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## THE NEWREPUBLIC ONLINE

TNR'S GUIDE TO THE SADDAM TRIAL, PART TWO.

### Judgment Calls

by Kal Raustiala

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[ Over the course of Saddam Hussein's trial, Kal Raustiala, a UCLA professor and expert on international law, will be writing a guide to the legal questions raised by the proceedings. Last week, he presented [the arguments for trying war criminals like Saddam](#). Today, he looks at the drawbacks of war crimes trials; weighs whether Saddam should be tried by Iraqi judges or international ones; and asks whether the prosecution chose the right charges to bring against Saddam. ]

#### Should war criminals be tried at all?

**T**he trial of Saddam Hussein descended into chaos last week. The arresting testimony of eyewitnesses was overshadowed by courtroom theatrics and a decided sense that Saddam, despite an ignoble capture in a spider-hole, had not fully lost his authority in Iraq. Defendants shouted at spectators, Saddam openly berated the judge, and defense lawyers denounced, then walked out of, the trial. At one point Barzan Ibrahim Al Tikriti, Saddam's half-brother and a defendant, pointedly asked, "Why don't you just execute us?"

In my last entry I noted the various arguments for trying war criminals. Yet not all observers believe that trials are always the superior choice. Some plainly favor summary execution. Some worry about the appearance, or reality, of victors' justice. Some question the cost: \$75 million in start-up funds from the United States for the Iraqi tribunal, and much more for the tribunals for the former Yugoslavia and Rwanda--the 2002-2003 budget alone for the Yugoslavia tribunal was nearly \$300 million. Finally, and most significantly, some argue that war crimes trials are often counterproductive. The most common argument in this vein turns on an age-old question: Must peace precede justice or justice precede peace?

Critics of war crimes trials frequently argue that amnesties--either explicit or implicit--can pave the way to peace; and only after peace is secured can the rule of law be secured. While distasteful, amnesties, according to this line of argument, may be a necessary evil. History shows that amnesties have often been the basis of durable peace settlements. Amnesties were used in Mozambique, El Salvador, Macedonia, and Cambodia, among other places. South Africa famously created a Truth and Reconciliation Commission with the power to grant individualized

amnesties; while unpopular with some, it also helped to ease the transition to a democratic, majority-ruled nation. Proponents of amnesties argue they are especially necessary when spoilers--the name given by some political scientists to groups that have the means to upend grand bargains--are powerful. Buying off these actors is sometimes required if the cycle of violence is to end.

The implications of this argument for Iraq are pretty apparent. There is plainly an active insurgency in Iraq. Some believe the insurgents are closely tied to former Baath Party leaders and to other Sunni groups that fear the consequences of a Shia-dominated Iraq. The connection to the relatively narrow trial of Saddam and a few others is less clear, however. Would the insurgency die down if Saddam was comfortably exiled to a villa in another country, like so many dictators before him? It's impossible to know for sure; but it seems unlikely.

### **Should Saddam be tried by Iraqi judges or international ones?**

**P**ast war crimes tribunals have run the gamut from international tribunals (such as the tribunals for the former Yugoslavia and Rwanda) to mixed tribunals (where international judges and prosecutors team up with, and assist, locals) to purely national tribunals. The Iraqi tribunal receives some assistance from the United States and other countries, but all the judges and the prosecutor are Iraqis.

Would an international tribunal, or even the International Criminal Court (ICC), have made more sense? An ad hoc international tribunal based on the Yugoslavia model would have required U.N. Security Council authorization, which was unlikely to be forthcoming. As for the ICC, its jurisdiction extends only to crimes committed after July 2002. Plus, Iraq is not a signatory to the ICC. Moreover, even if the ICC *had* been an option, it probably wouldn't have become involved: The court's principle of "complementarity" holds that the ICC should always defer to a good faith national trial.

The decision to use a national tribunal was controversial with human rights groups, which objected that Iraq lacked qualified jurists, would not protect defendants' rights adequately, and would use the death penalty. The failure to internationalize the tribunal also leaves the many non-Iraqi victims of the former regime without serious recourse to justice.

But an Iraqi trial seems more likely than an international tribunal to achieve some key goals of war crimes tribunals: truth-telling, reconciliation, and, most important, establishing the rule of law in Iraq. And prior war crimes trials far from the scene have faced serious problems, both in gathering evidence and in remaining relevant to the societies that have the most at stake. The Rwanda tribunal, for instance, sits in Tanzania; the Yugoslavia tribunal sits in The Hague. This approach is easier on the judges and prosecutors but attenuates the message such tribunals are meant to send to the citizens of the countries whose former leaders are on trial.

A mixed tribunal, based in Iraq but using more foreign expertise, might have helped smooth the trial process. Certainly the Iraqi tribunal has had growing pains. Yet so has the wholly internationalized Yugoslavia tribunal, where the Milosevic trial is still ongoing after four long years. And the international nature of the trial hasn't stopped the former Serbian leader from at times skillfully using the tribunal as a bully pulpit--just as Saddam is starting to do in Iraq.

## Were the right charges brought against Saddam?

**R**egardless of what sort of tribunal is used, prosecutors need to decide what charges to bring. This is a vexing issue. At present Saddam and the other defendants are facing a relatively narrow set of charges, given that well-supported allegations against them include torturing prisoners, draining the marshes in the south, using chemical weapons against the Kurds, and other atrocities. The strategy has been to eschew a comprehensive, Nuremberg-style trial in favor of proceedings focused on a comparatively small but certainly horrific act: the murder of some 148 Iraqis in a small Shia town in retaliation for an assassination attempt on Saddam.

Critics argue that using this one crime as the crux of the case may shortchange Saddam's numerous victims--especially if he is convicted and executed rapidly. A rapid trial may also undermine the history-teaching rationale of tribunals, by blocking the gathering and presenting of evidence on Saddam's many terrible acts. In a *New York Times* op-ed earlier this fall Gary Bass, author of a book on war crimes tribunals, contended that the alternative to a full and comprehensive war crimes tribunal "is on display in Turkey, where the collapse of a war crimes tribunal after World War I paved the way for today's widespread Turkish nationalist denial of the Armenian genocide" of 1915.

This is plainly a serious risk. The fact remains, however, that a swift trial has virtues of its own. Long trials, like the trial of Milosevic, risk devolving into procedural chess games. And a drawn out trial could dull the edges of whatever lessons it is supposed to impart to the Iraqi people. While the effect of Saddam's trial on the insurgency is unclear, a long trial might well become a rallying point for insurgents, and a medium through which Saddam can exert his remaining authority. Already Saddam seems to have used the trial to signal his vitality. Numerous accounts of the trial stress his lack of remorse, his indignation, and the seeming deference he still commands.

Striking the middle ground by trying Saddam for a few other well-chosen crimes, such as the Anfal campaign, has its attractions. The Kurds certainly suffered long at his hands. The problem with such a strategy is that if two or three crimes are chosen, the victims whose crimes are *not* chosen may feel particularly aggrieved. By prosecuting just one incident, which can symbolically stand in for the many horrors Saddam's regime wrought, the tribunal may have, on balance, opted for the best course.

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