



INTERNATIONAL
COMMISSION
OF JURISTS

IRAQ:
THE TRIAL OF SADDAM HUSSEIN
and
THE RIGHTS OF THE VICTIMS

October 2005

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THE TRIAL OF SADDAM HUSSEIN

and

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Introduction

“It is obvious that gross violations of human rights and fundamental freedoms, particularly when they have been committed on a massive scale, are by their nature irreparable. In such instances any remedy or redress stands in no proportional relationship to the grave injury inflicted upon the victims. It is nevertheless an imperative norm of justice that the responsibility of the perpetrators be clearly established and that the rights of the victims be sustained to the fullest possible extent.”

Theo van Boven, UN Special Rapporteur on the Right to Reparation¹

The trial of former President Saddam Hussein and seven other defendants is scheduled to start on 19 October 2005. Irrespective of the outcome of the trial, the status of the accused and the sheer extent of gross violations of international human rights law and serious violations of humanitarian law committed during his regime over more than 30 years, have already made this trial one of the most important judicial proceedings in many decades. The way justice is delivered during the whole process will set fundamental precedents for respect for the rule of law in Iraq and could have major consequences throughout the Middle East.

States have a fundamental responsibility to bring to justice perpetrators of gross violations of international human rights law and serious violations of humanitarian law. They must ensure that proceedings follow international fair trial standards. Beyond prosecuting and punishing those responsible, states also have the “duty to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations.”²

International attention has focussed so far on the prosecution of Saddam Hussein and the other defendants, in particular the need to ensure fair trial guarantees. It is certainly crucial to avoid a hasty verdict on particular charges in which political considerations could take precedence over respect for international fair trial standards. However, almost no attention has been paid to the rights of those who were victims during the regime of Saddam Hussein. Against a background of increasing political radicalization and possible entrenchment of a conflict between different religious and ethnic communities that has led to a pro- or anti-

¹ Study on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, UN Doc. E/CN.4/Sub.2/1993/8, para. 131.

² Principle 1 of the UN Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, recommended by the UN Commission on Human Rights (Resol. 2005/81) of 21 April 2005.

Saddam polarization, it is essential also to focus on the rights of victims to reparation and truth.

This report examines the rights of victims of gross violations of international human rights law and serious violations of humanitarian law committed while Saddam Hussein was in power. It examines the provisions of both the Statute and the Rules for Proceedings and Evidence Gathering (the “Rules of Procedure and Evidence”) of the Iraqi High Criminal Court (the “Iraqi Court”), regarding the rights of the victims.

I. Background

The Statute of the Iraqi High Criminal Court (formerly called the Iraqi Special Tribunal) was adopted on 10 December 2003 by the Iraqi Governing Council (IGC). The IGC had been appointed on 13 July 2003 by Paul Bremer, the Administrator of the Coalition Provisional Authority (CPA). Three days after the adoption of the Statute, the US-led Coalition announced the capture of Saddam Hussein. On 17 July 2005, the first criminal case was filed against him for his alleged role in the massacre on 8 July 1982 of more than 140 people in the town of Dujail, in retaliation for an attempt on his life there on the same day. The trial of Saddam Hussein and seven other defendants charged in the same case is scheduled to start on 19 October 2005. It is expected to be the first of a dozen trials, each focussing on specific events, such as the 1991 repression of the Shi’a uprising in Southern Iraq or the gassing of Kurds in Halabja in 1988.

The Statute and the Rules of Procedure and Evidence underwent several changes and the Iraqi Transitional National Assembly promulgated revised versions on 11 August 2005. The jurisdiction of the Court extends from 17 July 1968 (when the Ba’ath party came to power) to 1 May 2003 (the fall of the regime of Saddam Hussein). The Court is competent to try crimes of genocide, crimes against humanity and violations of “certain Iraqi laws.”³ The CPA suspended the death penalty, but the Iraqi Interim Government reinstated it on 8 August 2004. If found guilty, Saddam Hussein and other defendants may face the death penalty.

The International Commission of Jurists (ICJ) unconditionally opposes the death penalty, as the ultimate form of cruel, inhuman and degrading punishment. The global trend towards abolition of the death penalty has been accelerating over the last decade. The statutes of the International Criminal Tribunals for Rwanda and for the Former Yugoslavia exclude the death penalty, as does the statute of the International Criminal Court (ICC).⁴

Along with other non-governmental organisations, the ICJ has expressed its strong doubts about the ability of the Iraqi Court to uphold international standards of fair trial, notably regarding independence and impartiality. These concerns have been echoed by the United

³ Such as “attempt to manipulate the judiciary or to influence the functions of the judiciary, wastage and squander of national resources (...) and the abuse of positions 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.” (Art. 14 of the Statute).

⁴ See Art. 23(1) of the Statute of the International Tribunal for Rwanda, Art. 24(1) of the Statute of the International Tribunal for Former Yugoslavia and Art. 77(1) of the Statute of the ICC, respectively. Similarly, the Special Court for Sierra Leone, set up under an agreement between the UN and the Government of Sierra Leone, also restricts penalties to imprisonment (Art.19(1)).

