

Iraq

Ensuring justice for human rights abuses

Those responsible for crimes under international law and other grave human rights abuses in Iraq must be brought to justice. To ensure that this goal is achieved, a comprehensive anti-impunity program needs to be developed. Its central pillar would be reforming the Iraqi criminal justice system. However, other complementary and transitional approaches will be needed, including approaches involving the international community.

Currently a number of proposals for bringing to justice perpetrators of human rights abuses in Iraq are being discussed. They reportedly include proposals for military tribunals or military commissions set up by the United States of America (USA). While under international humanitarian law the USA, as one of the occupying powers in Iraq, would be entitled within narrowly circumscribed limits to set up US courts in Iraq, there are a number of considerations that would make this approach undesirable.

Military tribunals should not be used to try civilians or to try soldiers accused of crimes under international law. Additional concerns include the fact that even if tribunals which have important fair trial guarantees are used, such as US courts martial, they will inevitably be perceived as victor's justice. Other mechanisms, such as military commissions modelled on those established after the attacks in the USA of 11 September 2001, are administrative bodies, not courts, and their procedures are grossly unfair. In either case, defendants would be exposed to the death penalty.

Other proposals being discussed include approaches involving international mechanisms or the use of Iraqi judges in transitional arrangements. However, no in-depth authoritative analysis of the situation in Iraq has been carried out as yet.

In this context, Amnesty International calls for the urgent establishment of a United Nations (UN) commission of experts to develop proposals for a program that would address comprehensively the issue of justice in Iraq, with the participation of Iraqi civil society. Such a commission should begin work immediately, regardless of whatever transitional arrangements are made for governing Iraq.

Ensuring justice is fundamental for the countless victims of decades of grave violations of human rights by Iraqi government agents, as well as the victims of abuses committed by any parties in the course of several conflicts, including the ongoing war and its aftermath. It is also fundamental as a means to prevent the repetition of crimes under international law and other human rights abuses. In order to be fair and effective, all measures aimed at ensuring justice must be in full conformity with international human rights law and standards. Neither victims nor suspects should receive second class justice.

In this paper, Amnesty International outlines the role of the UN commission of experts and sets out fundamental principles which should govern any approach to ensuring justice for abuses in Iraq. It outlines the need for reforming the Iraqi criminal justice system, and reviews transitional and complementary approaches that ought to be considered as part of a comprehensive program to ensure justice.

The need for a United Nations commission of experts

A commission of experts, along the lines of the commission which led to the establishment of the International Criminal Tribunal for the former Yugoslavia, should be set up urgently to develop proposals for a comprehensive program to ensure justice in Iraq.

In particular, the commission should study the situation of the Iraqi criminal justice system and the existing body of Iraqi judges, prosecutors and lawyers. It should advise on a program for reviewing the background of criminal justice system officials, and for training, so as to ensure compliance with international human rights standards. It should also advise on possible transitional and complementary judicial approaches, pending the reform of the Iraqi criminal justice system.

The commission should be set up by the UN, which has recognized expertise and authoritativeness in this field. One of the commission's central tasks would be to ensure the participation of Iraqi civil society organizations and experts in the development of the justice program. Preparations for such a commission should begin now. The commission could report in a matter of months.

In the meantime, all parties to the current conflict who are in authority in Iraq must ensure that evidence of crimes is properly preserved.

Fundamental principles for ensuring justice

The following fundamental principles should govern any approach to ensuring justice for abuses in Iraq:

(a) ***Independence and impartiality***: any tribunal must be truly independent from the executive authority and pursue suspected perpetrators solely on the basis of the evidence against them and through a fair process, in strict accordance with international law and standards for fair trial.

(b) ***No selectivity***: there should be no selectivity in the pursuit of suspects on the basis of nationality, rank, ethnicity, religion, or any other such ground. Anyone suspected of having committed crimes in Iraq must be brought to justice.

(c) ***No statute of limitations***: grave abuses must be addressed regardless of when they occurred. In particular, there should be no statute of limitations for crimes under international law (including genocide, crimes against humanity and war crimes), whether committed at any time in the past or during the current war and in its aftermath.

(d) ***No amnesties***: there should be no amnesties, pardons or similar measures for crimes under international law if such measures would prevent the emergence of the truth; a final judicial determination of guilt or innocence; and full reparation for victims and their families.

