

# CRS Report for Congress

Received through the CRS Web

## Options for Trying Saddam Hussein for International Crimes

Jennifer K. Elsea  
Legislative Attorney  
American Law Division

### Summary

While U.S. courts do not appear to have jurisdiction under U.S. law for most of the crimes alleged to have been committed by Saddam Hussein, several options are available for prosecuting him for crimes against humanity, genocide, and war crimes. Precedents include national courts and national and international military tribunals similar to those used in the aftermath of World War II, an international ad hoc tribunal similar to those set up by the U.N. to adjudicate atrocities in the former Yugoslavia and Rwanda, and “hybrid” tribunals — which combine national and international elements. The Bush Administration supports prosecution by a special Iraqi court. Under the Geneva Conventions, if the United States were to turn Hussein over to the Iraqi interim government or another detaining power, it may remain responsible for assuring that the receiving power observe the safeguards in the Conventions.

The December 13, 2003 capture of former Iraqi President Saddam Hussein brings a new sense of urgency to questions regarding his criminal responsibility for past atrocities — where can he be tried and for which crimes?<sup>1</sup> An answer to these questions depends on the authority and legitimacy of the chosen venue and the scope of its jurisdiction under international law. This report discusses the options and examines the application of the Geneva Conventions to war crimes trials.

### Background

The Coalition Provisional Authority (CPA)<sup>2</sup> delegated authority to the Iraqi Governing Council (IGC) to create a special tribunal to try Saddam Hussein and other

---

<sup>1</sup> These issues were explored in greater depth by the Senate in April, 2003. *See Prosecuting Iraqi War Crimes: A Consideration of the Different Forum Options: Hearing Before the Senate Comm. on Governmental Affairs*, 108<sup>th</sup> Cong. (2003) [hereinafter *Hearings*].

<sup>2</sup> *See* CRS Report RL31339, *Iraq: U.S. Regime Change Efforts and Post-Saddam Governance*.

Iraqis accused of atrocities and war crimes.<sup>3</sup> On December 10, 2003, the IGC established the Iraqi Special Tribunal for Crimes Against Humanity (“IST”), which will have jurisdiction to try Iraqi nationals or residents for certain crimes committed between July 17, 1968 and May 1, 2003.<sup>4</sup> Article 48 of the interim constitution, adopted March 8, 2004, confirms the exclusive jurisdiction of the IST to try such crimes, notwithstanding another provision that proscribes “special or exceptional courts.” The IST is an independent entity whose judges and prosecutors are appointed by the IGC.(or, presumably, its successor) (IST Stat. arts. 1(a) and 5(c).) The Tribunals will consist of panels of five judges for trials and nine judges for the Appeals Chamber. (Id. art. 4.) There will also be up to twenty Tribunal Investigative Judges with the power to issue subpoenas, arrest warrants, and indictments of suspects. (Id. art. 7.) The rules for the IST contemplate the participation of international judges and prosecutors primarily in an advisory capacity (id. arts. 6(b), 7(n) and 8(j)), although the IGC, “if it deems necessary, can appoint non-Iraqi judges who have experience in the crimes encompassed in th[e] statute, and who shall be persons of high moral character, impartiality and integrity.” (Id. art. 4(d).) The Bush Administration has not officially agreed to hand over any former regime members to the IGC for trial, but has reportedly dispatched a team of experts from the Justice Department to assist in the collection and evaluation of evidence.<sup>5</sup>

Some observers believe the Iraqi Special Court will lack legitimacy because the IGC, whose members are appointed by the Coalition Provisional Authority (CPA), may be regarded by some as a U.S. surrogate rather than a sovereign government,<sup>6</sup> or because they believe the Iraqi judiciary to be incapable of convening a court that will be regarded as

---

<sup>3</sup> See Coalition Provisional Authority Order Number 48, Doc. CPA/ORD/9 Dec 2003/48, available at [<http://www.cpa-iraq.org/regulations>][hereinafter “CPA Order 48”] (citing authority of Ambassador Bremer as Administrator of the CPA “and under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions. . .”). CPA Order 48 authorizes the IGC to promulgate a statute, elements of crimes to be tried, and rules of procedure, all in coordination with the CPA. The CPA Administrator reserves the authority to alter these documents “if required in the interests of security”). *Id.* § 1(6). In case of conflict between CPA regulations and a ruling or judgment of the IST, the CPA promulgation will prevail. *Id.* § 2(3). The order expires on the establishment of a new government. *Id.* § 3. It is unclear whether the U.S. government will retain authority allocated to the CPA after the planned transfer of sovereignty on June, 30, 2004. See generally CRS Report RL31339.