Nations Special Rapporteur on the independence of judges and lawyers, who expressed concern that:

“The pressure weighing on the judges and the prevailing insecurity in Iraq may undermine its independence. Moreover, the Tribunal has certain deficiencies, some of which can be traced back to the manner in which it was set up and, in particular, to the restriction of its jurisdiction to specific people and a specific timeframe (...) The Tribunal’s power to impose the death penalty demonstrates the extent to which it contravenes international human rights standards (...) Because it was established during occupation and was financed primarily by the United States, its legitimacy has been widely questioned, with the result that its credibility has been tarnished.”⁵

The present report does not address the issue of the legitimacy of the Iraqi Court, and examines fair trial aspects only from the perspective of the victims’ rights.

II. Human rights violations and crimes against humanity

The Government of Saddam Hussein was responsible, among others, for gross and systematic violations of international human rights law. Violations included torture and ill-treatment, large-scale extrajudicial executions, enforced disappearances, arbitrary arrests and incommunicado detention for months or years without access to lawyers or relatives, unfair trials and massive destruction of property.

Torture and extra-judicial executions were widely used against actual or perceived political opponents, army and security officers suspected of opposition or involvement in coup attempts. Many victims of torture died or suffered permanent physical and psychological damage. The authorities have also carried out 'judicial punishments,' such as hand or foot amputation, branding of the forehead and cutting off of the ears.

The security forces of Saddam Hussein’s Government also forcibly expelled thousands of people on the basis of their ethnic origin, in particular in Iraqi Kurdistan. Governmental repression mainly targeted the Shi'a Muslims in Southern Iraq and in some districts of Baghdad, as well as Kurds in the north of the country.

Tens of thousands of people disappeared while Saddam Hussein was in power and their fate remains unknown. The UN reported more than 16,000 cases of enforced disappearances, but according to human rights groups, the number of disappeared is much higher. Many victims were Iraqi Kurds who disappeared during the Anfal campaign in 1988 when the authorities reportedly destroyed thousands of villages and towns in Iraqi Kurdistan. In the ‘70s and ‘80s, thousands of Shi’a went missing when whole families were expelled to Iran by the authorities. In 1991, in the wake of the uprising by the Kurds in the north and the Shi’a in the south, thousands of people from these communities disappeared. Members of communities or tribes such as the Yazidi in 1996 or the Barzani tribe in 1983 also disappeared after being arrested by governmental forces.

⁵ Report of the Special Rapporteur of the Commission on Human Rights “Civil and political rights, including the questions of independence of the judiciary, administration of justice, impunity”, (A/60/321), para 42.

Many of these human rights violations amount to crimes against humanity and are therefore within the jurisdiction of the Iraqi Court. Under international law, the massive, widespread or systematic practice of torture, murder, enforced disappearance, deportation or forcible transfer of population, arbitrary detention, inhuman acts and persecution on political, racial, national, ethnic, cultural or religious grounds, constitute crimes against humanity.⁶

III. The victims

"The groans and cries to be heard in these pages are never uttered by the most wretched victims. These, throughout the ages, have been mute. Wherever human rights are completely trampled underfoot, silence and immobility prevail, leaving no trace in history; for history records only the words and deeds of those who are capable, to however slight degree, of ruling their own lives, or at least trying to do so. There have been - there still are - multitudes of men, women and children who, as a result of poverty, terror or lies, have been made to forget their inherent dignity, or to give up the efforts to secure recognition of that dignity by others. They are silent. The lot of the victim who complains and is heard is already a better one."

René Maheu, in: Preface to *Birthright of Man*, an anthology of texts on human rights prepared under the direction of Jeanne Hersch (UNESCO, 1968)

The Rules of Procedure define a victim as “a person who claims, or realizes that a crime has been committed against [him] and that it falls under the jurisdiction of the Iraqi High Criminal Court”.⁷ This formulation implies that only people who have been the direct victims of a crime are considered as victims.

This definition is more restrictive than the definition enshrined in several international standards.⁸ The UN Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law (the “Guidelines on the Right to a Remedy and Reparation”) include in the definition of “victims” the “immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent their victimization.”⁹

⁶ See inter alia: the Charter and the judgement of the International Military Tribunal (Nürnberg); the GA Resol. 95 (I) of 11 December 1946; the Draft Code of Crimes against the Peace and Security of Mankind of the UN International Law Commission (UN Docs. A/46/10, A/47/10, A/49/10 and A/51/10); the Statute of the International Tribunal for the Former Yugoslavia (Art. 5); the Statute of the International Tribunal for Rwanda (Art. 3); the Rome Statute of the International Criminal Court (Art. 7); the Declaration on the Protection of All Persons from Enforced Disappearance (Preambular para. 4) and the draft International Convention for the Protection of all Persons against Disappearances (Art. 5).

⁷ Rule 1 (13).

⁸ E.g. Principle 1 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; Art. 19 of the UN Declaration on the Protection of all Persons from Enforced Disappearances; Art. 20 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions and Art. 9(2) and (3) of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.

⁹ See Principle 8, adopted by the UN Commission on Human Rights (Resolution 2005/35 of 19 April 2005).

