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A VIEWER'S GUIDE TO THE SADDAM TRIAL, PART ONE.

Worth A Try

by **Kal Raustiala**

Only at **TNR Online**

Post date: 12.05.05

[Over the course of Saddam Hussein's trial, Kal Raustiala, a UCLA professor and expert on international law, will be blogging regularly. Today's entry: the rationales for trying Saddam.]

The trial of Saddam Hussein resumes today. The bloodshed that has accompanied the trial--lawyers and judges have been assassinated--highlights both the continuing instability in Iraq and the powerful symbolism of Saddam in the dock. In legal terms Saddam is on trial for the execution of some 150 Iraqi civilians in a predominantly Shia town north of Baghdad. Politically, of course, the stakes are much higher.

In the minds of most observers Saddam is clearly guilty of this and many worse crimes. Few believe he will be acquitted, and the death penalty seems likely. The alternative to this tribunal--summary execution--certainly would attract substantial popular support here and in Iraq. Why, then, have a trial at all?

I'll return to that question in a moment, but first some history. The modern concept of war-crimes tribunals begins with the Nuremburg tribunal in the wake of World War II. After a hiatus of some 40 years, war-crimes tribunals were created in the 1990s for the former Yugoslavia (where Slobodan Milosevic remains famously on trial) and for Rwanda, as well as for lesser-known conflicts in Sierra Leone, Cambodia, and East Timor. The culmination of this trend toward international criminal adjudication was the creation in 2002 of the International Criminal Court. This court, which the Bush administration actively opposes, is the first permanent, rather than ad hoc, international criminal body in history.

Nuremburg, and its less famous sister tribunal in Japan, the Tokyo Tribunal, were startling events in their day and are revered by many as major steps toward international justice. That said, the decision to try the Nazis at Nuremburg was not uncontroversial at the time. Stalin, for instance, proposed summarily executing tens of thousands of Nazis, but eventually came around to the idea of a tribunal.

Even within the United States many saw Nuremburg as a travesty of justice that would besmirch the legal process. Supreme Court Justice Harlan Stone wrote that "it would not disturb me greatly if the power of the Allies was openly and frankly used to punish the German leaders for being a bad lot, but it disturbs me some to have it dressed up in the habiliments of the common law and the Constitutional safeguards to those charged with crime." The charge of "victor's justice" was swiftly raised, and raised again in ensuing years. And it is true that the charges brought against the Nazis were carefully crafted to exclude acts that, while also horrific, had been undertaken by the Allies.

In defending the idea of a trial for the defeated Nazi leaders, Robert Jackson, the chief American prosecutor and a Supreme Court justice himself, declared on the tribunal's opening day that

The former high station of these defendants, the notoriety of their acts, and the adaptability of their conduct to provoke retaliation make it hard to distinguish between the demand for a just and measured retribution, and the unthinking cry for vengeance which arises from the anguish of war. It is our task, so far as humanly possible, to draw the line between the two.

The interesting question then, and now, is why we ought to draw that line. Precisely what purpose does a just and measured retribution--not to mention a formal and legal process of achieving retribution--serve in the context of horrific war crimes by heads of state?

Advocates of war-crimes tribunals generally point to several considerations. One is to express values: the values of law over power, of justice over vengeance.

While we *could* have simply shot or imprisoned Goering and the other Nazis, we instead allowed them to defend themselves in a court of law. The Allied decision to "stay the hand of vengeance" was declared to be, and believed to be, a powerful statement of identity and moral worthiness.

Another purpose is to publicly document history. Nuremburg produced a mountain of paper detailing the actions of the Nazi regime. Yet not only was a documentary trove produced. Much more important, the history of the Third Reich was presented with high drama, effectively forcing the world and the German people to acknowledge the terrible events that had occurred. Of course, this strategy of historical lesson-giving does not always work. It is not clear that the long-term impact of the Milosevic trial, still ongoing after four years and not at all popular among Serbs, will be to "teach" the Serbs about the atrocities committed by their former leaders.

A third purpose, familiar from criminal law at home, is deterrence. The existence of war-crimes prosecutions, it is sometimes argued, will deter horrific acts. The evidence that war-crimes trials deter is fairly weak. And given that war criminals are by definition engaged in war, and therefore face the prospect of death in any event, it is not surprising that a vague threat of trial isn't all that chilling to them. In any event, the deterrence rationale works best when the tribunal exists beforehand. That is one reason for the creation of the International Criminal Court: Proponents argue that only a standing tribunal can really deter.

A fourth is to emphasize individual guilt. Focusing on the acts of individuals defuses cycles of retribution among groups. Many perpetrators of war crimes believe--or at least claim--that their ethnic or religious groups have suffered grave insults at the hands of others. The spiraling cycle of group-against-group violence is familiar the world over. By stressing individual guilt and responsibility, it is said, war-crimes tribunals dampen these cycles of retribution and allow peace to flourish.

A fifth rationale is to purge threatening leaders. If tyrants are allowed to live freely, they may stir up trouble again. This rationale can be contested in two ways: First, many believe that allowing war criminals to flee or live in seclusion is, all things considered, more rather than less likely to bring peace. Second, killing leaders can have the same purgative effect as trying them.

Most of these rationales apply in some form to the Iraqi tribunal. The Saddam trial certainly is intended to send a statement about the character of the new Iraqi regime. By placing Saddam in a courtroom and asking him, as the presiding judge did on the opening day, "to state his name and profession," the Iraqi tribunal sent the message that all Iraqis are equal before the law. Likewise the tribunal aims to document history. (An important question, which I will put aside from the moment, is *whose* and *how much* history.)

The third rationale, deterrence, applies less well to this trial. Perhaps the tribunal will deter Iraqi insurgents from committing terrible crimes--though it does not appear to be deterring them now. The fourth rationale, dampening retributive cycles of violence, certainly seems applicable in theory to Iraq, a place with many aggrieved groups and much violence. Whether the trial will actually achieve this result--or instead will aggravate ethnic and religious tensions--is another matter. The fifth rationale, purging dangerous leaders, is also applicable to Iraq.

In the next entry I will consider some arguments *against* war-crimes tribunals. Some argue that tribunals can, in many situations, cause more harm than good. Iraq may be such a situation. The question of whether to try Saddam is also related to what kind of tribunal is used. Should the tribunal be purely Iraqi, or should it be what is sometimes called a "mixed tribunal": one involving international as well as domestic judges? Either way, are the charges against Saddam the correct ones to bring? These questions are much less easy than may appear.

KAL RAUSTIALA is a professor of law at UCLA.

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