<sup>4</sup> See The Statute of the Iraqi Special Tribunal (2003)[hereinafter “IST Stat.”], available at [[http://www.cpa-iraq.org/audio/20031210\\_Dec10\\_Special\\_Tribunal.htm](http://www.cpa-iraq.org/audio/20031210_Dec10_Special_Tribunal.htm)]. The crimes include genocide, crimes against humanity, and war crimes, as well as violations of certain Iraqi laws, including manipulation of the judiciary, the wastage of national resources and the squandering of public assets, abuse of power, and the “pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country.” *Id.* art. 14.

<sup>5</sup> Adam Entous, *US steps up plans for tribunal on Iraq war crimes*, REUTERS, Apr. 6, 2004.

<sup>6</sup> The U.N. Security Council (UNSC) has determined that the Iraqi Governing Council and its ministers are the “principal bodies of the Iraqi interim administration,” which “embodies the sovereignty of the State of Iraq during the transitional period.” UNSC Res. 1511 para. 4, U.N. Doc. S/Res/1511 (2003). However, the interim government was not elected by the people of Iraq in accordance with their UNSC-recognized right to govern themselves. See *id.* Furthermore, the UNSC “underscores . . . the temporary nature of the exercise by the Coalition Provisional Authority (Authority) of the specific responsibilities, authorities, and obligations under applicable international law recognized and set forth in resolution 1483 (2003).” *Id.* para. 1.

fair and impartial with regard to the crimes of the prior regime.<sup>7</sup> Accordingly, some advocate the establishment of a court with an international composition, possibly under the auspices of the United Nations. The newly created International Criminal Court (ICC) is not a likely venue because its jurisdiction is limited to crimes committed after July 1, 2002, and because Iraq is not a party.<sup>8</sup>

## War Crimes Tribunals: History and Development

Prior to the twentieth century, war crimes were generally tried, if tried at all, by belligerent States in their own national courts or special military tribunals. After World War I, the Allies appointed a 15-member commission to inquire into the legal liability of those responsible for the war and the numerous breaches of the law of war that it occasioned. It recommended the establishment of an international military tribunal to prosecute those accused of war crimes and crimes against humanity, including Kaiser Wilhelm. The United States objected to trying the Kaiser because it wished to avoid a precedent that would allow the trial of heads of state for sovereign acts. After Germany refused to comply with the locally unpopular provision of the peace treaty requiring it to turn over accused war criminals to the Allied forces for trial, a compromise was reached in which Germany agreed to prosecute those persons in its national courts.<sup>9</sup> Of 901 cases referred to the German Supreme Court for trial at Leipzig, only 13 were convicted.<sup>10</sup> Because German nationalism appeared to have hindered the earnest prosecution of war criminals, the results were largely seen as a failure.<sup>11</sup>

**International Military Tribunals.** Precedent from the Second World War could provide a model for the United States and its coalition partners to establish a joint military tribunal to prosecute war crimes and possibly crimes against humanity committed by Saddam Hussein and his officers. After World War II, the Allies applied lessons learned at Leipzig and formed special international tribunals for the European and Asian theaters. The United States, France, Great Britain and the Soviet Union together established the International Military Tribunal (IMT) at Nuremberg for the trial of major war criminals.<sup>12</sup> The International Military Tribunal for the Far East (IMTFE) in Tokyo was established by a Special Proclamation of General Douglas MacArthur as the Supreme Commander

---

<sup>7</sup> See, e.g., Douglas W. Cassel, Jr., *What Kind of Trial Should Saddam Have?*, CHI. DAILY L. BULL., Dec. 24, 2003, at 5 (2003); *Hearings, supra* note 1, at 66 (Response of Ambassador David J. Scheffer) (noting that the Geneva Conventions may constrain the ability of the interim government to amend Iraqi penal laws).

<sup>8</sup> The ICC could prosecute crimes committed in Iraq by Iraqis after July 1, 2002, only if Iraq consents or if the UNSC refers a case to the ICC. See CRS Report RL31495, *U.S. Policy Regarding the International Criminal Court*. Because of the United States' opposition to the ICC and its power to veto either eventuality, trial at the ICC for these crimes is unlikely.

<sup>9</sup> See *id.* at 46.

<sup>10</sup> See *id.* at 49.

<sup>11</sup> See *id.* at 51-52.

<sup>12</sup> See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, 1945, 82 U.N.T.S. 279 [hereinafter "London Charter"].

in the Far East for the Allied Powers.<sup>13</sup> In Europe, many national military tribunals were established to try the less high-profile war crimes and crimes against humanity.