Moreover, the definition of “victim” in the recently finalized International Convention for the Protection of all Persons from Enforced Disappearance (yet to be adopted by the General Assembly) does not only encompass the disappeared person him/herself but also “any individual who has suffered harm as a direct result of enforced disappearance.”¹⁰ The concept of a victim as a person who has suffered harm as the result of the commission of a crime and not only as a direct victim is also clearly stated in the Rules of Procedure and Evidence of the ICC.¹¹ The UN Special Rapporteur on the Right to Reparation, Mr. Theo van Boven, has written that “reparation may be claimed by the direct victims and, where appropriate, the immediate family, dependants or other persons having a special relationship to the direct victims.”¹²

The restrictive definition of “victim” used by the Iraqi Court prejudices the right of victims to access justice and to benefit, among other matters, from protection measures to which they are entitled.

IV. Victims of gross human rights violations and judicial proceedings

“Although the decision to prosecute lies primarily within the competence of the State, victims, their families and heirs should be able to institute proceedings, on either an individual or a collective basis, particularly as parties civiles or as persons conducting private prosecutions in States whose law of criminal procedure recognizes these procedures. States should guarantee broad legal standing in the judicial process to any wronged party and to any person or non-governmental organization having a legitimate interest therein.”

Principle 19 (2) of the UN Set of principles for the protection and promotion of human rights through action to combat impunity.

International law entitles victims to an effective remedy, which should be a judicial remedy (ordered by a court), in the case of gross violations of human rights.¹³ The right to a effective remedy for victims of violations of human rights and international humanitarian law has been described not only as a basic principle of general international law but also as one of the pillars of the rule of law and a democratic society.¹⁴ It also grants victims, individually or collectively, the right to “complain about the policies of individual officials and governmental

¹⁰ Art. 24.1 of the International Convention for the Protection of all Persons from Enforced Disappearance

¹¹ Rule 85 of the Rules of Procedure and Evidence of the ICC.

¹² Study on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, UN Doc. E/CN.4/Sub.2/1993/8, para. 137.

¹³ See the Decision of admissibility of 13 October 2000, Communication No 778/1997, Case Coronel *et al* (Colombia), UN Doc. CCPR/C/70/D/778/1997, para. 6.4.

¹⁴ Council of Europe, Resolution 78 (8) of the Committee of Ministers, cited by Meleander, G., “Article 8”, in Eide et al. (eds.), *The Universal Declaration of Human Rights: A Commentary*, Scandinavian University Press (1992), p.143; *Blake v. Guatemala* (Reparations), para.63; See also *Castillo Paez v. Peru*, (1997) 34 Inter-Am. Ct. H.R. (ser. C.), paras. 82, 83; *Suárez Rosero v. Ecuador*, (1998) 375 Inter-Am. Ct. H.R. (1985) 35 Inter-Am. Ct. H.R. (ser. C.) para 65; *Peru* (Reparations), judgment of 27 November 1998, para. 169; *Castillo Paez v. Peru* (Reparations), judgement of 27 November 1998, para. 106.

bodies with regard to violations of human rights and fundamental freedoms, by petition or other appropriate means.”¹⁵ Victims have the right to have such complaints examined in a “fair and public hearing by a competent, and impartial tribunal established by law”¹⁶ and “to obtain from such an authority a decision (...) providing redress, including any compensation due (...) as well as enforcement of the eventual decision and award, all without undue delay.”¹⁷ Consequently, international law entitles victims to participate in criminal proceedings, to assert their right to justice, reparation and truth.

In several countries throughout the world, national legislation allows victims to take an active role in initiating criminal proceedings against an individual or a group of persons to file a civil suit, or to have legal standing in the judicial process (such as *partie civile*). Through legal standing, victims can be represented in court and assert their rights to justice, truth and reparation in the judicial proceedings.

Under Article 22 of the Statute of the Iraqi Court, victims’ families and “Iraqi persons harmed” can file a civil suit before the Court “for the harm they suffered from the actions that constitute crimes according to the provisions of th[e] Statute.” Article 22 provides that the Iraqi Court is empowered to “adjudicate such claims in accordance with the Iraqi Criminal Code No. 23 of 1971 and other relevant laws.

The Iraqi Criminal Code stipulates that: “ A person who has suffered direct material or ethical damage from any offence has the right to bring a civil case against the accused and the person responsible under civil law for the actions of the accused.”¹⁸ It also provides that “a civil case against those responsible under civil law may be brought either collectively or individually in accordance with criminal procedures.”¹⁹ The Iraqi Criminal Code affords legal rights to the plaintiff, such as the “right to object to the intervention in the criminal proceedings of the person under civil law.”²⁰

However, Iraqi victims have reportedly not filed a civil suit before the Iraqi Court, either individually or collectively. It is worth noting that even if victims had filed a civil suit under Article 22 of the Statute, the Rules of Procedure, the Iraqi Criminal Code No. 23 of 1971 and the Statute itself would not have provided the necessary guarantees to ensure that the victims’ rights to a remedy and reparation be respected. The Iraqi Criminal Code was promulgated shortly after Saddam Hussein came to power and the weak and general provisions relating to the rights of victims to reparation are seriously inadequate to address the type of grave and systematic violations of international human rights and humanitarian law that were carried out under his regime. The legal provisions governing the trial of Saddam Hussein do not sufficiently elaborate on the full range of rights of the victims, made up of the right to truth, justice and reparation.

¹⁵ Art. 9(3)(a) of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms

¹⁶ Art. 14(1) of the International Covenant on Civil and Political Rights.

¹⁷ Art. 9(2) of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.

