jews from a small community of five thousand to six thousand⁹ from their homes and blindly and blatantly accused them of spying for Israel. Without producing a single strand of evidence whatsoever, a show trial was organized and publicized throughout Iraq. Saddam knew the verdict way before he ordered the arrests of the Jews and it was nothing short of death. As expected, all 14 were sentenced to death by hanging. Radios broadcasted the event continuously and students from schools were brought to witness the hanging in public. There

⁸ Ibid.

⁹ JERUSALEM POST, <https://www.jpost.com/international/the-baghdad-hangings-581955> (last visited Dec. 23, 2021)

was a really huge crowd to witness the hanging of the never-proven-guilty victims of Saddam's reign of terror. By this event he was sending out a message throughout Iraq and to the international community that he is not someone to be meddled with and if they did so, terrible consequences await them.

Saddam was cunningly brilliant that he realized that being a ruthless leader will not achieve him the top position. He also realized that in order to be a great leader, Iraq should be drastically transformed into a great country first. Under the suggestion of Saddam, the country experienced a social and economic revolution. He started by nationalising the oil industry in the year 1972, which will provide him with abundant flow of revenue to the government. The newly found revenue will be used for implementing large scale development in infrastructure of the country including dams, education, and healthcare. He focused on eradicating illiteracy in the country by developing the education sector by launching a "National Campaign for the Eradication of Illiteracy" and "Universal Free Education" and mandatory literacy programs for all. Those who did not attend the program is jailed. Due to the huge influx of investment from the State into the essential services sector, Iraq had one of the best medical facilities in the Middle East.¹⁰ For his work in developing the country in such a rapid manner, the United Nations Educational, Scientific, and Cultural Organization (UNESCO) awarded him. Looking back, we can say that this period in Iraq's history was the best time to live in if one does not question the government. Saddam was gaining popularity among the masses and many considered him to be rising star and a future leader. Critics often compared his popularity with that of the popularity Adolf Hitler had in the Nazi Germany.¹¹ Realizing the popular support from the public, Saddam patiently waited for his turn to garb the top post. He started to denigrate the President among the Party members and was successful in manipulating them. In 1979, Saddam Hussein pressurized the President to resign and became the fifth President of Iraq at the age of 42.

IV. SADDAM'S ATTROCITIES

(A) The Crackdown

Almost into a week into the presidency, Saddam arranged a meeting of the members of the Ba'ath Party and read out the name of 68 members whom he claimed to be conspiring against him. They were arrested and tried for treason and of which one third were executed by the firing squad. By doing so Saddam made extremely clear to his dissidents that he will not

¹⁰ PBS, http://www.pbs.org/newshour/bb/middle_east/iraq/war/player1.html (last visited Dec. 23, 2021)

¹¹ JOHNS HOPKINS UNIVERSITY PRESS, <https://jhupbooks.press.jhu.edu/title/saddam-husayn-and-islam-1968%E2%80%932003> (last visited Dec. 23, 2021)

tolerate any opposition in his government and he enjoyed total discretion in the decision that he made. This event is considered to be one of the notorious events that took place during his reign. This event also marked the beginning of the dictatorship of Saddam in Iraq.

(B) Invasion of Iran and WMDs

The same year, an Islamic revolution was happening in the neighbouring country Iran. The Shah of Iran was overthrown by a religious leader Ayatollah Khomeini. Saddam feared that such a revolution would take place in Iraq since Iran is a Shia majority country and so is Iraq. Next step in his agenda was to become an eminent leader in the Middle-East and would make Iraq the mightiest country in the region. To flex his power as a fearless leader, he invaded Iran who was the designated enemy of the Arabs with little intelligence. He was convinced that it would be an easy task as Iran was undergoing a revolution and believed that there is no other time to take advantage of this vulnerability.

