Trying Saddam and other dictators: the limits of the law

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Introduction

Great expectations surrounded the decision to put Saddam Hussein on trial. Many hoped that it would purge the demons of the past, heal old wounds, and lay the foundations of a new, democratic Iraq.

Before considering the trial of Saddam and his colleagues, it is worth examining various aspects of its development in the light of earlier tribunals dealing with deposed leaders, especially the Nuremberg and Tokyo war crimes trials, and the two *ad hoc* tribunals dealing with former Yugoslavia and Rwanda. These aspects include the creation of the court, the court statute, the political context, and finally, the likelihood that the court will achieve its aims.

The creation of the court

The court to try Saddam was, like previous tribunals, established by the United States. The American spirit of litigation first acquired an international dimension in 1944, with the decision to put senior Nazis on trial for war crimes, 'crimes against peace', and crimes against humanity. The trials at Nuremberg and Tokyo followed. Now, after the Cold War interregnum, war crimes tribunals are back in vogue once again.

Such is the reputation of these courts that it is easy to forget that this is not the only way to deal with a toppled dictator. Other possible responses include execution without trial, hard exile, soft exile, truth and reconciliation processes, amnesty, or simply ignoring them. Some of these options were aired in the debate that preceded the Nuremberg tribunal. Secretary of State Cordell Hull favoured a drumhead court martial followed by a sunrise execution, while Treasury Secretary Henry Morgenthau proposed putting the SS members to work in punishment battalions. But the Secretary of War, Henry Stimson, whose Department had to deal with the defeated nation, suggested a tribunal to try the Nazi leaders, thus highlighting the bestiality of Hitler's regime while heralding the virtues of the Allies. These two motives are have clear parallels in the subsequent trials of Tojo, Milosevic and Saddam.

The idea of prosecuting the Iraqi regime dates back to the late 1980s, when organisations like Human Rights Watch began campaigning for judicial action. At that time, the prevailing idea was to bring a case before the International Court of Justice – in other words, state-on-state action. It was only later, when tribunals came back into vogue in the early 1990s, that the idea of prosecuting individuals emerged. This notion gained weight during the Clinton administration, when Ambassador for War

Crimes Issues David Scheffer began marshalling evidence against Saddam and other Iraqi officials. But it failed to ignite wider global interest: many UN members thought that moves to prosecute would undermine efforts to persuade the regime to comply with weapons inspections.

The new Bush administration, inaugurated in 2001, was also initially lukewarm about the idea. Although the Department of State continued to tinker around with different ideas through its 'Future of Iraq' project, which involved Iraqi exiles and long-serving international advocates like Cherif Bassiouni, the idea of prosecuting the Iraqis was placed on the back burner. As Bassiouni points out, the idea of a trial was only revived in Washington in spring 2003, *after* Baghdad had fallen, and *after* the Americans had began arresting senior officials of the Ba'ath regime.[1] By then, it had become painfully and publicly apparent that the crucial weapons of mass destruction (WMD) did not exist. The administration was casting for a retrospective justification for the intervention, and reached for human rights. Placing those arrested on trial enabled it to recast a war against WMD as a war for justice for the Iraqis.

Once the Americans had decided to proceed with the trial of Saddam and his colleagues, the question then arose: which court? The Iraqis had their own courts, of course, but these were not what Washington had in mind. Nor, for reasons discussed later, did it contemplate the International Criminal Court (ICC) or UN-controlled *ad hoc* tribunal. Instead, the Americans drew up a blueprint for a special court, to be located in Iraq, and to be presided over by Iraqis advised by international lawyers. This project would be initiated, financed, and given logistical support by the United States. The Regime Crimes Liaison Office in Baghdad is the lead institution, operating under the auspices of the US Department of Justice, with $128 million Congressional funding at its disposal.

So the Americans controlled both the establishment of the court and the timing of the trail. They decided that the Iraqis should prosecute Saddam and his colleagues, rather than take any other action; and they decided that the prosecution should happen sooner rather than later. These decisions made good sense from an American perspective. First, a trial would provide a retrospective human rights justification for America's intervention in Iraq. Second, it would prevent the Iraqis from taking matters relating to the regime's former leaders into their own hands (it is worth remembering that defendants are still in American custody). Third, a trial would generate good PR, and commentators the world over did indeed predict that it would prove cathartic and usher in a new era of peace and democracy. And finally, by passing the conduct of the trial to the Iraqis, the United States could pronounce their commitment to Iraqi self-government, while simultaneously distancing itself from the proceedings if things started to go wrong.