¹⁸ Para. 10.

¹⁹ Para. 13.

²⁰ Para. 15(a).

V. Protection of victims and witnesses

Article 21 of the Statute enshrines the principle of the protection of victims and witnesses. Several provisions reflect those of the statute creating the ICC and provide positive legal safeguards to protect victims and witnesses. Some important elements are however missing, as described below.

VICTIMS AND WITNESSES UNIT

The Rules of Procedure provide for the establishment of a Victims and Witnesses Unit. The Unit is meant to serve “all victims and witnesses who stand before the [Iraqi Court] as well as all other individuals who may be in danger because of the testimonies given before the Court.”²¹ The Unit has to make recommendations to the Iraqi Court regarding safety issues, provide “preventive measures and security procedures and set short term or long term plans” and “guarantee the appropriate support, consulting, medical assistance, physical and psychological therapy mainly regarding rape and sex abuse cases.”²²

Rule 15 also provides for the Unit to be staffed with “experts in forcefulness [sic] (or injuries) including injuries related to sexual assault crimes, and cooperate if necessary with non-governmental and international governmental organizations.”

The provisions of this Rule are similar to those contained in Article 43(6) of the Statute of the ICC and Rule 17 of its Rules of Procedure and Evidence. However, unlike the ICC, Rule 15 of the Iraqi Court does not specifically mention the need for the Iraqi Court and the parties to receive training in the field of trauma, sexual violence, security and confidentiality.

No information has been released by the Iraqi Court on the creation of the Victims and Witnesses Unit, and as at October 2005, it is not known whether it has been established and, if so, how it is implementing the relevant provisions of the Rules of Procedure.

CONFIDENTIALITY

The Rules of Procedure of the Iraqi Court detail at length the procedure to ensure confidentiality of the information regarding victims and witnesses who testify in court. For example, the Iraqi Court can decide to “restrain the announcement to the public or to the media in identifying the residence of the victim or the witness (...) by expung[ing] the name and the identifying information recorded in the public records of the [Iraqi Court], by not disclos[ing] to the public the identity records of the victim or witness and by not allow[ing] to photograph the testimony.”²³

The Statute of the Iraqi Court allows for secret witnesses. Article 21 states that the Rules of Procedure should provide for the protection of victims and witnesses, “including also the secrecy of their identity.” The question of secret witnesses is a contested issue, including among human rights defenders, as secret witnesses may undermine the right of the defence. The anonymity of witnesses can deprive the defendant of the basic guarantees of justice. Indeed, as the Inter American Commission on Human Rights points out: “The defendant is (...) prevented from carrying out any effective examination of the opposing witnesses, as he

²¹ Rule 15.

²² Rule 15.

²³ Rule 48, Second, A.

or she does not possess any information regarding the witnesses' background or motivations and does not know how the witness obtained information about the facts in question."²⁴ Certain exceptional measures have to be taken to protect the life and physical integrity of witnesses and victims, always providing that such measures do not compromise a defendant's fair trial rights, including the right to a defence.

International standards place a heavy responsibility on governments to ensure the effective safety of victims and witnesses *before, during and after* the trial. The Guidelines on the Right to a Remedy and Reparation provide that: "States should (...) ensure [the victims and their representatives] safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial (...) proceedings that affect the interests of the victims." Similarly, Principle 15 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions states that "Complainants, witnesses, those conducting the investigation and their families shall be protected from violence, threats of violence or any other form of intimidation." Many other principles of international law contain similar provisions to ensure the safety of victims and witnesses.²⁵

The Victims and Witnesses Unit of the Iraqi Court has to "provide adequate preventive measures and security procedures and set short term or long term plans and to commit to develop them in order to protect and assist them."²⁶ However, the Unit does not appear to be equipped to ensure the safety of the witnesses and victims *before, during and after* the trial. Such protection could only be carried out by government agencies as part of a more profound witness protection scheme. However, it would be highly problematic to implement a proper witness protection scheme within Iraq, given the level of violence, instability and weak institutions.

LOCATION OF TRIALS

The Statute allows the Iraqi Court to sit in other provinces of Iraq besides Baghdad, if the Council of Ministers approves a proposal by the President of the Court.²⁷ Participation of the victims at the trial is indeed an essential component of the access - including physical - to justice. The ability to participate in trials outside of the capital for a country as big as Iraq, made up of specific ethnic, religious and tribal groups in different geographical areas, would constitute an important step towards providing access to justice for victims and witnesses in Iraq. As at October 2005, there are no indications that the Iraqi Court plans to organize hearings outside the capital.

The Statute also allows the Iraqi Court or investigative judge to carry out their tasks outside of Iraq, subject to presidential authorization.²⁸ This provision is potentially very important in the case of Iraq – a country where violations of international human rights and humanitarian law

²⁴ Report on Terrorism and Human Rights, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 233.

²⁵ For instance Art. 13(5) of the Declaration on the Protection of all Persons from Enforced Disappearance states that "Steps shall be taken to ensure that any ill-treatment, intimidation or reprisal or any other form of interference on the occasion of the lodging of a complaint or during the investigation procedure is appropriately punished." Principle 3(b) of the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states that "Alleged victims of torture or ill-treatment, witnesses, those conducting the investigation and their families shall be protected from violence, threats of violence or any other form of intimidation that may arise pursuant to the investigation."