In 1980, Iraq invaded Iran and two years into the war Iraq suffered heavy casualties. Iran started to conquer territories of Iraq by performing a dreadful tactic involving youngsters who volunteered to run across the mine fields to trigger possible mines in the region and clear the path for the troops. The war became a fight for the title of the ruthless leader ever. In order to remove this stalemate, Saddam weaponized a secret nerve agent called Tabun which was developed during the Nazi era. The effects of this chemical weapon are so severe that even Hitler refused to use them in the warfare. The nerve agent once inside the human system can cause serious problems to the nerve systems and cause death.

In 1983, Saddam did not blink once when he ordered to unleash the chemical weapon to neutralize the Iranian advancement. This just furthers the argument that he is a complete psychopath that shows no remorse and does sinister acts to save his pride. Emphasis has to be placed on the fact that there is no opposition to his rule as a result of which there is no checks and balance on his power as well. With the promising result that he expected from unleashing this Weapon of Mass Destruction (WMD), he decided to use the same on his people as well. He had been facing opposition from the Kurds and he decided to gas them with Tabun. He had total disregard to the effects of this nerve agent on the humanity. This act resulted the death of over five thousand civilians and over ten thousand had to live with disfigurements for the rest of their lives. When confronted with the use of WMDs against the civilians, Saddam lied by stating that they were used by the Iranians.

In 1988, after 8 years of fighting, Iran agrees to the ceasefire. The estimated deaths of this war were over a million people. As any egotistical, narcissistic, megalomaniac dictator, he

proclaimed himself to be the winner in this war even without gaining any territory. But the war had left Iraq in ruins with no water and electricity and road. In order to leave his legacy, he named almost anything and everything in his name especially when he rebuilt the historic site of Babylon and the International Airport.

(C) The Aftermath

The economic state of affairs in Iraq was in shambles after the war and Iraq owed a staggering 40 billion USD to Kuwait and Saudi Arabia. He turned his sights towards Kuwait when they refused to waive off 10 billion USD that Iraq owed. He also suspected that the Kuwaitis were manipulating the oil market with the intention of harming the revenue of Iraq. After the war with Iran, Saddam managed to amass a large army that became the largest army in the Middle-East.

(D) Invasion of Kuwait/Gulf War

In 1990, Saddam invaded Kuwait by sending more than hundred thousand troops seeing that country is practically defenceless and is rich in oil. Saddam made a colossal lapse of judgment when he orders to invade Kuwait. He did not realise that the powerful west had economic interests in Kuwait and it would result in an intervention from the western forces. This invasion was condemned worldwide as it brought together nations like the US and Russia and the former UAR. In 1991, Operation Desert Storm marked the beginning of the Gulf War. Under a hundred hours the coalition forces were able to fight off the Iraqi army and liberated Kuwait. After the tragic defeat in the hands of the west, people in Iraq started forming rebel groups. He suppressed them brutally as he did with the Kurds. As usual, he claimed victory in the Gulf War stating that the coalition forces were not courageous enough to fight the Iraqis in their soil. Iraq faced hardships socially and economically when it was sanctioned by the United Nations (UN). With the sanctions in place Saddam cannot export or import oils unless he proves that he has dismantled the WMDs that he developed. The UN sent weapons inspectors to search for the presence of WMDs, but was refused entry. At the cost of his people's life, Saddam did not comply with the UN and this continued for over a decade. Death due to starvation and lack of medical facilities resulted in the death of thousands.

(E) Operation Iraqi Freedom

On September 9, 2001, the World Trade Centre attack in the US by Al-Qaeda changed the perspective on how US perceived Iraq. Saddam applauded Al-Qaeda for the attacks and the President of the United States George W. Bush collectively called the Iran, Iraq, and the North Korea as the "axis of evil". In 2003, the President announced the invasion of Iraq. The operation

was known as “Operation Iraqi Freedom”.

Few weeks into battle, the coalition forces were able to capture Baghdad and witnessed first-hand how much the people of Iraq despised Saddam. The hunt for Saddam began and he was found not very far away from his hometown. He was taken to the Guantanamo Bay and was interrogated by the US and two years later in 2005, he stood trial at the Iraqi Special Tribunal for the various crimes against humanity.

