

At Saddam's Trial, the Law Is Just Part of the Picture

By Gary J. Bass

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They have a defendant: Saddam Hussein, who will have the right to remain silent but most assuredly won't. They have a courtroom: a grand chamber originally used by Hussein to showcase gifts from foreign dignitaries. And now Iraqi lawyers, with American officials lurking as discreetly as possible in the wings, have to conduct one of the most earthshaking trials in modern history.

Wish them luck. The actual business of putting a toppled regime on trial is a mind-bending mix of legal principle and political necessity. It is a special kind of judicial theater, with both prosecution and defense playing out political objectives that go far beyond the determination of guilt or innocence. "Justice insists on the importance of Adolf Eichmann," wrote political philosopher Hannah Arendt, in expressing her admiration for the professionalism of the Israeli judges presiding over Eichmann's 1961 trial. "On trial are his deeds, not the sufferings of the Jews, not the German people or mankind, not even anti-Semitism and racism."

Justice may insist on judging only Hussein's deeds, but every courtroom action must be taken with an eye toward Iraqi politics. For Hussein, the trial is a chance to speak to the whole planet -- and to whip up hatred of his American enemies in Iraq and the wider Arab world. For President Bush's administration, it is a chance to change the topic from undiscovered weapons of mass destruction to tangible human rights violations (although Bush's commitment to fight for human rights skips past humans of the Liberian or Uzbek variety). And for the fledgling Iraqi government, installed by virtue of American arms, it is a chance to break with the past and show itself as a more democratic kind of regime.

Nothing about the trial will be simple. It won't be easy to find Iraqi judges untainted by association with Hussein's totalitarian state. The prosecutors will require crash courses in the fine arts of war crimes law and investigations. Then there is the Pentagon's recent announcement that it is treating Hussein as a prisoner of war. Under the Geneva Conventions, prisoners of war are supposed to face an international tribunal or a tribunal of the occupying power. Hussein's status will need to be resolved to remove any doubt that the Iraqi court -- a far better venue, given world opinion about the U.S. occupation -- has jurisdiction.

Hussein, as well as other major Iraqi war crimes suspects, will most likely stand trial under an Iraqi Governing Council statute passed days before the former dictator was dragged from his hole. The statute creates a special independent Iraqi court, with jurisdiction over genocide, crimes against humanity and war crimes committed by Iraqis from July 17, 1968, until May 1, 2003.

Definitions of those specific charges come right out of standard international law -- for the most part, they were literally cut-and-pasted from the establishing documents of the International Criminal Court, which the Bush administration opposes. The Iraqi Governing Council picks the prosecutors and judges (who can be non-Iraqi, although the Iraqi justice minister says that would undermine Iraq's sovereignty). The statute requires that the prosecutors, all Iraqis, be assisted by non-Iraqi advisers; this allows international experts with valuable experience from the war crimes tribunals for Rwanda, Sierra Leone and the former Yugoslavia to help with the investigations and ensure that Hussein's trial meets international legal standards.

Hussein gets the usual array of defendant rights: presumption of innocence, public trial, cross-examination of witnesses, the chance to appeal. He can defend himself, or hire a lawyer; if he can't afford one, the court will pay for one. His main lawyer must be an Iraqi, but non-Iraqis may assist.

The prosecution will be seeking to prove beyond a reasonable doubt that Hussein was in charge of a host of murderous bureaucracies, which became the instruments of torture and death for hundreds of thousands of Iraqis. To link Hussein and the mass graves, prosecutors will work their way up from eyewitnesses (who could be asked if, say, they saw insignia to identify the killers) to platoon captains to commanders to senior politicians. Hussein could be convicted either for ordering atrocities or -- once it has been shown that Iraqi security forces were systematically committing atrocities -- for not taking steps to stop them.

While the prosecution tries to make its legal case, Hussein is all but certain to use his last moments on the world stage -- and, since the tribunal allows for the death penalty, probably his last days on earth -- for political satisfaction. His defense will almost surely be in the defiant tradition of Hermann Goering, who denounced the Allies from the dock at Nuremberg, or that of former Serbian president Slobodan Milosevic, whose current rants in The Hague against purported Croatian fascism, Bosnian Islamic fundamentalism and American imperialism are meant to score points at home in Serbia.

The outlines of Hussein's grandstanding are easy to imagine: It was really the Iranians who slaughtered the Kurds in 1988; Iranian forces used poison gas too; Kuwait is the 19th province of Iraq; U.N. sanctions against Iraq were a crime against humanity; the Reagan administration backed me throughout. Hussein will appeal to Iraqis' sense of grievance over soldiers and civilians killed by America in two wars and, through an anti-American regional press, to a wider Middle East where resentment of America runs deep. None of this is particularly helpful to Hussein's legal cause -- but that is not his goal.