²⁶ Rule 15, First, C of the Rules of Procedure.

²⁷ Art. 2.

²⁸ Rule 2 of the Rules of Procedure.

have led to thousands of victims of repression to flee the country to find asylum in third countries. The repression of the Kurdish community in 1991, for example, led to hundreds of thousands of refugees crossing into Iran. If subsequent trials on other charges against Saddam Hussein and other defendants take place in the future as planned, such victims living abroad could testify as witnesses before the investigative judge.

VI. Right to reparation

Tens – or even hundreds – of thousands of Iraqis have suffered grave violations of international human rights law and serious violations of international humanitarian law during Saddam Hussein's regime. The violation by Iraq of its obligation to respect - and ensure respect - for human rights gives rise to an independent international obligation to provide reparation.²⁹ Many regional conventions, UN human rights treaties and standards enshrine the right to a remedy and reparation for victims who have suffered violations of their rights. International tribunals have also recognized the right to a remedy and reparation.³⁰ The state has the duty to act in accordance with international legal principles of accountability, justice and the rule of law, irrespective of the existence or not of provisions in the national legislation entitling victims to file a suit before a criminal court.

The right to “an effective remedy (...) for violations of fundamental rights granted by the Constitution or by law” is enshrined in the Universal Declaration of Human Rights³¹ and further developed in Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) which Iraq ratified in 1971. As a State Party to the ICCPR, Iraq has to ensure that “any person whose rights and freedoms as contained in the Covenant are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”³²

Iraq is also party to the Convention on the Elimination of All Forms of Racial Discrimination (CERD), which it ratified in 1970. Article 6 makes clear that “States Parties shall assure to everyone within their jurisdiction (...) the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.” The legal obligations contained in the Convention are particularly relevant in the case of Iraq given the massive human rights violations suffered by ethnic groups for decades, such as the Kurdish communities.

The right to reparation has several components, such as compensation (i.e. the physical, moral or mental damage should be assessed and the victims financially compensated) and restitution. To the extent possible, the victim should be restored to his/her original situation (e.g. of liberty, enjoyment of human rights, identity, family life, citizenship, return to one's place of residence, restoration of employment and return of property). This right is

²⁹ Chorzow Factory Case (*Ger. v. Pol.*), (1928) P.C.I.J., Sr. A, No.17, at 47 (September 13); Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. U.S.*), Merits 1986 ICJ Report, 14, 114 (June 27); Corfu Channel Case; (*UK v. Albania*), ICJ Reports 23 (1949).

³⁰ See, e.g. ruling of the Inter-American Court of Human Rights on the Velásquez Rodríguez Case. Serial C, No 4 (1989), para. 174. See also *Papamichalopoulos vs. Greece I* (Art. 50) E.C.H.R. Serial A, No 330-B (1995), page 36.

³¹ Art. 8.

³² Art. 2(3)(a).

particularly relevant considering the forced massive displacement of large communities in Iraq, either by direct force or repression, or indirectly (e.g. drying up of the marshes in Southern Iraq). In addition, victims should benefit from rehabilitation measures, such as medical and psychological care, as well as legal and social services. Victims of torture and ill-treatment, as well as relatives of those extra-judicially executed, disappeared or seriously harmed by the human rights violations in Iraq should be provided with such services, and should benefit from appropriate relief.

Judicial sanctions against persons liable for carrying out human rights violations are one of the most fundamental components of the right to reparation. It is the duty of states to inform the general public, and in particular the victims of gross violations of human rights, of “all available legal, medical, psychological, social, administrative and all other services to which victims have a right of access.”³³ Victims - individually or collectively - are entitled to equal and effective access to justice as provided for under international law. The collective access to justice is particularly important in Iraq, as many ethnic or religious communities, such as the Kurds and the Shi’as, have been specifically targeted for repression under the former regime of Saddam Hussein. The Iraqi authorities have the duty to inform the public about “all available remedies” for gross violations of international human rights law and serious violations of international humanitarian law and assist them in seeking access to justice.³⁴ The forthcoming trial on the Dujail case focuses just on one particular event, but other gross or systematic violations of human rights have occurred in many other circumstances during Saddam Hussein’s regime, whose victims are also entitled to justice. The perpetrators of these other human rights violations also have to be prosecuted and sentenced, through judicial proceedings that fully respect international fair trial standards.

Among others, the right of victims to obtain satisfaction involves the official recognition of the violations committed, such as for instance an “official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim”, a public apology or “commemorations and tributes to the victims.”³⁵ These aspects of the right to reparation are extremely important in the Iraqi context, as they would finally mean the official recognition of the victims’ sufferings after more than twenty years of silence and repression.

The victims are also entitled to “seek and obtain information on the causes leading to their victimization (...) and to learn the truth in regard of these violations.”³⁶ International standards increasingly emphasize the centrality of the issue of the right to truth for the victims of gross violations of international human rights law.³⁷ In the case of Iraq, implementation of this right is particularly crucial, as no official investigation has ever been carried out into the violations of human rights perpetrated by members of the regime and security forces, who enjoyed impunity. The total black out over massive or systematic human rights violations has lasted for decades, and it is essential for the Iraqi victims and their relatives, as well as for the Iraqi people as a whole, that an in-depth investigation finally shed light on the extent, circumstances, outcome and motivations for the tens of thousands of cases of enforced

³³ Guideline 24.

