

Societal Reconciliation, the Rule of Law and the Iraqi High Tribunal

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1. Introduction

Prima facie, international(ised) criminal trials concern themselves with the culpability of the accused in criminal law. Ideally, this task is undertaken in a context within which prosecutors, judges and defence counsel evidence a robust commitment to the protection of due process rights. Where procedural and substantive law is applied impartially and with care, the trials of alleged perpetrators of core international crimes have the capacity to signal to a wider audience – not least perpetrators and victims – the limits of impunity where the rule of law exists.

It is rather more difficult to assess the degree to which the adroit application of advocacy and adjudication contribute to the closing of post-war or post-dictatorship societal cleavages. Social reconciliation and the impartial application of criminal justice, as the latter is generally understood by the legal positivist, need not be inimical to one another. But international(ised) criminal processes since 1993 have too often been distinguished by the disdain shown to them by important social constituencies, for instance, ethnic Serbs in the former Yugoslavia and the Hutu majority in Rwanda – to say nothing of Arab Sunni in Iraq.

Where it is manifest, tension between reconciliation and criminal justice accountability has numerous sources, ranging from the perceived insensitivity of counsel *vis-à-vis* victim-witnesses during adversarial proceedings, to trial judgments deemed by social constituencies to be at odds with the principles of natural justice, as popularly understood. More common, however, is the clash between reconciliation and criminal justice accountability stemming from the failure of offices of the prosecutor to exercise investigative and prosecutorial discretion with an eye to the social cleavages which gave

rise to, or were otherwise exacerbated by, the political-military conflicts from which emerged the international criminal and humanitarian law ('ICHL') violations.

Bringing the objectives of social reconciliation and impartial criminal justice into harmony must start with a consideration by chief prosecutors and their senior personnel (for example, counsel, analysts and investigators) of the relationship between case selection and the social purpose of the litigation of core international crimes. The frequent failure of offices of the prosecutor to assess carefully the impact of proposed prosecutions on conflict-riven societies, with deleterious socio-political consequences, has been noted by important stakeholders in the international system of justice, not the least key donor States and much of sub-Saharan Africa. As such, any discussion of the relationship between reconciliation and international(ised) criminal justice is at once timely and necessary.

2. The Iraqi High Tribunal's Failure in Due Process

Taken together, the trials of Saddam Hussein and other erstwhile senior Iraqi Baathist-regime leaders before the Iraqi High Tribunal ('IHT') from October 2005 onwards can be adjudged only as having failed entirely as an exercise in due process. On the face of it, this failure might be ascribed to four factors: (1) the unfamiliarity of the Iraqi prosecutors, judges and defence counsel with the substantive ICHL they were applying; (2) the inadequate ability of these same jurists to grapple with complex case files; (3) the near-total breakdown of socio-political order across Iraq outside of the Kurdish-majority provinces, which gave rise to the murder of a number of participants in IHT trials, including several defence counsel and witnesses; and (4) the undisguised political pressure, emanating from the office of the Iraqi Prime Minister, upon key participants in IHT proceedings.

3. The IHT's Flawed Foundations for Reconciliation

Trials which do not conform to minimal standards of due process for whatever reason – and are correspondingly seen by a sizeable domestic constituency as being manifestly unfair – cannot inform national reconciliation efforts. Likewise, it is a logical fallacy to assume that any criminal trial, even where it follows scrupulously those procedural guarantees afforded to the accused, is likely to further national reconciliation where an armed conflict of considerable intensity, enveloping the bulk of the civilian population, remains underway. That noted, the root of the failure of the Iraqi High Tribunal as an exercise in reconciliation lies elsewhere, to wit, (1) in the flawed foundations of the Tribunal, as reflected in its Statute and (2) in an inept investigative and prosecutorial strategy.

3.1. The IHT Statute

Promulgated only the day prior to the opening of the first trial (that is, *Dujayl*), after a lengthy ratification process, the IHT Statute offered several 'justifying reasons' for the establishment of the special adjudicative body. Targeting clearly – and solely – erstwhile members of the Baathist dictatorship, the temporal jurisdiction of the IHT ran from the Baathist seizure of power in 1968 until the collapse of the regime on 1 May 2003. The Statute set out "the rules and punishments" to be applied in the context of "a fair trial", whilst noting that the objective of the IHT was to "reveal the truth, and the agonies and injustice caused by the perpetrators of such crimes", at the same time protecting the rights of Iraqis, which included the redress of injustices committed against them.¹

To argue that the IHT was born of political calculation is to mischaracterise the ideals of the coalition officials who led the process; those involved were driven by an unarticulated belief in the redemptive potential of criminal justice accountability for the crimes perpetrated by a hateful regime. The absence of any explicit or implicit reference to reconciliation in the IHT Statute was not unusual: linking criminal justice to reconciliation stands outside the domestic legal traditions of both Iraq and the West. The practice of law in both cultural *milieus* is similar, that is, it concerns itself with the culpability of accused persons and, to varying degrees, with redress for the victims of crime.