V. IRAQI SPECIAL TRIBUNAL (IST)

(A) The Establishment

People of Iraq were elated when they heard the news of the capture of Saddam Hussein and his accomplices, especially the thousands of his victims of violence like the minority Kurds and the Shi’ites who rebelled against this ruthless dictatorship. The question arose on when and how will they be prosecuted. When the coalition forces took control of Iraq after a bloodied war, all eyes were set on the possibility of the creation of some form of tribunal to be established to try and prosecute the repressive members of the Ba’ath Party. There were four possible options in front of the United States.

The first option is to hold a domestic trial presided by Iraqi judges which should be held outside the territory of Iraq by way of exerting the universal jurisdiction of Iraq in trying such cases which in terms of jurisprudence is a viable option.

The Second option is the creation of a hybrid court consisting of members of national and international community which is similar to the Special Court for Sierra Leone which came into existence by an agreement between Sierra Leone and the United Nations. Likewise, the Kosovo Specialist Chambers was established to try and prosecute war criminals. The Chambers is staffed by international judges and an increasing number of international personnel.

The third option is the treaty-based international court where the domestic jurisdictions of the State parties to the treaty are pooled in to try and prosecute alleged criminals. A prime example for this is the Nuremberg Trial where the States that came out victorious in World War II formed an international court. The constitution of this Court was highly criticized on the grounds that the judges appointed was from the Allied powers instead of appointing judges from neutral States. Efforts were made to fix this issue in the Tokyo trials where judges apart from the Allied nations participated in the adjudication process. The International Criminal Court (ICC) functions in a similar manner. ICC does not have the jurisdiction to try Saddam because of the fact that the crimes committed were prior to the establishment of ICC i.e., 2002. Another problem is that Iraq is not part of the Rome Statute that governs the ICC.

The fourth and final option is the creation of a national Iraqi tribunal that would have the backing of international communities in terms of resources and assistance. After carefully verifying all the options, the then Bush administration decided to proceed with the fourth option.¹² U.S. insisted on an Iraqi-led process and opposed to any other form of tribunal being established.

Non-Governmental Organizations (NGO) like the Human Rights Watch was in the favour of a whole new of creating an ad hoc international criminal tribunal formed by the Security Council under Chapter VII of the UN Charter. Similar tribunals were established in the same procedure in the former Yugoslavia and Rwanda. The NGO community wanted the UNSC to establish such an ad hoc tribunal and set jurisdiction to investigate and prosecute the crimes committed by the Ba'ath Party towards Iraqis, crimes committed during the Iraq-Iran War, and the crimes committed by Iraq during illegal invasion and occupation of Kuwait. They raised serious scepticism on the judiciary of Iraq to launch a trial of this complicated. There were many complications in establishing an ad hoc tribunal. One such complication is the high cost involved in the proceedings of operating such tribunals and extreme delays in the proceedings. This was analysed in the domestic tribunals like the Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

The Iraqi Governing Council (IGC) was established by the Coalition Provisional Authority (CPA) in compliance with the UNSC Resolution 1483. The IGC acts as the primary body that governs the interim government until a government which is internationally recognized is elected by the people of Iraq. The IGC was in agreement with the decision of forming a national tribunal and was entrusted with creating the Iraqi Special Tribunal (IST) and the Statutes that governs them. IST will have jurisdiction to try any Iraqi for high crimes such as genocide, crimes against humanity, war crimes, and any other crimes mentioned under the Iraqi law.¹³

(A) Legitimacy of IST

The establishment of a domestic tribunal was legitimate according to Article 17 of the Rome Statute of the International Criminal Court which reiterates the supremacy of the national criminal jurisdiction. Another benefit of setting up of a domestic tribunal is that it helps in capacity building which will allow Iraqi judiciary to hold more prosecutions of similar kind and deliver effective judgments. Legal scholars and the members of the international community around the world were sceptical about the legitimacy of the formation of IST by an

¹² HUMAN RIGHTS WATCH, <http://www.hrw.org/press/2003/04/iraqtribuna10415031tr.htm> (last visited Dec. 24, 2021)

¹³ Iraqi High Criminal Court Law, 2005, Art. 10-14, No. 10 Acts of National Assembly, 2005 (Iraq)

occupying force like the U.S. There is no precedent or legal norm in international law that allows the U.S. as an occupying force in establishing such a tribunal in an occupied territory as a result of which a question as to the legitimacy of IST came under the radar.

