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**THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COUNCIL ON INTERNATIONAL AFFAIRS
TASK FORCE ON ISSUES RELATED TO THE TRIAL OF SADDAM HUSSEIN**

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Recommendations Related to the Trial of Saddam Hussein

Introduction

In light of the enormity of the crimes with which Saddam Hussein is likely to be charged, the unique circumstances leading up to his disposition and capture and the fact that his trial presents a timely and significant occasion to promote the rule of law and end the cycle of lawlessness abhorrent to the Association and tragic for the people of Iraq and civilized societies, the Association offers the following observations and recommendations concerning the substance and procedures to be used in the anticipated trial of Mr. Hussein.

The Association believes that clearly articulated and universally accepted legal principles continue to provide instruction even where the particular circumstances found in post-Saddam Hussein Iraq may challenge the successful application of traditional legal solutions.

First, the Association recognizes that the current Iraqi judicial system, after years of neglect and misuse by the Ba'athist regime, is ill equipped to conduct or even support a complex trial involving allegations of such crimes as aggression, crimes against humanity, war crimes and genocide without the participation, in some way, of international experts.

Second, the Association recognizes that with respect to the death penalty the people of Iraq retain the right and burden of determining such a fundamental element in the relationship between a state and its citizens. However, consistent with most relevant human rights international treaties and its own longstanding position, the Association urges that the death penalty not be available for use in this case.

Third, while the Association strongly supports the use and improvement of the multilateral instrumentalities of international law, including the International Criminal Court, it recognizes that the principles of complementarity, sovereignty and dignity accord to the Iraqi people the right to try, in a duly constituted court of law, their former leaders, since the people of Iraq were the primary victims of the crimes alleged. However, serious crimes against non-Iraqi citizens, such as Iranians and Kuwaitis, may require that there be an international component in any trial that is conducted.

The Ba'athist regime led by Mr. Hussein stands accused of some of the most grievous crimes mankind has experienced. Its principal victims were the Iraqi people, mainly ethnic and religious groups disfavored by his regime. Under the totalitarian rule of Mr. Hussein, Iraq also conducted vicious wars against its neighbors and their allies. Trial and punishment by an Iraqi government without international participation might not provide sufficient accountability. To promote the process of creating an accurate historical record and to ensure that justice is done for victims as well as for the accused, the Iraqi people must ensure that any trial meets internationally recognized standards of professionalism, independence, openness and thoroughness.

Compilation of the vast amount of evidence necessary to form the basis for a comprehensive indictment and successful prosecution would launch the healing process in Iraq. This process would likely be enhanced by the experience of trials for the senior leaders of the Ba'athist regime that meet the internationally recognized standards and also by some form of national truth and reconciliation process that enables Iraqi society to come to terms with crimes perpetrated by other agents of the regime.

Recommendations

In addition to bringing Mr. Hussein and his principal accomplices to justice before a duly constituted and competent court of law, an indictment and trial under appropriate international standards would further the following objectives: (i) developing the rule of law in Iraq; (ii) strengthening the perception of the United States and its coalition partners as helping to spread democratic values; and (iii) confirming the United States' commitment to international cooperation and standards. Of the possible venues, a modified form of the recently chartered Iraqi Special Tribunal for Crimes Against Humanity may best be able to fulfill these objectives. Should the charter of the Special Tribunal not be modified to meet these objectives, an international or hybrid national-international court or an international tribunal could be established by the Iraqi government to try Mr. Hussein.

Before turning Mr. Hussein and his principal accomplices over to any tribunal for trial on charges of both domestic and international human rights violations, the United States and its coalition partners should be assured that the trial will be conducted in accordance with established legal standards codified in the Geneva Conventions, the International Covenant for Civil and Political Rights and the Universal Declaration of Human Rights. Political expediency should not permit such standards to be ignored or glossed over. To best ensure legal sufficiency and political legitimacy, remand should be premised on the following conditions:

- Strengthening the Special Tribunal to provide for both Iraqi and non-Iraqi judges, prosecutors, defense counsel and investigative and administrative staffs, with qualifications/experience in handling cases involving complex human rights violations to ensure the competence of the tribunal as required under Article 14 of the International Covenant on Civil and Political Rights. At least one non-Iraqi jurist would serve on each Trial Chamber and at least two on the Appeals Chamber. These non-Iraqis would serve in addition to advisors to the Special Tribunal courts and the Prosecutions Department. A training program for Iraqi judges could be instituted if necessary.
- Selection of judges, prosecutors, counsel and support staff would be made jointly by the Iraqi Governing Council (or its successor) and the United Nations Security Council (or

some other international or regional authority). Some preference could be given to the empanelling of secular jurists from countries near Iraq.

- Amending or reenacting the provisions of the Statute of the Iraqi Special Tribunal by the new Iraqi government that assumes power after June 2004 to accommodate these provisions and those that follow:
 1. The charges to be considered would be those involving international crimes, and, where appropriate, domestic offenses involving serious crimes.
 2. The Special Tribunal would adopt rules of evidence and procedure of what are generally regarded by the international community as the highest standards such as those developed for the International Criminal Court, and would require for conviction evidence of guilt beyond a reasonable doubt. The evidence should be compelling, substantial and well documented.
 3. The maximum penalty would be life imprisonment. A finite right of appeal would be included in the trial procedures, as would be customary under international law.
 4. The trial would take place in Baghdad, be conducted in the Arabic language (with simultaneous interpretation) and be open to the public and the media. Evidence accepted by the judges would be available in its original language to the public and the media, except where necessary to protect the innocent.
 5. Robust security must be provided for all participants in the proceedings. Appropriate provisions would also be made to protect witnesses, including, where appropriate, the identity of a witness.