Even a toppled dictator can still be tremendously imposing in court. Milosevic, while unpopular with the vast majority of Serbians, still has loyal goons back in Serbia who send him secret police files to help him cross-examine witnesses. Many of these witnesses, especially victims testifying about crimes against their families, have been visibly wary of the former president. Others have relished the chance to tell him off. For some Serbs, it is obviously wrenching to testify against someone who claimed to

symbolize Serb nationhood. I once watched a Serb spy testify angrily against Milosevic but still feel the need to tell the court, "I consider myself even today to be a loyal Serb."

Iraqi judges, prosecutors, court officials and witnesses could all face intimidation or worse from the remnants of Hussein's security apparatus. Hussein can even remind the judges that he was the one who put them on the bench. "Once the Iraqi exiles escaped Saddam's reach, it got hard for them to recall just how big the guy was," says Noah Feldman, a former senior constitutional adviser to the Coalition Provisional Authority and the author of "After Jihad: America and the Struggle for Islamic Democracy." Feldman adds: "Unlike Milosevic, he really did in a deep way enjoy popular legitimacy for 30 years. It's not that they liked him, but he was the man in charge."

But no matter how much Defense Secretary Donald H. Rumsfeld or Salem Chalabi, the Iraqi Governing Council's legal adviser, might want it to, the court will not be inclined to shut Hussein up. "You damn well better not cut him off, or deny him the right to advocate on his behalf," says a U.N. prosecutor. "Every time you narrow the definition of a defense, you appear to your constituents as a kangaroo court."

This prosecutor was referring specifically to the bombastic Milosevic. But the words easily apply to Hussein as well. The legal niceties that constrain the court simultaneously provide Hussein remarkable latitude to speak out.

For the prosecutors, convicting Hussein isn't enough, especially if his guilt seems a foregone conclusion. They need a ringing judicial denunciation of Hussein's totalitarianism.

The indictment, still in the works, will be crucial. American prosecutors at Nuremberg amassed 5 million pages of documents to prove their case and to establish an irrefutable history of Nazi cruelty. The indictments of Milosevic and former Bosnian Serb leader Radovan Karadzic are an impressively comprehensive recitation of the Serb wars against Bosnia and Kosovo. But it has taken more than two years for U.N. prosecutors in The Hague to make their case against Milosevic, who seems likely to get equal time to rebut it.

So Iraqi prosecutors are likely to go for something more streamlined. They could prosecute a smaller number of particularly notorious atrocities that would serve as examples of the regime's brutality. The advantage: A leaner indictment means a shorter trial and a smaller target for Hussein in his defense. The disadvantage: It gives Hussein more of an opportunity to say that a particular massacre was a unique case rather than part of an overall pattern, and it doesn't build the kind of historical record that is needed to document the horror of Baathist cruelty under Hussein.

Both justice and Bush administration interests would seem to dictate charging Hussein with using poison gas during the Iran-Iraq War. Iranians deserve to see their suffering recognized in court, and the administration would presumably like to remind the world of Iraq's use of chemical weapons against another country. But Iraqi domestic politics will

make this excruciatingly difficult. "Too many [Iraqis] died in that war," says Feldman. "[The prosecutors] can't do anything that makes Iraqis feel defensive."

The statute also specifically allows for a uniquely weird charge, stemming from a 1958 Iraqi law established when pan-Arabist sentiment ran high -- "the pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country." This means that Iraq's invasion of Kuwait is a crime under Iraqi law, but attacks on non-Arab countries such as Iran and Israel are not.

The most chilling charge will be genocide -- the crime of crimes. But genocide charges place a special burden on prosecutors, who must prove that the defendant had a specific intent to wholly or partially wipe out a particular group of people. "Very few people in history would say publicly they were about to commit a genocide," says Dermot Groome, the prosecutor leading the Bosnia genocide case against Milosevic. Instead, Groome said, prosecutors try to show a pattern of targeted slaughter, "so that the chamber can infer that the only explanation for these acts was a genocidal intent." Gruesomely, Iraqi prosecutors will have to show that Hussein acted without mercy: If a few Kurds were deported instead of gassed, then the genocide case is weakened.

The prosecution has a final way of stigmatizing Hussein. Political leaders are usually charged only with giving orders to kill. But Hussein will almost surely be charged with simple murder -- for example, allegedly ushering his health minister out of a 1982 cabinet meeting and shooting him dead.

In the end, the murder charges reveal Hussein's essence. As head of state, he had the power to unleash at a distance a stupendous array of ways to destroy human life, from the invasion of other countries to the secret police's knock on the door at 4 a.m. But it was morally no different from killing a person with his own hands. If the trial can drive that message home, it will have done something real to contribute to the safety of human life in an unsafe land.

Gary Bass, an assistant professor of politics and international affairs at Princeton, is the author of "Stay the Hand of Vengeance: The Politics of War Crimes Tribunals" (Princeton University Press). He is writing a book on humanitarian war.