Even though, the U.S. captured Saddam and his accomplices neither of the parties can be tried in the U.S. because of no federal law that enables them to prosecute them. Since, they are Prisoners of War (POW) under the Third Geneva Convention, neither the law of the U.S. nor the international law can prosecute them on crimes that were committed before they were captured except by exercising the universal jurisdiction under the Genocide Convention Implementation Act of 1987. But the Act is limited to the commission of genocide committed by a U.S. national or by the U.S. itself. Therefore, it is not possible to charge them with any federal law of the U.S.

As long as these jurisdictional limitations exist, the legitimacy of IST relies on the fact that it was established under the authority of the occupying country. According the Fourth Geneva Convention and the Hague Regulations of 1907, and as per customary international law the U.S. as the occupying country cannot do the following on the occupied territory:

- i. Enter into an agreement with or on behalf of the governing body of the occupied territory;
- ii. Change the legal system that exists in the occupied territory;
- iii. Change the status of judges and public officials;
- iv. Issue new penal provisions;
- v. Change existing penal legislations;
- vi. Prosecute the citizens of the occupied territory for the crimes committed before such occupation;
- vii. Change the functioning of the existing administration; and
- viii. Alter the tribunals of the occupied territory.

In case of penal law of the occupied territory, the occupying force can repeal any provisions that will facilitate with maintaining law and order and security in the region. It is well evident that the U.S. did not comply with the laws governing the powers that can be exercised by an occupying force in an occupied territory.

Another point to be emphasised is that even though the IST Statute was drafted by the IGC, they were subjected for approval by the CPA bringing the establishment closer to being illegitimate. Many believed that due process and a fair trial will not be possible under this Statute because it was drafted under the recommendation and funding of the occupying force

and where the judges of IST are being trained by legal professionals based in that are occupying Iraq. The Court will not remain independent in making a just judgment because it may face interference from the occupying forces.

Even though the UNSC resolution recognized the U.S. and the U.K. to be the occupying forces under the international law it does not mean that the provisions of the Fourth Geneva Convention that lays down the obligations of occupying forces on occupied territories would supersede or can be amended by the UNSC resolution.

In conclusion, it is clear that the establishment of IST would have a standing chance if there was a democratically government in place to decide on matter involving law and legal institutions. The choice to establish IST while the country was being occupied by foreign forces was a gross miscalculation that led many to criticize its legitimacy and enforced the perception that the U.S. is trying to influence the judicial process.

VI. IRAQI HIGH TRIBUNAL (IHT)

In January, 2005 a newly elected Transitional National Assembly (TNA) which enjoyed more legitimacy was assigned to make necessary amendments in the legal structure and to draft a successor for IST. The main task of TNA is to draft a permanent Constitution for Iraq that included an article to govern Iraqi High Criminal Court (IHCC). In August, 2005 IST was officially revoked by TNA and introduced IHCC. Unfortunately, this was defective in nature because when TNA adopted the new law and presented the same to the Presidency Council for review and ratification and subsequent publication in the Official Gazette where only 40 Articles were published instead of 42 Articles. This proved how ineffectual the legislation process of Iraq and has total disregard for legislation procedure. In September, the whole process was carried out again and was published in the Official Gazette on October 18, 2005 just a day before the trial. The jurisdiction of IHT looms over both Iraqis and non-Iraqis who are accused of committing genocide, crimes against humanity, and war crimes between 1968 and 2003. IHT applies the penalties based on the existing Iraqi law.

The trial chamber of IHT consists of five judges who are entrusted with controlling the conduct of the trial, decides which witnesses to be called to testify, and what type of questions to be asked to the witnesses and the accused. In case of a conviction the accused can appeal to the Appeals Chambers which consists of nine judges including the president of IHT. In an appeal a conviction may be set aside, reversed, revised, or sent back for retrial.