³⁴ Guideline 12(c) and 12(d).

³⁵ Guideline 22.

³⁶ Ibid.

³⁷ See inter alia: Human Rights Committee, Decision of 21 July 1983, María del Carmen Almeida de Quintero and Elena Quintero de Almeida case (Uruguay) Communication No. 107/1981, para. 14. First report of the United Nations Working Group on Enforced or Involuntary Disappearances, UN Doc. E/CN.4/1435, of 22 January 1981, para. 187; and Annual Report of the Inter-American Commission on Human Rights, 1987-1988, OAS document, OEA/Ser.L/V/II.74, Doc. 10, rev. 1, p. 359.

disappearances, extrajudicial killings, deportation, torture, systematic house destruction and other violations.

The right of victims to satisfaction also includes the search for the whereabouts of the disappeared and the bodies of those executed, and their identification and reburial by their families. The Iraqi authorities have the obligation to make every possible effort to establish the identity of the victims of enforced disappearances, locate their remains and enable their families to finally mourn them. They also have to restore to their families the bodies of those killed, extra-judicially executed or those who died in detention.

Disappeared persons represent an extremely important category of victims in Iraq. According to human rights NGOs³⁸, hundreds of thousands of people have disappeared in Iraq, including thousands of Kurds in 1988 in the context of the Anfal campaign, thousands of Shi'a Muslims during the 1970s and 1980s and thousands Kurds and Shi'a during the 1991 uprising in the north and south of the country.

The (draft) International Convention for the Protection of all Persons against Disappearances spells out the right of victims to "know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person."³⁹ It also defines the duty of the state to "search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains."⁴⁰ Each State Party is bound to adopt legislation that ensures that "victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation."⁴¹ The Convention lists restitution, rehabilitation, satisfaction (including restoration of dignity and reputation) and guarantees on non-repetition as possible other means of obtaining reparation.

The provisions of the (draft) International Convention for the Protection of all Persons against Disappearances reflect the authoritative legal developments in the field of reparation and the increasing importance attributed to victims' rights as a major component of justice and the rule of law, which no longer focuses only on the prosecution of perpetrators. In addition, this right is increasingly referred to in various national contexts, and has been recently stressed during the last session of the Commission on Human Rights regarding the case of Colombia, when it underscored the need "to establish (...) a legal framework that fully recognizes and guarantees the rights to truth, justice and reparations."⁴²

The Iraqi authorities should explicitly recognize the victims' right to truth, justice and reparation, and adopt a legal framework that provides for its implementation. The law should ensure that its provisions are in line with the Guidelines on the Right to a Remedy and Reparation. The right to truth is an undisputed moral imperative for all victims of gross violations of human rights and is a prerequisite for justice and the rule of law upon which only peace can be established.⁴³ The UN Commission on Human Rights, for instance, has stressed

³⁸ <http://web.amnesty.org/library/Index/ENGMDE010062001?open&of=EN>

³⁹ Art. 24(1) (E/CN.4/2005/WG.22/WP.1/REV.4).

⁴⁰ Article 24(2).

⁴¹ Article 24.

⁴² Statement by the Chairperson, Commission on Human Rights, 2005.

⁴³ The Commission of Experts concerning grave violations of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia stated in its final report: "thus, the conclusion is inescapable that peace in the future requires justice, and that justice starts with establishing the truth." UN Doc. S/1994/674, Annex, para. 320.

the “imperative for society as a whole to recognize the right of victims of gross violations of human rights and serious violations of international humanitarian law, and their families, (...) to know the truth regarding such violations, including the identity of the perpetrators and the causes, facts and circumstances in which such violations took place.”⁴⁴ Implementing this right to truth would constitute a groundbreaking precedent in Iraq, and would be crucial in setting the bases of a society rooted on justice and the rule of law.

The implementation of the victims’ right to justice, truth and reparation assumes that victims are aware of the procedures available to seek redress. Disseminating such information requires political will and operational and effective institutions, as well as dialogue with the parties concerned, the victims themselves, the victims’ families or third parties (including organizations and associations advocating respect for the rule of law and human rights). To ICJ’s knowledge, the Iraqi Government has made no serious and systematic attempt to inform the general public and the victims in particular - whether those related to the Dujail events or those concerned by future trials - about their right to reparation and has so far not set up any mechanism or body to implement it.

VII. A “Commission for the Martyrs” as a truth and reconciliation commission?

On 21 August 2005, Laith Kubba, spokesman for the Iraqi Prime Minister, announced at a briefing that the Ministerial Council had approved a draft law to “establish a commission to take care of the martyrs’ families” which would be forwarded to the National Assembly. “Martyrs” were defined as “those who were executed and victims of mass graves and victims of political assassinations.”⁴⁵

Referring to the “injustice that had befallen thousands of Iraqi people by the government”, he said that the families of many political or religious or national groups killed by the former government had “lost their rights and were prevented from assuming high position in the government.” Laith Kubba said the Iraqi Government was calling for “nationwide reconciliation in Iraq” and wanted to “restore [the martyrs’] rights.” The spokesman defined “rights” as financial facilities, debt cancelling, real estate loans, granting plots of land and monthly donations, to be set by the Ministerial Council.