Nonetheless, the challenge facing the IHT – aside from the fact that the Iraqi State and society were collapsing around it – was that the Tribunal was a domestic body charged with addressing uniquely egregious violations of criminal law. At the time of its promulgation, the

narrow focus which the Statute placed upon Baathist-regime criminality was likely to be counter-productive to any hope of fostering societal reconciliation. In particular, when the first trial opened in October 2005, Iraq was plagued by widespread, serious violations of domestic law and ICHL perpetrated by, amongst others, forces under the control of the Government of Iraq as well as international actors ranging from Iranian proxies to American security contractors. The IHT had no jurisdiction over these perpetrators, who enjoyed *de facto* immunity from prosecution. This fact, seen in the socio-political context of 2005, rendered almost inevitable the failure of the IHT to alleviate the enormous ethnic and sectarian cleavages.

3.2. Investigative and Prosecutorial Strategy

Had the due process issues which plagued the IHT from the first prosecution been avoided, the narrow focus of the IHT Statute upon Baathist-regime criminality need not have undermined the IHT entirely as a force for good over the medium and longer terms. Whilst ethno-sectarian reconciliation may well have then exceeded the grasp of the Iraqi people, IHT trials might nevertheless have signalled the prospects for (and benefits of) the rule of law as well as reconciliation, despite the context of near total lawlessness in which IHT trials took place. Indeed, the said context demanded the impartial application of law, however symbolic. That the opportunity to advocate for the rule of law and societal reconciliation was missed by the IHT owed much to the inadequacy of the investigative and prosecutorial strategy.

In the main, IHT investigations were built around substantial crime bases. The best known examples of particularly egregious Baathist-regime criminality remain the 1988 *Anfal* campaign waged with, *inter alia*, chemical weapons in the Kurdish north, and the violent repression by the Baathist regime of the 1991 uprising of the Shi'ite majority in the south. These investigations and prosecutions, naively led by well-meaning Western advisors seeking to highlight the indisputable suffering of large swathes of the Iraqi population, ultimately fed the ethnic and sectarian narratives advanced respectively by the Kurdistan Regional Government and the post-Baathist, Shi'ite-dominated administration which has exercised power over the rest of Iraq from Baghdad since 2004. *Anfal* and 1991 Uprising were the second and third IHT trials. The first prosecution, brought against Saddam Hussein and seven other accused, focused on a relatively small crime base in *Dujayl*, that is, the persecution of a number of extended Shi'ite families, with alleged links to the ruling (since 2004) Dawa Party, following a failed attempt upon the life of Saddam during a visit to *Dujayl*

¹ Official Gazette of the Republic of Iraq, Number 4006, Law of the Supreme Iraqi Criminal Tribunal, dated 18 October 2005.

in 1982.² In summary, IHT case selection lent itself to divergent elements of the Iraqi leadership who sought to advance political programmes which were fundamentally at odds with national reconciliation.

The selection of *Dujayl*, *Anfal* and 1991 Uprising as the first three IHT cases – which together dominated the docket for a period of roughly three years – need not, in and of itself, have been at odds with the objective of social reconciliation. Put another way, the moral requirement that these serious crimes be addressed during any examination of Baathist-regime criminality did not necessarily have to fuel the unhelpful political impulses then (and still) dominating Iraqi political discourse. The problem was that the accused in these and other IHT cases were selected in a manner that served to reinforce the ethnic and sectarian tensions which had given rise to open civil warfare across much of the country. Stated simply, the accused in IHT trials were – with exceedingly rare exceptions such as Tariq Aziz – Sunni Arabs hailing from the western and north-central governorates. The selection of accused without reference to their near homogeneous origins reinforced the damaging and wholly false post-2003 Kurdish- and Shi'ite-political narrative that the Baathist regime had been an ethnic-sectarian clique built upon narrow Sunni and Arab lines. In reality, the upper reaches of the Baathist regime constituted an inclusive (that is, multi-ethnic and effectively a sectarian) power-political elite held together by the shared exploitation of national wealth. The prosperity of this elite rested, in turn, upon the considerable skill with which Saddam Hussein managed divergent tribal interests throughout the country, employing the dispensation of material rewards and, where cold political calculation was deemed to require as much, harsh repression.

4. Criminal Trials, the Rule of Law and Societal Reconciliation

ICHL practitioners would do well to understand that, on one level, criminal trials for egregious violations of ICHL are highly symbolic exercises as perceived by the affected societies through the leading of evidence and in trial judgments. Where they are executed properly – which was manifestly not the case at the IHT – such trials are, in principle, concerned solely with the protection of the rights of accused persons whilst determining their culpability in law. In practice, the trials of persons alleged to have perpetrated core international crimes are

very different from those of run-of-the-mill domestic thieves and murderers. The most obvious reason is that where persons are called to account for the most serious violations of ICHL, their trials assume a significance to the wider populace beyond the accused themselves. In particular, it is held here that, in much of the public mind, persons tried for ICHL offences serve as proxies for the far greater number of perpetrators who will never be called before a criminal court or tribunal; at the same time, the victimisation which is recognised during a given trial is not seen by other victims as *sui generis* but, rather, as being representative of wider patterns of suffering.