It is to be noted that the appointment of foreign judges who are experts in matter of international criminal proceedings was available in the IST Statute. But, in IHT the appointment of foreign

judges is allowed only if a State other than Iraq is party to the case. Under IHT foreign lawyers can only act in advisory capacity to the prosecution and defence lawyers and also can advise the judges on international criminal proceedings.

VII. THE TRIAL

October 19, 2005 was the date of the beginning of the trial of the former President of Iraq, Saddam Hussein and his accomplices of the Ba'ath Party who collectively were responsible for the torture and murder of almost 148 people of the town of Al-Dujail all of whom are charged with crimes against humanity for this ruthless act.

(A) The Dujail Massacre

In 1982, in the wake of Iraq-Iran war, Saddam was visiting the town of Al-Dujail, a majority Shi'ite town. He was there to thank the local community for sending their sons to fight the war.¹⁴ The whole event was to ensure the people that the war is under control and Iraq is winning, which in reality was not. Saddam and his convoy were on its way out of the town when they were ambushed by a Shia militia. The whole event was videotaped and was broadcasted throughout the world media. Saddam ordered his security team to identify and track down the attackers. It can be seen in the video that people pleading to them saying that they were not part of the militia that attacked the convoy, fearing for their life because of Saddam's notorious reputation of killing people to calm his inner maniac.

Saddam assured the locals that he will identify and track down only those who are involved in this attack. As always, he went back on his assurance and started torturing and executing the people of Dujail indiscriminately. About 148 people including children were tortured and executed in the process and the locals were shook by this massacre. Their homes and lands were either destroyed or confiscated by the government in retaliation. They refer to this incident as the Al-Karitha which means the disaster.

(B) Significance

The significance of this trial is of extreme importance since the victims of this repressive dictator and his accomplices will finally have a chance at redemption for the mental and physical persecution that they have suffered and the whole international community has eyes on how the trial would be conducted in a highly politically polarized environment in Iraq. This trial was provided an opportunity to redress the criticism the Nuremberg Trial faced and was

¹⁴ ABC NEWS, <https://abcnews.go.com/WNT/IraqCoverage/story?id=2761269&page=1> (last visited Dec. 24, 2021)

hopeful in presenting an example to the international community with a model trial. The trial unlocked various chain of events that happened behind back doors that led to this brutal massacre. A lot was riding on IHT since it was essential that the proceedings to be conducted in a fair and just manner providing the defendants all possible opportunity to make their case. It was evident that the judges of the trial were hoping to set a standard for Iraqi judicial system compared to the previous judicial system that passed harrowing judgment without following any due process of law and was under influenced by the politics. It is improbable to expect the trial to be in complete conformity with the yard stick set by the international law.

(C) Verdict

Following a series of rampant and unruly behaviour by Saddam Hussein during the trial from interrupting the prosecution and questioning the judge to using the platform which was live telecasted to make propaganda speeches on how he is wrongfully tried by this Court and arrogantly saying that he is the President of this country and he condemn this procedure the judges decided to hang Saddam for the ordering the murdering of Iraqi people of Al-Dujail on December 30, 2006. Along with Saddam his former chief of intelligence and half-brother, Barzan al-Tikriti was also sentenced to death. Awwad Hamd al-Bandar, the former president of the Revolutionary Court was sentenced to death on charges of wilful killing. Taha Yasn Ramadan who was the former vice president and head of the popular army was found guilty on torture, deportation, wilful killing, and other inhumane acts and were sentenced to life imprisonment. Ba'ath Party members, Abd Allah al-Ruwaid, and Ali Dayih Ali were found guilty of wilful killing and were sentenced to 15 years in imprisonment. Mizher al-Ruwaid, who was the former Ba'ath Party leader was found guilty on wilful killing and torture and was sentenced to 15 years and 7 years of imprisonment respectively. The above-mentioned defendants were charged with crimes against humanity and was found guilty. A Ba'ath Party member from Dujail was acquitted because of lack of evidence. The execution of Saddam was recorded in an illicit phone and was widely circulated. It can be seen in the video that the executioner taunting him in the last minute of his life and completely botching up the execution.

