

Justice the Day After

Author: [Chibli Mallat](#)

Long-standing efforts to bring the Iraqi leadership to justice have failed, leaving the strategy for dealing with any deposed rulers unclear.

One of the many missing pieces in American strategy in Iraq is how to deal with the leaders of Iraq if and when they are caught. While "decapitation" is an integral part of the effort towards regime change, the policy is legally questionable in the absence of any indictment of those being targeted.

Morally, of course, it is unacceptable to bomb rank-and-file Iraqis while leaving those at the head of the hierarchy under some form of protection. But international law lags behind moral sensibility and the fate of Iraqi leaders who might be arrested is uncertain. Will they be sent to America? Tried in Iraq? Submitted to an international tribunal like Slobodan Milosevic and other Balkan leaders? Already the legitimacy of the whole war is under question and the arrest of any Iraqi officials will compound the conundrum.

As American tanks push into the heart of the Iraqi capital, reality has caught up with policy over what to do with Saddam Hussein and his aides. The reverse point is academic: while much can be heard in Baghdad about President George W. Bush as "war criminal", no serious international forum is available to judge any alleged violations by the coalition of the laws of war.

In a normal situation, any Iraqi leader should benefit from the same POW status as the soldiers who have already been arrested. But "the war for Iraq", as the conflict is called in Washington, is anything but usual: witness the request made to some of the surrendering soldiers to put on their civilian clothes and go home. A similarly approximative legal position will obtain should any of the top leaders, or local Ba'ath operatives, fall in the custody of British or American forces.

Why has nothing been done to anticipate this problem? It is not for failing to try in the 12 years since the clause on the responsibility for the war was dropped from UN ceasefire Resolution 687 which ended the Kuwait war on April 3, 1991. Everything would have been different if that clause, which put the responsibility for the invasion of Kuwait squarely on Saddam Hussein, had remained in the resolution. But there had been no model of an international tribunal since Nuremberg and British Foreign Office lawyers were worried about prosecuting high Iraqi officials whom they could not bring before a judge. This mistake still haunts international policy.

Germany suggested a tribunal for Iraq, but the call was drowned in Euro-Atlantic bombast about a war allegedly won even though those responsible for it remained in power. On April 5, 1991, Resolution 688 requested "that the Iraqi government cease the repression of its own population", which had risen up against the regime the previous month and was being brutally suppressed in the Kurdish north and Shia south. But more than a decade later, 688 has not been put in effect.

As the exile opposition in the West slowly regrouped, the largest opposition coalition, the Iraqi National Congress, began an effort to establish an international ad hoc tribunal to deal with the Iraqi leadership. A special committee compiled a list of 12 notorious characters, including the two sons of Saddam Hussein, his two sons-in-law and well-known figures like Ali Hassan al-Majid ("Chemical Ali") and Tariq Aziz, Iraq's peripatetic envoy. (American officials and Iraqi opposition leaders have since augmented the list, citing variously from a dozen to 2,000 high-ranking officials.) The INC study was published in May 1993, on the very day the Security Council unanimously established the International Criminal Tribunal for the former Yugoslavia.

Despite that obvious precedent, a similar tribunal could not be established for Iraqi leaders with a far heavier criminal record - in large part because of Middle Eastern diffidence towards a precedent which

could threaten other Arab leaders, but also because of a lack of follow-up by the US administration and the Iraqi opposition.

In the summer of 1996, the issue surfaced again in London with the formation of an organisation - Indict - that sought to establish a special tribunal like those for the former Yugoslavia and Rwanda. Although endorsed by a large coalition, and funded by various governments and parties including the US Congress, Indict's initial success was blunted by poor chairmanship and divide-and-rule policies in the State Department and Central Intelligence Agency. The Clinton administration refused to do anything serious about Iraq for the full eight years of its mandate, and Indict's initial momentum was lost.

But as Indict's efforts were running into the sand, the Pinochet precedent in London opened another avenue for international justice: national tribunals. The most promising national route was Belgium, which in 1993 had passed a law allowing Belgian courts to try those accused of "serious violations of international humanitarian law" even if they were not in Belgium. Using this legislation, four Rwandans were tried, convicted and sentenced to long-term imprisonment.

In 2001 a number of Iraqis, mostly Kurds, filed a case against Saddam Hussein, Ali Hassan al-Majid and others. The case was significantly strengthened in February 2003 when the Belgian Supreme Court, in a judgement on a case brought against Ariel Sharon over the Sabra and Shatila massacre in Beirut's Palestinian camps, ruled that Belgian courts are indeed competent to try massive violations of international humanitarian law such as those committed by Iraq's leadership over three decades.

Ariel Sharon has been indicted, despite the fact that he is formally immune until he leaves office, and Brig. Gen. Amos Yaron, commander of the troops that surrounded the Beirut camps, also faces prosecution.

Today Israel's prime minister, Ariel Sharon, and Iraq's president, Saddam Hussein, find themselves on the same side to prevent international justice from obtaining. The indictment of Iraq's top leaders could now offer a serious basis for addressing their criminal record - said by a UN Rapporteur to be the heaviest since the Second World War.

Chibli Mallat, EU Jean Monnet chair in European law at Saint Joseph's University in Lebanon, founded Indict in 1996 and brought the case against Ariel Sharon in Belgium in June 2001. (See www.mallat.com) This article is the first in a two-part series.

Location: [Balkans](#)
[Israel](#)
[Iraqi Kurdistan](#)
[Iraq](#)

Source URL: <https://iwpr.net/global-voices/justice-day-after>