(e) ***Fair trials***: suspects should be brought to justice in proceedings that fully respect international law and standards for fair trial at all stages of the proceedings. The presumption of innocence must be respected from the moment a person becomes a suspect until he or she is proved guilty beyond a reasonable doubt. Civilians must be tried only before civilian courts. Military personnel accused of crimes under international law must also be tried before civilian courts.

(f) ***No death penalty or torture or ill-treatment***: there should be no recourse to the death penalty or other form of cruel, inhuman or degrading punishment, whatever the circumstances. Suspects must never be subjected to torture or ill-treatment.

(g) ***Reparation for victims***: victims and their families must be accorded effective means to obtain full reparation for the violations they have suffered, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

These principles are derived from international human rights and humanitarian law and standards, including:

- Articles 9, 14 and 15 of the International Covenant on Civil and Political Rights;
- The UN Standard Minimum Rules for the Treatment of Prisoners;
- The UN Body of Principles for All Persons under Any Form of Detention or Imprisonment;
- The UN Basic Principles on the Independence of the Judiciary;
- The UN Guidelines on the Role of Prosecutors;
- The UN Basic Principles on the Role of Lawyers;
- The UN Standard Minimum Rules for the Administration of Juvenile Justice;
- Article 37 of the Convention on the Rights of the Child;
- Article 75 of Protocol I Additional to the Geneva Conventions;
- The Rome Statute of the International Criminal Court.

Approaches to ensuring justice

1. Reforming the Iraqi criminal justice system

The first and foremost responsibility for ensuring justice for crimes in Iraq should rest with the Iraqi criminal justice system. However, Amnesty International has long been concerned about widespread human rights violations relating to the criminal justice system, including legislation inconsistent with international law and standards; grossly unfair trials; lack of independence; and the use of torture, the death penalty and other cruel, inhuman or degrading punishment.

Given this background, the Iraqi law enforcement agencies and the judiciary must be radically reformed to ensure that they operate in line with international human rights law and standards. This is likely to be a long-term process and must begin as a matter of priority.

The other complementary or transitional approaches for ensuring justice discussed in this paper should be viewed as supportive to this goal. Each of these approaches should be assessed in light of the impact they will make on the overall issue of impunity in Iraq.

2. Exploring transitional approaches

Transitional judicial approaches may be necessary given the likely time that it will take to reform the Iraqi criminal justice system, and the current limited potential for other international and regional approaches such as those outlined below. However, any transitional approach, if established, should support the goal of reforming the Iraqi criminal justice system.

As is common in certain countries in the Middle East, East Africa and Europe, foreign judges could be employed to serve on transitional tribunals, and other foreign experts could be recruited as prosecutors and defence lawyers and lawyers for victims. Judges, prosecutors and lawyers from other Arab countries could make a valuable contribution in this regard, given the similarity of many Arab legal systems and the common language. Conversely, questions about the impartiality of transitional tribunal will be raised if nationals from the USA or the United Kingdom (UK) serve on any such tribunals. Possible transitional approaches include:

(a) An international *ad hoc* tribunal

An international *ad hoc* tribunal for Iraq could be established by the Security Council, as in the case of the International Criminal Tribunals for the former Yugoslavia and Rwanda, or by the General Assembly.

There is a risk that politics at the Security Council or the General Assembly may lead to a tribunal with a mandate restricted only to abuses committed by Iraqi nationals, or with arbitrary temporal limitations, or with definitions of crimes, principles of criminal responsibility and defences inconsistent with international law. In addition, such a tribunal will require adequate resources and full cooperation by the international community, two requirements that have not been sufficiently met in the case of the two existing *ad hoc* tribunals. Both such tribunals were not established as part of a comprehensive program to rebuild national judicial systems. However, should these obstacles be overcome, an international *ad hoc* tribunal could prosecute a limited number of cases and thus contribute to ensuring justice.

(b) A mixed tribunal

A tribunal including both international and Iraqi judges could be established by the Security Council or in other ways. A precedent is the Special Court for Sierra Leone, established by a treaty between Sierra Leone and the United Nations in 2000. The Court, based in the country, has been funded solely by voluntary contributions,

making financing uncertain and enabling it to investigate and prosecute only a small number of individuals. The international community failed to establish a program to rebuild the national criminal justice system so as to ensure that crimes not dealt with by the Special Court would be investigated and prosecuted in national courts. In addition, most such crimes are covered by a national amnesty, in contravention of international law.