[1] Bassiouni, MC, *Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal* www.law.case.edu/saddamtrial

An Iraqi-run trial

Right from the start, the US emphasised the importance of the Iraqis taking responsibility for the trial. During an interview on ABC's *Primetime* on 16 December 2003, George Bush promised a court run by Iraqis that would stand up to international scrutiny. Then, in stark contravention of the presumption of innocence, he said: 'I think [Saddam] ought to receive the ultimate penalty for what he has done to his people. I mean, he is a torturer, a murderer, and they had rape rooms, and this is a disgusting tyrant who deserves justice, the ultimate justice. But that will be decided not by the president of the United States but by the citizens of Iraq.'[2]

Lawyers and human rights advocates have been asking why an international court was not convened instead. This, they argue, would be less susceptible to both American and Iraqi political influence. There are problems with this argument, however. Whatever one's view of US policy, America has in fact acted in accordance with international law, which assumes that domestic trials should ideally precede international ones. The International Criminal Court, for example, is a court of last resort, and will not consider a case unless a state is either unwilling or unable to bring a case itself. Indeed, as sovereign powers, states have not just a right but an obligation to mount a case against their citizens, even with regard to the most heinous crimes. (The Genocide Convention, for example, states that people so accused 'shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties'.) All this runs counter to the argument, advanced this week by Michael Mansfield QC on the *Today* programme, that very grave crimes should be tried at international tribunals.

Even if the Iraqi case collapses (a possibility that cannot be ruled out), it is by no means certain that Saddam and his colleagues could then be tried internationally. An *ad hoc* tribunal set up under the auspices of the UN would be unlikely, as there is no Security Council consensus behind creating one. France and Russia are seemingly opposed, and America would find it awkward to execute a *volte face* after having espoused the court in Iraq. And what of the International Criminal Court? It does not consider crimes committed before July 2002, the date of its establishment, thus ruling out consideration of the main crimes on Saddam's charge sheet, such as the Anfal campaign of 1988 or the decimation of the Marsh Arabs after 1991.

So an Iraqi court it is, and there are certain advantages to this situation. Domestic trials (assuming that they are not blatant travesties of justice) enjoy much greater credibility than international courts, for the very obvious reason that citizens expect to try their own. That is why international justice is invariably cast as politicised justice imposed by powerful and self-interested external forces, and why Serbs, Croats and Rwandans take such a dim view of the distant trials in The Hague and Arusha.

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[2] ABC *Primetime*, 16 December 2003. See transcript at news.bbc.co.uk/1/hi/world/americas/3328015.stm

The political context

The US wanted to pass responsibility to Iraq, but to whom, precisely? Battle for the control of the court has passed through several phases, a process symptomatic of the splintering of the regime along political and religious lines. For example, the first administrator, Salem Chalabi, was appointed by his uncle Ahmed Chalabi, deputy prime minister and chair of the National Deba'athification Council, with the nod from Paul Bremer, the head of the occupying authority. But there were problems with this appointment: both men had longstanding links with the Americans, and there were concerns that Ahmed Chalabi would use his nephew to manipulate the Tribunal's proceedings. A bitter struggle ensued to dislodge Salem Chalabi, and murder charges were brought against him in 2004. He resigned, and the charges were dropped. A second political battle erupted for control of the court in 2005.

Meanwhile, court officials have complained about the pressures being brought to bear on the work of the court. There have been false pronouncements about trial dates, unproven claims about evidence and confessions, and last-minute legal changes such as the elimination of the right of defendants to represent themselves. There have also been displays of George Bush-style rhetoric ('Saddam deserves a death sentence 20 times a day' said President Jalal Talabani last September.[3])

Are the Americans concerned about this? Yes and no. On the one hand, pressure on the court is symptomatic of the fissures within the Iraqi regime, a problem that obviously rebounds on the US. On the other hand, it shows that the Americans have succeeded in transferring 'ownership' of the court to the Iraqis.

The statute and rules

The statute governing the court calls on two bodies of law: international treaty law, which defines genocide and other crimes, and the Iraqi Criminal Code. On 10 December 2003, the Iraqi Governing Council (appointed by the US-run Coalition Provisional Authority) adopted the Statute of the Iraqi Special Tribunal. In October 2005, the National Assembly attempted to endow the court with greater domestic legitimacy by revoking that statute and replacing it with another, and renaming it the Iraqi High Criminal Court.