The jurisdiction of the Nuremberg Tribunal was based on universally applicable international law regulating armed conflict, and its authority was based on the combined sovereignty of the Allies and Germany's unconditional surrender.<sup>14</sup> While crimes against humanity were defined in the London Charter to include peacetime violations,<sup>15</sup> the tribunal exercised jurisdiction over crimes committed by the Nazi regime against civilians only where those crimes were connected to the planning, preparation, initiation, or waging of an aggressive war.<sup>16</sup> Thus, while the Nuremberg Tribunal provides precedent for holding individuals responsible for violations of international law, it does not provide a basis for the Coalition nations to assert jurisdiction over crimes against humanity committed on Iraqi territory that were not connected to an armed conflict. However, American military tribunals in Europe asserted broader jurisdiction over crimes against humanity, severing the need for any connection with war crimes in all but one relevant case.<sup>17</sup>

**Ad Hoc International Courts.** The U.N. Security Council (UNSC), acting under its Chapter VII authority of the U.N. Charter, could establish an ad hoc criminal court similar to the International Criminal Tribunal for the former Yugoslavia (ICTY) or the International Criminal Tribunal for Rwanda (ICTR) established in the 1990s.<sup>18</sup> The UNSC has adopted numerous resolutions with respect to the situation in Iraq and Kuwait since Iraq's invasion of its neighbor in 1990, and remains actively seized of the matter. UNSC Resolution 1483 affirmed the need for accountability for the crimes committed by Saddam Hussein's regime, but did not prescribe a venue. A new resolution creating an international court for Iraq would require the support (or at least acquiescence) of the five permanent members of the UNSC, including the United States. Support for a new ad hoc tribunal may not be forthcoming because of the lengthy and costly nature of the procedures for the ICTY and the ICTR, and the lack of consensus on the death penalty.<sup>19</sup>

**Hybrid Tribunals.** Another option for trying Iraqis accused of international crimes might be to create a hybrid tribunal similar to the Special Court for Sierra Leone. This

---

<sup>13</sup> Charter of the International Military Tribunal for the Far East, 1946, T.I.A.S. No. 1589.

<sup>14</sup> See Matthew Lippman, *Crimes Against Humanity*, 17 B.C. THIRD WORLD L.J. 171, 238 (1997).

<sup>15</sup> See London Charter art. 6(c) (defining crimes against humanity to include "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated").

<sup>16</sup> See Lippman, *supra* note 14, at 192-93 (noting that crimes committed against German Jews and others prior to 1939 were not cognizable under the London Charter).

<sup>17</sup> See *id.* at 219-20. British military tribunals also asserted jurisdiction over genocide despite the absence of any nexus to the crime, explicitly invoking universal jurisdiction. *Id.* at 239.

<sup>18</sup> See CRS Report RL30864, *Yugoslavia War Crimes Tribunal: Current Issues for Congress*.

<sup>19</sup> See Dianne Orentlicher, *Venues for Prosecuting Saddam Hussein: The Legal Framework*, Am. Soc'y Int'l L. Insight No. 124, available at [<http://www.asil.org/insights/insigh124.htm>].

court is the product of an agreement between the United Nations and the government of Sierra Leone. Similar hybrid tribunals that were created by U.N. administering authorities are operating in East Timor<sup>20</sup> and Kosovo,<sup>21</sup> and the United Nations has agreed to participate in a hybrid tribunal in Cambodia to punish perpetrators of genocide. The procedures and jurisdiction of hybrid tribunals are set by agreement between the host government and the United Nations, and a hybrid tribunal for Iraq could be tailored to the particular circumstances in Iraq. However, because the IGC has indicated it wishes to reserve its prerogative to allow the death penalty, it may be difficult to gain the support of U.N. members who are opposed to the death penalty.

## The Geneva Conventions and War Crimes Tribunals

Saddam Hussein and other Iraqis detained by coalition forces are protected by the 1949 Geneva Conventions.<sup>22</sup> The protections vary according to the status of the individual detained, and include provisions for the trial and punishment of detainees, particularly with respect to grave breaches of the Conventions. As High Contracting Parties to the Conventions and as Detaining Powers within their meaning, the coalition governments are obligated to “search for persons alleged to have committed, or to have ordered to be committed, . . . grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.” (GPW art. 129.) Grave breaches include “wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial “ in connection with an armed conflict. (GPW art. 130.)

