Some Thoughts on the Trial of Saddam Hussein: The Realities of the Complementarity Principle

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1. The Principle of Complementarity

In 1998, at the negotiations of the Rome Statute for the International Criminal Court, a principle was adopted which sets the background to the creation of the Iraq High Tribunal (“IHT”). The principle of complementarity recognized the sovereignty of nations and their preeminent responsibility to prosecute alleged offences within their jurisdiction. The principle of complementarity countered any suggestion that the responsibility for addressing international offences was exclusively held by some external agency, be it the United Nations, the Security Council, the International Criminal Court or whomever. The first responsibility of any state was to prosecute serious criminal offences themselves.

When considering the question of the appropriate venue and the appropriate legal framework to deal with alleged crimes committed by members of the former Ba’athist regime in Iraq, it is important to keep in mind that if Iraq had been a member of the International Criminal Court (“ICC”), its first duty would have been to attempt to deal with such offences itself. Only if the Iraq system had shown

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1) In January 2001, he took up position with the United Nations as Prosecutor of Serious Crimes in East Timor, before returning to independent practice and pursuing a mixed practice of national and international criminal law. He has worked for agencies such as UNICEF and the International Bar Association, and on projects funded by the United Kingdom, Australian and Swedish governments.

2) Article 17 of the Rome Statute for the ICC on Issues of admissibility reads as follows:

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
   (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
   (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

3) Of course, in respect of the alleged crimes of the Ba’athist regime these were outside the temporal jurisdiction of the International Criminal Court as they predated July 2002. However, the principle remains the same.
itself unable or unwilling to tackle such prosecutions, would the ICC have had jurisdiction to take over. If that is the situation for a member state of the ICC, then so it must be for a non-member.

In addition, when considering the appropriate venue for an Iraq tribunal, no doubt the experience of the international tribunals would have been considered. Unfortunately the experience has not been a very happy one. The tribunals for the Former Yugoslavia (ICTY), for Rwanda (ICTR), for Cambodia (ECCC) and for East Timor (Special Panels in Dili), have all been repeatedly criticized by international observers. They have variously proved to be expensive, \(^4\) slow, \(^5\) difficult to agree upon with the national jurisdictions, \(^6\) and hampered by a lack of political will. \(^7\)

There is a strong argument to be made that a country which has just emerged from a period of dictatorship is not a proper place to hold trials, which inevitably focus upon the divisions which the dictatorship caused. A charge of crimes against humanity has at its heart an offence committed against the wider civilian population, and against the conscience of humanity. Trials staged after the fall of a regime will invariably be conducted by the parts of society which emerge, released, from the oppression of the former regime. This will most often mean that those who perform the state-appointed functions of prosecution and judiciary will come from the previously oppressed group. In that context, is it possible for those who preside over such trials not to be one of the victims; not only because they are part of humanity, but because they are inevitably drawn from the society which was oppressed? This argument, however persuasive it may be, has been lost to the principle of complementarity. Could it ever be possible to find a judiciary which is wholly independent of the crimes, from within the country’s own citizens? And, if it was not, would this be a legitimate objection to a national tribunal? If it is, then what does complementarity mean in practice and why have internationalized courts such as in East Timor, Sierra Leone and Cambodia, used national judges along side their international colleagues?

2. The Iraq Model

The Iraq High Tribunal was different from previous models for the prosecution of crimes against humanity and genocide. Since the early 1990s, a number of

\(^4\) The costs of the ICTY and ICTR are running at approximately $90M per year, each.
\(^5\) The ICTR has a defendant held without trial for 8 years.
\(^6\) Cambodia is now attempting to try accused thirty years after the events, following six years of negotiation between the UN and the Cambodian government; see, for instance, Cambodia, U.N. sign pact on Khmer Rouge trial, Asian Political News, 9 June 2003.
\(^7\) At the ICTY, senior accused remain at large, for instance Ratko Mladic and Radovan Karadzic: Statement by Carla del Ponte, Prosecutor, ICTY to the UN Security Council 10 December 2007, available at: http://www.un.org/icty/pressreal/2007/pr1202e-annex.htm; in East Timor,