The statute sets out the principles governing the court. Article 1 asserts that the court shall be fully independent. It also establishes that the court has jurisdiction over Iraqi or non-Iraqi residents of Iraq accused of committing, in Iraq or elsewhere between 17 July 1968 and 1 May 2003, any of the following: genocide, crimes against humanity, war crimes, or certain crimes under Iraqi law (manipulation of the judiciary,

[3] Quoted in news.bbc.co.uk/2/hi/middle_east/4221202.stm

squandering of public assets, and aggression against other Arab nations).

Article 15 sets out the core of the prosecution case. It states that crimes committed by a subordinate do not relieve his superior of criminal responsibility. Further, the official position of any accused 'whether as president, chairman or a member of the Revolution Command Council, prime minister, member of the counsel of ministers, or a member of the Ba'ath Party Command' shall not relieve them of criminal responsibility nor mitigate punishment. Further, 'No person is entitled to any immunity'; in other words, no one is above the law – the buck stops at the accused.

Article 19 sets out the rights of the accused, and states that the accused shall be presumed innocent until proven guilty. (This a legal fact but a political fiction. To paraphrase Hannah Arendt, who was talking about Adolf Eichmann and Israel: if Saddam had not already been found guilty beyond all reasonable doubt, the Americans would not have wanted or dared to capture him.) The defendants are also entitled to adequate time and facilities for the preparation of their defence, and to free and private communication with counsel of their own choosing. Yet defence lawyers have complained that their clients have not been accorded these rights: for example, American guards are always present during meeting with the defendants. (Supporters of the court contend, against the spirit of the statute, that their presence is necessary to prevent defendants from taking Goering's option: committing suicide.[4])

Further, the defendant shall not be forced to confess. If the defendant pleads guilty, the accompanying Rule 37 says the court shall satisfy itself that the plea is made freely and voluntarily. (This is an indirect reference to torture, which, as human rights organisations have pointed out, is not explicitly prohibited). The defendant also has the right to remain silent, and the court shall draw no inference from the exercise of that right. Some observers argue that the Statute does not stipulate that the test for proving guilt should be 'beyond reasonable doubt'; others contend that the equivalent in Iraqi civil law ('to a moral certainty') amounts to the same thing.[5]

Finally, the statute sets out certain principles with regard to the judges. Under Article 33, no person who was previously a member of the disbanded Ba'ath Party shall be appointed as a judge, prosecutor, or employee of the Court. (Judges have already been ejected under the deBa'athification rule: the latest casualty was Judge Said Hameesh, who was nominated to replace Judge Rizgar Amin.) Further, under Rule 7, each judge shall act independently and shall not submit to directions issued by the presidency, the cabinet or any other governmental department with regard to their judicial role. (When Rizgar Amin resigned on the grounds that he had been criticised for being too lenient, there was widespread speculation that he was submitting to official, as well as public, pressure.) Further, also under Rule 7, judges must perform

[4] Scharf, M, 'Issue # 18: What are the major misconceptions about the IST?' *Grotian Moment: The Saddam Hussein Trial Blog*, 25 October 2005 www.law.case.edu/saddamtrial/entry.asp?entry_id=27
[5] *Ibid.*

their duties with impartiality. A judge may not sit in any case in which he has a personal interest, concern or association which might affect his impartiality. This issue is of relevance to the latest presiding judge at the tribunal, Raouf Abdul Rahman, who was born in the Iraqi Kurdish town of Halabja, site of the infamous gas attack in 1988. It is likely, if they have not already done so, that the defence will oppose his appointment on those grounds.

It is also worth noting one feature of the statute that has been widely discussed, but is referred to only passing in Rule 37: the death penalty. This issue is highly controversial, and indicates the lack of consensus in the international community. It also explains why the US has had difficulty attracting the public support of other countries for the court. Many nations, including the signatories of the European Convention on Human Rights, have refused to participate on the grounds that they oppose capital punishment. (Britain apparently has a more elastic position, only participating in the parts of the process that would not result in the death penalty.) The United Nations secretariat also objects to participation in the court on those grounds, and Kofi Annan declared that serving members of the UN-created *ad hoc* tribunals should not take part in the training of Iraqi judges. One does not have to be a supporter of the death penalty to wonder whether there are other motives at work. Could it be that the death penalty offers a convenient – and seemingly principled – pretext for these countries and organisations to distance themselves from a dubious court?