The Detaining Power also has the option to “hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has

---

<sup>20</sup> Security Council Resolution 1272 (1999) authorized the United Nations Transitional Administration of East Timor (UNTAET), which administered the courts there until Timor Leste achieved statehood in 2002. Special panels of one of the district courts, comprised of two international judges and one East Timorese judge, have exclusive jurisdiction over genocide, war crimes, crimes against humanity, and other serious offences. UNTAET Regulation 2000/15, Doc. No. UNTAET/REG/2000/15 (2000). UNTAET also established an independent Commission for Reception, Truth and Reconciliation to investigate human rights violations.

<sup>21</sup> U.N. Security Council Resolution 1244 created the U.N. Interim Administration Mission in Kosovo (UNMIK) with authority to administer an interim justice system as part of its nation-building mandate. The interim courts handle atrocity cases of less severity than those tried at the ICTY, which lacks the capacity to try all such cases. See Laura A. Dickinson, *The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo*, 37 NEW ENG. L. REV. 1059 (2003). International prosecutors and judges have been appointed in some cases due to concern that local officials did not act impartially in cases of crimes against minorities. See Organization for Security and Cooperation in Europe, Report 9 — On the Administration Of Justice 6 (2002) *available at* [[http://www.osce.org/kosovo/documents/reports/justice/Report9\\_eng.pdf](http://www.osce.org/kosovo/documents/reports/justice/Report9_eng.pdf)].

<sup>22</sup> Of primary importance are the Third and Fourth Geneva Conventions of 1949. (Third) Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316 [hereinafter “GPW”]; (Fourth) Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516 [hereinafter “GC”].

made out a *prima facie* case.” (GPW art. 129.) However, if the accused is a prisoner of war (POW), he may only be transferred “after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention.” (GPW art. 12.) If the transferee Power “fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall . . . take effective measures to correct the situation or shall request the return of the prisoners of war.” (Id.) Thus, if Iraqi POWs are turned over to the Iraqi interim government, coalition forces may remain responsible for ensuring that they are treated in accordance with the Conventions, including that any trials adhere to the same procedures applied by the Detaining Power to its own military personnel and otherwise comply with the safeguards of the GPW, including death penalty provisions. (GPW art. 102.)

The requirements are similar for civilian “Protected Persons” (“PP”) within the meaning of the Fourth Geneva Convention (“GC”). Like POWs, PPs may only be transferred to another Party who will observe the requirements of the Conventions, except that a PP may be repatriated to his own country after hostilities have ceased. (GC art. 45.) The GC also contains a number of procedural safeguards for PPs accused of crimes. They may be sentenced by the Occupying Power only after a “regular trial.” (GC art. 71.) There is an obligation to try persons accused of grave breaches (enumerated in GC art. 147), or hand them over to another High Contracting Party with the ability to pursue a prosecution in accordance with the protections of the Conventions. (Id.) Thus, the United States could try Saddam Hussein and others accused of war crimes in federal court or by military court-martial (with respect to POWs) for grave breaches of the Geneva Conventions. The War Crimes Act of 1996<sup>23</sup> provides federal court jurisdiction to try war crimes perpetrated by or against U.S. nationals. For other international crimes not related to any armed conflict, under the theory of “universal jurisdiction,”<sup>24</sup> any country that can exercise personal jurisdiction over the alleged perpetrator may do so, at least where such jurisdiction would be reasonable and the applicable domestic laws provide jurisdiction. The Genocide Convention Implementation Act of 1987<sup>25</sup> would allow prosecution in U.S. federal courts of genocidal acts only if they were committed by a U.S. national or within the United States. U.S. federal courts are not now empowered to try non-U.S. nationals for crimes against humanity committed overseas, unless the conduct amounts to torture.<sup>26</sup> Thus, in order to try Saddam in federal court for his alleged genocide or crimes against humanity against the Iraqi people, new legislation would be required.<sup>27</sup>

---

<sup>23</sup> P.L. 104-192, 110 Stat. 2104, 18 U.S.C. § 2441.

<sup>24</sup> The “universality principle” defines a category of crimes that are so egregious as to be the object of universal concern, regardless of the situs of the offense and the nationalities of the offenders or victims. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1986).

<sup>25</sup> P.L. 100-606, 102 Stat. 3045, 18 U.S.C. §§ 1091-93.

<sup>26</sup> P.L. 103-236 § 506, 108 Stat. 463, 18 U.S.C. §§ 2340 -2340B.

<sup>27</sup> Because these crimes may be covered under the theory of universal jurisdiction, such legislation would not necessarily be invalid as an *ex post facto* criminal prohibition, though defense counsel could be expected to raise such a defense.