Details of this draft law were not available as at October 2005 and the Government has not released further information about the proposals.

The setting up of a commission that would address truth and reconciliation issue would constitute a groundbreaking development in Iraq, with huge judicial, social and political implications. It would represent a fundamental landmark in the history of the country in establishing the truth relating to decades of mass executions, torture, enforced disappearances and massive repression of whole communities. A truth and reconciliation commission with an effective mandate based on international human rights principles could indeed represent a major step in implementing the victims’ rights to a remedy, reparation and truth.

⁴⁴ See preamble of Resol. 2005/66.

⁴⁵ “Iraqi Council seeks support for Saddam’s Victims”, US Fed News, 22 August 2005.

However, the scant information on the provisions of this law available so far seem to indicate that victims' "rights" are limited to financial compensation at most and are far from addressing other major aspects of reparation and remedy, such as the right to rehabilitation and satisfaction, and other aspects of the right to restitution.

If the Iraqi authorities are indeed planning to create a truth and reconciliation commission, they should take into account essential elements before proceeding further. An effective and meaningful truth and reconciliation cannot be created in haste. In particular, when considering the option to set up such a commission, the authorities should take into account, among others, the following elements:

- *Drawing lessons from previous truth and reconciliation commissions:* An Iraqi truth and reconciliation commission should draw on the experience of previous commissions set up in other countries and learn from their mistakes and difficulties. Even though truth and reconciliation commissions need to take into account national and regional particularities, they have much in common in relation to respect for the rule of law and for international standards on the rights of victims.
- *Compliance with principles to combat impunity:* A truth and reconciliation commission should fully comply with the UN Set of principles for the protection and promotion of human rights through action to combat impunity.
- *Openness and dialogue with all sectors of society:* The decision to set up a truth and reconciliation commission should only be taken after broad consultation with the public in general and the interested parties in particular (such as victims' organizations, NGOs, relevant civil society groups, organizations representing the interests of specific communities that were targeted during Saddam's regime). A national debate involving all interested parties should take place, and their voice heard, notably with respect to the mandate and scope of the commission. The draft law creating such a commission should be made public and its formulation debated widely.
- *Mandate:* The terms of reference of the commission should be clearly defined and should ensure the independence, impartiality and competence of its members, in particular their security of tenure during the life of the commission, except on grounds of incapacity or behaviour.
- *Guarantees for victims and witnesses:* The commission should provide guarantees for the physical integrity and protection of witnesses and victims.
- *Publicity of the reports and recommendations:* the final report of the commission should be public and should include recommendations regarding legislative and other actions to combat impunity.
- *Financial and human resources:* A truth and reconciliation commission in Iraq would have a particularly complex and long-term mandate, given the extent of the massive violations and the long time-span they covered. Its work would include unearthing mass graves, forensic examination and shedding light on the fate of the disappeared. Such a commission would need considerable financial and human necessary resources.

- *Political process, peace and security:* A truth and reconciliation commission presupposes a stable government and working institutions in an environment of peace and security.

The current situation prevailing in Iraq does not meet the minimum requirements necessary for establishing such a commission. Even if the law setting up such a commission was formulated in line with international human rights standards, it is highly doubtful that a commission could fulfil its mandate in an effective way. The current widespread and indiscriminate violence in Iraq, coupled with the continuing military occupation of the country by the US-led Coalition, severe governmental instability and weak institutions, would fundamentally undermine the effectiveness and credibility of such a commission.

Even if Iraq were to set up a truth and reconciliation commission in the future, it would not substitute the state's obligation to prosecute and punish those responsible for human rights violations and to grant compensation to the victims and their relatives.⁴⁶ In the case of Chile, the Inter-American Commission on Human Rights said that: "The Government's recognition of responsibility, its partial investigation of the facts and its subsequent payment of compensation are not enough, in themselves, to fulfil its obligations under the [American] Convention [of Human Rights]. According to the provisions of Article 1.1, the State has the obligation to investigate all violations that have been committed within its jurisdiction, for the purpose of identifying the persons responsible, imposing appropriate punishment on them, and ensuring adequate reparations for the victims."⁴⁷ The fact that a truth commission cannot be a substitute for prosecution has been emphasized by the Inter-American Commission in other cases, such as El Salvador.⁴⁸

VIII. Conclusions and recommendations

International law grants victims of gross violations of international human rights law and serious violations of humanitarian law the right to an effective remedy and reparation. Tens – or possibly hundreds – of thousands of Iraqis victim of massive and systematic violations of human rights such as torture, executions and enforced disappearances carried out during Saddam Hussein regime are entitled to an effective remedy and reparation. Bringing the perpetrators to justice is one of the most important components of the rights to a remedy and

46 Inter-American Commission on Human Rights, Report N° 28/92, Cases 10,147, 10,181, 10,240, 10,262, 10,309 and 10,311 (Argentina), 2 October 1992, para. 52.

47 Inter-American Commission on Human Rights, Report N° 36/96, Case 10,843 (Chile), 15 October 1996, para. 77. See also Inter-American Commission on Human Rights, Report N° 34/96, Cases 11,228, 11,229, 11,231 and 11,282 (Chile), 15 October 1996, para. 76, and Report N° 25/98, Cases 11,505, 11,532, 11,541, 11,546, 11,549, 11,569, 11,572, 11,573, 11,583, 11,585, 11,595, 11,652, 11,657, 11,675 and 11,705 (Chile), 7 April 1998, para. 50.

