

Trying a Tyrant:

Should the Iraqis Alone Sit in Judgment of Saddam?

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Brief Analysis

RUTH WEDGWOOD

The question of whether Saddam Husayn should be tried by an international tribunal or by an Iraqi court has been widely discussed lately. The International Criminal Court (ICC), to which the United States has long objected, does not have jurisdiction for such a trial; it can only consider crimes that occurred after July 1, 2002. Moreover, since neither Iraq nor the United States was party to the treaty that created the ICC, they would need to convince the UN Security Council to draft a resolution referring the matter to that court. In addition, the ICC treaty demands that trials be held locally if the country in question is capable of carrying out the necessary legal procedures.

Some have suggested that Saddam be tried by the ad hoc International Criminal Tribunal for the Former Yugoslavia (ICTY), based in the Hague. Although that body has a structure and a prosecutor, the latter can barely handle his current caseload; adding more responsibilities would probably not be a good idea. Also, as with the ICC, using ICTY to try Saddam would require a Security Council resolution.

In short, any international trial for Saddam would require a Security Council resolution, even if a special international court were set up for just this purpose. The five permanent members of the council would have to agree on the jurisdictional scope of any such court, which would be tricky. The French, Germans, and Russians would be unwilling to legitimize the occupation of Iraq and the transfer of power to the new U.S.-anointed authorities, and their opposition could hinder the pretrial process significantly. The death penalty is another problematic issue; most European countries hold that the death penalty is against international law, so they may insist that this penalty be withheld from any new international court. Differences could also emerge regarding the process of appointing a prosecutor.

Even if a Security Council resolution were passed, the UN is infamous for having many mechanisms that permit delay and complications. In particular, the Advisory Committee on Administrative and Budgetary Questions has many ways to impede a resolution if it does not agree with the final objective toward which that resolution aims. In short, bringing the Saddam issue to the UN would mean long delays.

Another lesson that the UN is reluctant to learn is that it does not carry much legitimacy in some parts of the world; the bombing of the UN headquarters in Baghdad served as solid proof of this fact. The history of UN sanctions in Iraq would not make it any easier for the organization to gain legitimacy in the eyes of Iraqis.

Two other factors that work against the international-tribunal option are cost and distance. For example, ICTY proceedings in the Hague are conducted in both French and English, with the French translations costing a great deal of money. Moreover, a trial in the Hague would seem very distant to the Iraqi people and to potential witnesses.

Saddam's trial could most readily be conducted by a local court. Trying Saddam would not require constructing an entire legal system in Iraq; all that would be needed is approximately five trial court judges, nine appellate court judges, and some number of investigating magistrates. The court could follow the model used in Cambodia and

Sierra Leone, namely, the so-called mixed tribunal, which combines both local and international elements. Indeed, international judges appointed by the governing authority of an Arab or Muslim judge would give credibility to the court and might make its decision more acceptable to Iraqis who would otherwise worry about political influence on the judges. The court could also employ international experts and observers at every stage in the process.

As for the level of proof that is needed to convict Saddam, using the "command responsibility doctrine" of criminal negligence would greatly ease any evidentiary problems. Under this doctrine, if the troops under a given military commander's control commit atrocities, then that commander can be held responsible as if he had committed the atrocities himself, even if it cannot be proven that he ordered the crimes in question.

Trouble may arise if Saddam is permitted to choose his own lawyer. In particular, he might misuse the trial as a stage from which to revive his political movement and foment a Ba'ath uprising. Alternatively, the trial could be a spectacular didactic event, as the Nuremberg trials were.

NEIL KRITZ

The international community spent enormous time and effort creating the ICC, without the participation of the United States. The court's fundamental principle is complementarity; hence, in the case of Saddam Husayn, the local option takes priority and internationalizing his trial is the least desirable option. Trying Saddam locally could be a difficult and lengthy process -- much more so than a trial in the Hague -- because it would require rebuilding the local justice system in a post-conflict environment.

Even so, a local court would make the Iraqi people, who had no control over their fate for decades, feel empowered. No new government in Baghdad can achieve legitimacy until it exhibits complete Iraqi ownership in a country free of occupation. Thus, the process of achieving justice and accountability for three decades of regime abuses should be based on that goal.

During summer 2003, Physicians for Human Rights surveyed approximately 2000 households in southern Iraq, generating several interesting results. For example, although an overwhelming majority of the respondents held that war crimes trials would be essential to preventing future problems in Iraq, only 12 percent were supportive of international trials. In other words, Iraqis have expressed a surprising level of trust in their judiciary system.

Whatever its form, an Iraqi war crimes court would need to work out many issues. It would need to find a way to review millions of relevant documents (over 300 million, according to some estimates). It would also need to establish a security system, a witness protection system, and a proper defense mechanism. The Iraqi judicial system before Saddam was greatly influenced by the Egyptian system, where the role of prosecutor has traditionally been extremely weak. For all of these reasons, any Iraqi war crimes court should prove its effectiveness before trying Saddam. Toward that end, it should try somewhere between 50 and 150 defendants before him.

The recent Iraqi Governing Council statute establishing a war crimes tribunal has created a new model that combines many of the lessons learned from post-conflict situations over the past several decades (e.g., regarding local ownership and judicial effectiveness). The statute requires the appointment of international observers and advisors to bolster the local process. This measure is wise because the court will need broad international support in order to reverse widespread distrust regarding Iraqi justice.

This Special Policy Forum Report was prepared by Joyce Karam.

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