(D) Criticism

Many criticised on the fact that the judges were not competent enough to hear such a complex case. Even though the judges were trained by the U.S. on how to adjudicate such sensitive matters the efforts partly went in vain. Equality is the part and parcel of every judicial system especially in a criminal trial. During the trial the defendants were put in a very tight spot by the Court by not allowing them to present critical evidences and witnesses and disallowed private consultation with their counsels. They were not allowed by the Court to contest the evidence

and witnesses produced by the prosecution. The Defence Office set up under IHT was underfunded and lacked proper resources to come up with good defence for the defendants. It is to be noted that IHT is governed by the traditional Iraqi Penal Code which does not conform to the judicial procedure set by international law. During the trial Iraq was in a sorry state of affairs with conflicts and rebellion and the judges and counsels were regular targets. Three defence counsels were murdered by the mob in the course of this trial which furthers the inability of the Tribunal to provide necessary security to them. Because of tight security situation the counsels were not able to prepare an adequate defence for their clients.

Another criticism was that the judges allowed the prosecution to enter into evidence new evidences which was not disclosed to the defence during the trial in such a way that they did not have an opportunity to come up with a proper defence. This was in contravention of IHT's rule on disclosure of evidence.

There were instances where the statements of absent witnesses and complainants were recorded and entered into the evidence depriving the defence the opportunity to cross examine them. These statements were recorded by the investigative judge not in the presence of the defence counsel.

There were severe evidentiary gaps by the prosecution as the whole trial relied upon assumptions rather than actual evidence. An example to this was during the trial of the president of the Revolutionary Court, Awwad al-Bandar the Court assumed that the trial conducted by him that led to the execution of the 148 Dujailis was nothing but a show trial rather than understanding the role played by the Revolutionary Court during Saddam's regime which made it extremely difficult to convince the Court otherwise.

All this blatant disregard to IHT's regulations and incompetency on the part of the judges closed the doors for the defendants to produce evidence and examine witnesses proves that the whole system was flawed from the beginning. The judges placed heavy reliance on assumptions and inferences rather than on actual evidences which makes one suspect that the U.S. has cherry picked those judges that leaned towards a particular political faction.

VIII. RECOMMENDATIONS

1. Political interference with the functioning of the Tribunal must end allowing it to operate independently. It is imperative that the country should have a judicial system that unbiased and appreciates evidence.
2. The IHT Statute shall be amended to include foreign judges to adjudicate and employ the services of foreign lawyers to represent matters that pertains to the high crimes.

3. Proper training to the judges and lawyers to be given on a priority basis on international law and its proceedings.
4. Rigorous security measures to be taken to protect the members of the Tribunal and a mechanism for redressing the concerns of Defence Office should be established.
5. The judges should be taught to respect the rights provided to the accused and to believe in the basic principle of ‘innocent until proven guilty’.

IX. CONCLUSION

As mentioned earlier that the Dujail Trial was opportunity for the Iraq’s judicial system to set a new standard which is based on just and fair trial and more importantly on the rule of law. Emphasis has to be placed on the fact that IHT was made with at least a hope of providing justice on good conscience it fell short of it at numerous occasions during the trial. The disturbed political conditions in Iraq and pressure from the public led to the trial being in contravention to most of the legal standards that the international community expected to follow. A lack of competent judges in the panel is another contributing factor by which this trial did not go according to the plan. It is disheartening that IHT Statute was amended and made it optional to include foreign lawyers or judges to be part of the panel.

It is essential that the international community learn from the mistakes of this Tribunal and work towards a better judicial process that welcomes rule of law and appreciates evidentiary values more than assumptions and inferences. Despite training the Iraqi judges on how to handle such a complex case, the Iraqi judges failed to heed by their recommendations. Saddam Hussein and his accomplices might have committed high crimes like the crime against humanity, but it does not deprive a person from having a fair trial.