Similar considerations and concerns relating to an international *ad hoc* tribunal would apply to a mixed tribunal. It would also require identifying Iraqi judges meeting international criteria of independence and impartiality and willing to serve on such a tribunal in the short term. If that can be achieved, such a tribunal would contribute to ensuring justice as in the case of an international *ad hoc* tribunal, with the added advantage of including Iraqi personnel.

3. *International and regional approaches*

There are already international approaches available for bringing to justice those responsible for crimes under international law committed in Iraq, including past and present crimes committed by the Iraqi authorities and their agents as well as crimes committed by any person belonging to any party in the context of recent conflicts, including the current war and its aftermath. A regional approach could be pursued.

(a) *Universal jurisdiction*

According to international law states are entitled, and in some cases required, to pursue alleged perpetrators of crimes under international law. This jurisdiction exists regardless of where and when these crimes occurred, regardless of the nationality of the suspects or victims and irrespective of whether there is any specific link with the country where the court is based, for example a threat to the state's own security.

Universal jurisdiction applies to genocide, crimes against humanity, war crimes, torture, extrajudicial execution and "disappearances" as the most serious crimes under international law, as well as to ordinary crimes under national law such as murder, abduction, assault and rape.

Obligations to bring to justice perpetrators of crimes under international law are found under customary international law, general principles of law, conventional international humanitarian law (specifically the four Geneva Conventions and Protocol I), and international human rights law (for example, obligations under the

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

States should investigate and prosecute those suspected of such crimes before their own courts, or hand them over to another state able and willing to try them according to international standards for fair trial and without the imposition of the death penalty. There are several ways in which universal jurisdiction could contribute to ending impunity in Iraq. They include:

- Individual foreign prosecutors and investigating judges exercising universal jurisdiction based on the chance arrival of suspects in a state;
- Individual foreign prosecutors and investigating judges exercising universal jurisdiction, as envisaged by the Geneva Conventions and used by some states, of investigating crimes when a suspect is not present, based on victims' complaints, and requesting the suspect's extradition;
- States agreeing to share responsibility for exercising universal jurisdiction.

Enacting effective universal jurisdiction legislation should be an urgent priority for all states (see Amnesty International, *Universal jurisdiction: The duty of states to enact and implement legislation*, AI Index: IOR 53/002/-018/2001, September 2001). However, many countries do not yet have enabling legislation for exercising universal jurisdiction or legislation that enables them to try perpetrators of certain crimes under international law. Other countries lack sufficient training or the political will to ensure such investigations and prosecution. In this context, the contribution that this approach would do the ensuring justice in Iraq is likely to be limited.

(b) The International Criminal Court

Under the Rome Statute, the current jurisdiction of the International Criminal Court (ICC) is limited to the crime of genocide, crimes against humanity and war crimes when committed within the territory of a state party or by nationals of a state party.

Further, the jurisdiction of the ICC is limited in time to 1 July 2002 for state parties that ratified the Rome Statute before its entry into force, and after the entry into force in the state party for those states that ratified the Rome Statute after it entered into force in July 2002. The scope of jurisdiction cannot be changed until the first review conference in 2009.

Iraq and the USA have not ratified the Rome Statute, whereas the UK has done so. However, states who are not party to the Rome Statute may nevertheless recognize the jurisdiction of the ICC by making a declaration under Article 12 (3) to accept “the exercise of jurisdiction by the Court with respect to the crime in question”.

Alternatively, under Article 13 (b) of the Rome Statute, the Security Council may adopt a resolution conferring jurisdiction to the ICC over a situation being considered under Chapter VII of the UN Charter. However, this can only be done with respect to crimes committed since 1 July 2002.

While using the ICC is a possibility, there are significant temporal and jurisdictional constraints which would make its contribution to ensuring justice in the context of Iraq extremely limited. Even without those constraints, the sustained US efforts to undermine the ICC make the prospects of a referral by the Security Council unrealistic in the short term.

(c) A regional criminal court

A regional criminal court, for example one set up within the framework of or linked to the League of Arab States, could be an appropriate mechanism for sharing the responsibility of bringing to justice perpetrators of the gravest crimes.

Similar initiatives of regional cooperation are being explored elsewhere, for example, the Caribbean Community (CARICOM) proposed Caribbean Court of Justice, which would have appellate criminal jurisdiction from all member states. Within the European Union, in addition to the existing institutions of Europol and Eurojust, the establishment of a European Prosecutor for certain financial offences is being considered. However, while a regional initiative of this nature should be pursued, it will require prompt consideration by Arab governments if it is to contribute to ensuring justice for abuses in Iraq.