The defence case

The first case against Saddam and his colleagues relates to the executions of nearly 150 men and boys from the town of Dujail and the imprisonment and torture of many more, following an assassination attempt against Saddam in 1982. The case began with an exchange of views between presiding judge Rizgar Amin and the former President. The judge asked Saddam to identify himself. 'You are an Iraqi, You know who I am,' replied Saddam.[6] The judge, unperturbed, instructed the recorder to note him down as 'Saddam Hussein, former President.' Saddam then proceeded to attack the legitimacy of the court itself, saying that it was a creature of the occupying power. Similar exchanges occurred at earlier trials, such as that of Slobodan Milosevic at The Hague. One can understand why, given that such courts are invariably newly minted, and often created at the instigation of foreign nations and global institutions.

Other than attacking the legitimacy of the court, what other case might Saddam's lawyers construct in his defence? The Nuremberg tribunal offers some useful clues. There, the judges explicitly banned a *tu quoque* or 'you too' defence (you are guilty of the same as us). But the German defence lawyers persisted nonetheless. They argued that Germany was not the only nation to have committed 'crimes against peace' during the Second World War. Had not the Soviets invaded Finland and

[6] 'You are an Iraqi, You know who I am,' *Guardian*, 20 October 2005

Poland? Had not the American occupied Iceland and Greenland? And, most pointedly, had not Britain planned to invade Norway in 1940, at the same time that Germany had actually done so? (The British had indeed been engaged in what one official called 'funny business' over Norway, but refused to present documents to the court on the direct instruction of Prime Minister Clement Attlee, who declared: 'We are not on trial.'[7]) All such documents were struck out.

But the German defence lawyers had more success with the 'reverse *tu quoque*' argument: if you did it, it must be legal; so if we did it, it must be legal too. The best example was the case of Admiral Karl Doenitz, who was charged with violating the laws of marine warfare by ordering U-boats to sink merchant ships and abandon survivors. Yet a deposition from Admiral Chester Nimitz, commander-in-chief of the US Pacific Fleet, made clear that US Navy submarines had done exactly the same thing. Doentiz's defence counsel Otto Kranzbuehler told the Tribunal: 'I in no way wish to prove or even to maintain that the American Admiralty in its U-boat warfare against Japan broke international law. On the contrary, I am of the opinion that it acted strictly in accordance with international law.' He continued: 'I want to establish that the American Admiralty in practice interpreted the London Agreement in exactly the same way as the German Admiralty, and thus prove that the German conduct of sea warfare was perfectly legal.'[8] As a consequence, Doenitz's sentence was not considered on grounds of breaking the laws of submarine warfare.[9]

Alfred Jodl's lawyer Franz Exner deployed the same 'reverse *tu quoque'* argument against the British. He pressed for the British commando handbook *Close Combat Regulations* to be entered into evidence, because if they 'should happen to include illustrations… of the shackling of prisoners and orders for doing so, one would be obliged to say that the British Government does not consider this kind of treatment illegal and that if it happens on our side we cannot be censured for it.'[10] This issue was so sensitive that the British military strategist Basil Liddel Hart wrote to the Lord Chancellor to warn him against prosecuting the Nazis for anti-commando measures: he had, he warned, met people who had seen the handiwork of British commandos on German soldiers.[11]

So how might this strategy work in the case of Dujail? If the prosecution were to establish that Saddam had personally authorised the executions of 148 people (and there are indications that such a document exists), they are likely to argue that the President was operating entirely within the law. How so? The defence team has already indicated that it might argue that Saddam was performing a straightforward executive function, in just the same way that the former Governor of Texas George

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[7] Sellars, K, *The Rise and Rise of Human Rights*, 34

[8] www.yale.edu/lawweb/avalon/imt/proc/03-05-46.htm. See also, Scharf, M, 'Issue #20: Can the defendants raise the "tu quoque" defense?' *Grotian Moment: The Saddam Hussein Trial Blog,* 22 November 2005, www.law.case.edu/saddamtrial/entry.asp?entry_id=34

[9] www.yale.edu/lawweb/avalon/imt/proc/juddoeni.htm

[10] www.nizkor.org/hweb/imt/tgmwc/tgmwc-08/tgmwc-08-75-06.shtml

[11] Sellars, K, *The Rise and Rise of Human Rights*, 34

Bush performed an executive function when he authorised the execution of 152 prisoners on death row.[12]

The limits of the law

Can the trial of Saddam and his colleagues achieve its aims? Its supporters have variously expressed the hope that it will educate people about the crimes committed by former leaders, leave a record for the future, deter others from committing similar abuses, and promote peace and reconciliation. But if there is a single conclusion to be drawn from the conduct of modern tribunals dealing with deposed dictators, it is that there is a limit to what the law can achieve. A trial might establish innocence or guilt, but it is unlikely to meet these broader political objectives.