To understand the symbolic nature of international(ised) criminal trials is to begin to grasp the relationship between criminal and transitional justice. Even had the necessary domestic expertise and socio-political stability been present in Iraq from 2005, the IHT could have ensured fair trials for only a fraction of Baathist-regime perpetrators and recognised the victimisation of but a small percentage of the victims of that dictatorship. The same might be said of most if not all of the international(ised) courts and tribunals which have emerged since 1993. Modern post-conflict experience suggests that the bulk of perpetration – where it is addressed at all – has to be examined through non-criminal justice means, for instance, by means of truth commissions. Given that so few perpetrators might realistically be prosecuted following unrest characterised by widespread ICHL violations, one might question the utility of criminal justice, especially where there is the prospect of other transitional justice mechanisms.

The view taken here is that, recognising the symbolism of criminal trials, offices of the prosecutor are best positioned to contribute to social reconciliation through careful case selection with an eye to correcting false narratives and demonstrating even-handedness. Upon their appointment and prior to opening the first investigations, chief prosecutors and their senior staffs ought to consider the nature of the social narratives which have served to fuel whatever conflict they are charged with addressing through criminal processes. In turn, these same officials need to consider what might be done, by means of case selection, to address manifestly false social narratives which may threaten the restoration of longer-term socio-political stability. Here, chief prosecutors should avoid references to amorphous concepts such as justice and instead present their cases to the public as a forum through which egregious criminal conduct and the victimisation of civilians is acknowledged as societal failure.

Whilst judges and defence counsel concern themselves with, amongst other matters, the protection of the

² Saddam Hussein and three other accused were found guilty of multiple offences and executed in 2006–2007. Hussein was subsequently a defendant in *Anfal*, which commenced in September 2006, prior to the verdicts being handed down in *Dujayl*, although his participation as an accused in that case ended with his execution in December of that year.

rights of the accused, offices of the prosecutor are free to prioritise moving quickly to trial on the basis of strong evidence. In so doing, chief prosecutors need to ensure that they do not select for prosecution, from the vast pool of targets made available as a result of thorough investigations, a collection of suspects whose ethnic or sectarian characteristics are likely to reinforce damaging social narratives. Likewise, the patterns of victimisation introduced at trial by prosecutors must avoid highlighting the victimisation of one group at the expense of another. In this context, it ought to be pointed out that the key failing of the IHT, had other circumstances afforded the possibility that the Tribunal might contribute to societal reconciliation in Iraq, was that the selection of suspects for prosecution reinforced the (false) narrative that the Baathist regime was an Arab-Sunni sectarian structure, the *raison d'être* of which was the persecution of ethnic Kurds and Shi'ites. The upshot of the IHT investigative and prosecutorial strategy, executed without meaningful cognisance of the ongoing conflict, was that the Sunni-Arab population of Iraq, which already considered itself severely oppressed by the post-2003 political arrangements, rejected the IHT as nothing more than an exercise in the further demonization of the Sunni-Arab minority.

It goes beyond the scope of this analysis, but an argument might be advanced that the chief prosecutor(s) of the International Criminal Tribunals for the former Yugoslavia and Rwanda made similar errors in the initial selection of accused and crime bases, losing at the start – and permanently – several ethno-national groups in the former Yugoslavia as well as Hutu constituencies (which regarded the perpetrators in their midst as being vilified above others, while the persecution of elements in both communities by other ethnic groups was ignored). The upshot of these misguided prosecutorial strategies is that the ICTY and the ICTR, for all their wealth of important jurisprudence and clear commitment to the rule of law through the scrupulous application of procedural fairness, contributed little to the cause of reconciliation in Rwanda as well as the successor States of the former Yugoslavia.

5. Concluding Remarks

ICHL has witnessed extraordinary growth as a discipline since its re-emergence in the mid-1990s, after what was effectively two generations of post-Nuremberg dormancy. But the increasingly sophisticated application of ICHL atop the wealth of modern jurisprudence has not, in the main, been coupled with sufficient consideration by offices of the prosecutor of the social purpose of its application, notwithstanding lofty United Nations Security Council and other references to peace, stability and the recognition of the suffering endured by the victims of the unlawful wielding of military and political power.

The collective failure of chief prosecutors in this respect is rooted in the fact that investigative and prosecutorial strategy has been developed without sufficient reference to post-conflict social cleavages. This approach has negatively impacted the willingness of key donor States as well as other important constituencies, such as sub-Saharan Africa, to countenance future exercises in international(ised) criminal justice, by both the International Criminal Court and other *ad hoc* international(ised) mechanisms. In these circumstances, it behoves ICHL practitioners, first and foremost, to consider carefully as a profession – perhaps for the first time – the purpose as well as utility, relative to the material and potentially negative social costs, of the application of ICHL in the rebuilding of fragile, post-conflict societies.

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