48 In the case of El Salvador, the Inter-American Commission on Human Rights pointed out that, despite the important role played by the Truth Commission in establishing the facts concerning the most serious violations and in promoting national reconciliation, the creation of this type of commission: "[cannot] be accepted as a substitute for the State's obligation, which cannot be delegated, to investigate violations committed within its jurisdiction, and to identify those responsible, punish them, and ensure adequate compensation for the victim (Article 1.1 of the American Convention), all within the overriding need to combat impunity."⁴⁸ Inter-American Commission on Human Rights, Report N° 136/99, Case 10,488 Ignacio Ellacuría S.J. and others (El Salvador), 22 December 1999, para. 230.

reparation, but is not the only component. The Statute of the Iraqi Court provides for claims by plaintiffs to be adjudicated by the court, but its formulation is vague and in any case victims have not filed a suit before the Iraqi Court in the Dujail case.

Victims of torture, relatives of those executed and disappeared, whole ethnic or tribal communities targeted by the repression by Saddam Hussein, have a right to know the truth about the decisions, reasons and circumstances of their victimization and the identity of the perpetrators. After more than three decades of massive and systematic human rights violations, shedding light on such crimes against humanity would represent a fundamental and indispensable undertaking. Under international law, the Iraqi authorities have the obligation to fully respect the victims' right to truth, justice and reparation.

However, until now, the Iraqi authorities seem to conceive of justice as meaning only retribution of those responsible, in particular Saddam Hussein, without consideration for the rights of the victims. The public suggestion that the Government might create a truth and reconciliation commission has little credibility, as the conditions in the country do not meet basic prerequisites for an effective and meaningful commission. In the absence of a stable political and security climate, and effective institutions, the creation of such a truth and reconciliation commission would be premature.

In addition, the possibility that Saddam Hussein and other co-defendants might be sentenced to death after the conclusion of the Dujail trial would fundamentally undermine the victims' right to truth, as a major source of information on the former regime's practices and policies would disappear, thus seriously curtailing the scope and credibility of future investigations. The rights of the victims of the Dujail killings are not more important than victims of other gross violations that took place under the regime of Saddam Hussein, who also deserve the same right to know the truth and the right to justice.

The International Commission of Jurists calls on the Iraqi authorities to:

- Fulfil all their international legal obligations regarding justice and acknowledge that prosecuting and punishing those found guilty for gross violations of international human rights law and serious violations of international humanitarian law constitute only one aspect of the rule of law and access to justice.
- Recognize and implement the fundamental rights of the victims to justice, remedy and truth in accordance with international standards, and take all appropriate steps to make the public in general, and victims and their relatives in particular, aware of these rights, including to petition the courts.
- In upholding the rights of the victims to a remedy and reparation, comply with the UN *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law*.
- Thoroughly implement the right of the victims to truth, by bringing to light and publicly documenting, *inter alia*, the reasons behind the human rights violations, the governmental or other policies that underlay them, the circumstances of their occurrence and their outcome. In-depth attention and commensurate resources should be devoted to the crucial issue of the fate of tens of thousands of disappeared, by making every effort to

identify the victims and their fate, and, if dead, to take all legal and practical measures to allow the relatives to finally mourn their dead.

- Only set up a truth and reconciliation commission when the basic preconditions are met, notably on the political, security and institutional level, and - if setting up such a commission - to follow the principles on the establishment and role of truth commissions contained in the updated UN *Set of principles for the protection and promotion of human rights through actions to combat impunity*.
- Take all necessary measures to preserve all evidence and sources of information that could contribute to the establishment of the truth about the violations of human rights.
- Ensure that all persons suspected of gross violations of international human rights law and serious violations of international humanitarian law in Iraq are tried before courts that fully respect international standards of fair trial. In particular, the courts should comply with all requirements of impartiality, independence and competence.⁴⁹
- Abolish the death penalty for all crimes, including crimes of genocide, and crimes against humanity and follow the example of the International Criminal Court and the ad hoc tribunals set up by the Security Council, which reflect the international consensus on the abolition of the death penalty and restrict punishments to prison sentence.
- Implement the recommendation of the UN Special Rapporteur on the independence of judges and lawyers, in particular by requesting the expert assistance of the UN to set up an independent tribunal that complies with international human rights standards, in order to try those responsible for gross human rights violations committed during the regime of Saddam Hussein.⁵⁰
- Immediately take all necessary steps, given the current circumstances, to ensure that sources of information on the crimes against humanity and crimes of genocide that have been committed under the regime of Saddam Hussein be preserved in order to contribute to the establishment of the truth for the benefit of all victims, their relatives and the Iraqi society as a whole.

⁴⁹ See the recommendation of the Report of the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers in the report: "Civil and political rights, including the questions of independence of the judiciary, administration of justice, impunity, UN Doc. (A/60/321) para. 51.

⁵⁰ Report of the Special Rapporteur of the Commission on Human Rights "Civil and political rights, including the questions of independence of the judiciary, administration of justice, impunity, UN Doc. (A/60/321) para. 43.