Let's examine the record on each of the aims listed above. Do trials educate people? Generally speaking, they tend to entrench opinions rather than change minds. The attitude of target populations to international tribunals has always been initially negative (although opinion may soften much later on). This reaction occurs because international tribunals are seen as an affront to sovereignty or as a continuation of a conflict by judicial means. Domestic or hybrid trials have a slightly better record in gaining public acceptance, but this depends on *when* the trial is conducted. If a society has moved on after a conflict (for example, France, finally, with regard to the trial of Maurice Papon), a trial may be seen as legitimate and necessary. But if a society is divided, as it is in Iraq, it is likely to become a lightening rod for sectarian tension, as the rift in public opinion over the trial of Saddam confirms.

Do trials leave a record for the future? Yes, albeit a partial one. This is because legal truth is very different from historical truth. The role of a trial is to establish a person's innocence or guilt – was he there? did she do it? – rather than to explain events or provide context. That is why, for example, the Nuremberg tribunal offers a rather distorted historical record, focussing on Nazi 'crimes against peace' rather than the Holocaust as the 'supreme crime', as chief prosecutor Robert Jackson dubbed it. Thus the main thrust of the prosecution case was to establish that Nazis were guilty of the crime of aggression; their operation of extermination camps was given nothing like the same kind of prominence.

Do trials deter others from committing similar abuses? Experience does not bear this out. The Rwandans were clearly not deterred by the Arusha trial – indeed, when the Tutsi-dominated Rwandan Patriotic Front took control, it turned the tables on the Hutus, massacring many thousands more. Nor did the existence of the tribunal in the Hague do much to deter Slobodan Milosevic from sending paramilitaries into Kosovo, despite direct warnings from diplomats that he would be prosecuted if they committed war crimes.[13]

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[12] Campbell, D, 'British QC for Saddam,' *Guardian*, 14 October 2005

[13] Snyder, J and Vinjamuri, L, 'Trials and errors: principle and pragmatism in strategies of international justice,' *International Security*, 28:3 (Winter 2003/04), 5-44

Connected to this, do trials promote peace and reconciliation? Again, the record suggests not. In some places, such as the former Yugoslavia, atrocities continued: it should be noted that the Srebrenica massacre took place two years after the establishment of the tribunal in The Hague. In other places, the war was displaced to another arena: for example, the conflict between the Hutus and the Tutsis is now being fought in the Democratic Republic of Congo. And in some cases indictments, such as the ICC's attempts to prosecute leaders of the Lord's Resistance Army in Uganda, may actually prolong conflict.[14]

Where societies have stabilised this is often in spite of the tribunals rather than because of them. In both Germany and Japan, the incarceration of convicted war criminals by the main tribunals and the subsidiary courts became a bone of contention between new political leaders and their erstwhile international allies. In 1953, for example, Chancellor Konrad Adenauer underscored this issue for America, Britain and France, and the West German electorate, when he visited British-run Werl prison and demanded the release of war criminals – weeks later, he was re-elected by a landslide. The Allies took the point, and almost all defendants who had escaped the noose in the trials of the mid-1940s had been released from prison by the late 1950s.

So the law has its limits. Until a few months ago, the Baghdad court was praised as a means to bring peace and reconciliation to a newborn Iraq. Now it is a focus of sectarian tension, with Shia politicians demanding swift, harsh justice and Sunni politicians threatening dire consequences if it is so dispensed. Will the judges buckle under the pressure? Maybe. Will the trial collapse? Possibly. Will Saddam get justice? Only time will tell.

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[14] See Lacey, M, 'Atrocity victims in Uganda choose to forgive,' *New York Times*, 18 April 2005, and Cobban, H, 'When war-crimes prosecutions are counterproductive,' *Christian Science Monitor*, 12 May 2005