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Their Day in Court

By SUSAN DOMINUS

Since October, amid ever-louder discussions of bombing plans and interrogation techniques, a different sort of conversation began trickling out of the Bush administration. A plan -- or something slightly less concrete than a plan, perhaps a will -- to see the upper tier of Saddam Hussein's court tried for war crimes and crimes against humanity was starting to take shape. In the intervening months, the debate has been joined by members of international bodies, legal scholars and interested political entities.

Recently, the Bush administration has indicated who the top targets of prosecution would be: at a minimum, six of the so-called dirty dozen, 12 senior Iraqi officials who, along with other officials, are said to have particularly gruesome records of torture, chemical attacks, mass disappearances and indiscriminate civilian killings. By the first night of the war, of course, it became clear that the United States' first priority was "taking out" the highest-ranking Iraqis, starting with Saddam himself. And as of this writing, it is unclear how many in this group remain alive.

Should some or all of these men survive, however, the question remains as to just how their trials might proceed. On what system of justice, let alone what continent, might they take place? The debate has been active, among both interested observers and the government officials who will eventually set the policy. And given the potential of such trials to determine, or even distort, the historical record, for nationals and for the rest of the world, the debate's resolution has a lot riding on it. "If you ask the average person why we got involved in World War II, they'd say Pearl Harbor, but also because the Germans were killing people in concentration camps," says Charles Forrest, chief executive officer of Indict, a human rights group that has been compiling evidence of Iraqi war crimes since 1997. "In fact, when we got involved in the war, the existence of the concentration camps weren't common knowledge. It was Nuremberg that brought all of that out into the open." Forrest and others say they believe that a few well-structured prosecutions of Iraq's leadership circle could do much to detail, for Iraq and the world, the history of Saddam's rule. They could also bolster the case for the American invasion in the first place.

There is no one obvious pattern that war-crimes prosecution of Iraqis would necessarily follow. The best-known recent war-crimes prosecutions -- those that have dealt with atrocities in Rwanda and the former Yugoslavia -- were conducted under international oversight. This was a matter of principle, a belief that only international bodies could confer the kind of moral legitimacy that such trials -- which are, after all, significantly about public display -- require. But obviously this is not a view that the Bush administration, which has rejected the International Criminal Court and extricated itself from international agreements, shares. Washington is no more likely to leave the trials of Iraqi war criminals to the United Nations than it was to leave the war itself to it.

Beyond the question of international justice, however, there are several practical considerations, in this as in all such prosecutions. How much money might this form of justice be worth to whoever's financing it? Is there still too much fighting going on to hold the trial in Iraq itself? How many educated lawyers could be rounded up among the citizenry? What form of justice would most persuade the victims to let the law, rather than civilian violence, punish the accused? Finally, for an administration that has made no secret of its belief in the justice and efficacy of the death penalty, there is one additional consideration: in which kind of court would the prosecutors most likely win not only convictions but also executions?

Among the probable targets for war-crimes prosecutions, Saddam and his two sons, Qusay and Uday, are the most familiar. But other high-ranking Iraqis are largely unknown to Americans. Whatever else they may accomplish, trials for war crimes and crimes against humanity would provide one of the first public glimpses at the dozens and dozens of men who have carried out Saddam's policies. It is certain to make for gruesome testimony, an accounting of crimes that sound like the darkest of comic-book conjurings: hospital-bed assassinations; murder and torture practiced with chilling, casual regularity; frequent mass executions; and prison purgings.

Since the gulf war, numerous nonprofit organizations have compiled legal evidence against the men who committed these acts. Organizations like Indict, established in 1997, the Iraq Foundation and Human Rights Watch have been steadily building cases, relying on witness testimony, declassified intelligence reports and chunks of the 18 tons of Iraqi government documents seized by Kurds in 1991, which now reside in a warehouse at the University of Colorado at Boulder.

Among those files, for example, are documents that point to the responsibility of Ali Hassan al-Majid, an Iraqi military commander, for attacks that killed as many as 100,000 Kurds. (In case documentation didn't clearly enough establish the basis for his nickname, Chemical Ali, he was also captured on tape at a Baath Party meeting saying, "I will bury them with bulldozers. . . . I will kill them all with chemical weapons.") Several witnesses place Saddam's sons, Uday and Qusay, in the room where political prisoners suffered long agonizing deaths, were thrown into acid baths, put feet first into a plastic-shredding machine, drowned by forced intake of water.

And the ranks of potential defendants extend far beyond those four men. High on the United States' list, for example, is Mohammed Hamza al-Zubaidi. Indict has testimony from survivors, defectors and Shiite rebels, all of whom say Zubaidi played a key role in suppressing the 1991 Shiite uprising.

Another leading target might be Barzan al-Tikriti, a half-brother of Saddam's. Though he served as Iraq's ambassador to the United Nations in Geneva, he may be charged with the disappearance (and presumed execution) of several thousand Kurdish men, as well as the personal torture of a few special enemies. At his instruction, one victim testified, a guard "began to beat me with a wooden cane on the soles of my feet. They took off my uncle's blindfold so he could see. . . . Barzan al-Tikriti was in a fierce rage. . . . Suddenly he stabbed me in the back with what could have been a screwdriver. . . . When I was stabbed for the second time, I lost consciousness." Barzan's prosecution could yield information about the whereabouts of the Kurdish dead, as well as of Saddam's fortune, which Barzan was thought to oversee during his Geneva years. Given his

ties to the West, however, it may not come to that: he is one of the figures considered most likely to strike a deal with prosecutors.

Others who have been targeted include Aziz Salih Numan, the second governor of Iraqi-occupied Kuwait, and Izzat Ibrahim, who was also active in punishing army deserters during the Iran-Iraq war. "They had used helicopters and dropped nets to capture people," reads testimony taken earlier this year. "When we got to the base, Izzat Ibrahim was sitting on a stage. . . . Seventeen prisoners were brought out and tied to posts. . . . Officials shot them with Kalashnikov rifles. The bodies were then dragged away. Then, strangely, four Gypsy dancing girls were brought to dance for those watching. They danced while the next 17 prisoners were brought and tied to the posts and left while they were executed. When the bodies had been taken away, the dancers returned. In total this happened 10 times -170 men were killed in front of us."

To many observers outside the Bush administration, the case for placing any eventual prosecutions under international oversight is clear: that is the model most likely to meet the standards of impartiality and justice on which the American legal system prides itself. Some also argue that it's the model most likely to further America's long-term strategic goals. Ruth Wedgwood, a professor of international law at Johns Hopkins, explains why the decision about how to proceed is so significant: "If the project here is to try to make Iraq a model for a more libertarian Middle East, you don't want to start out with evidently unfair trials."

Very clearly, the most vocal members of the Bush administration see things differently. Testifying before Congress in February, Pierre-Richard Prosper, the administration's ambassador at large for war crimes issues, suggested that the war-crimes tribunals for Rwanda and the former Yugoslavia were "too slow" and "too removed from the everyday experience of the people and the victims." As Charles Forrest of Indict says, "There's no way they're going to let these guys stand there on some platform in a space-age courtroom, justifying themselves before the world the way Milosevic has for years on end." Critics also point out that United Nations tribunals are not set up to handle the kind of delicate intelligence information that might come out of Iraqi prosecutions.

Defense Secretary Donald H. Rumsfeld has always been explicit about his intention to see anyone who committed crimes against United States troops in the current war prosecuted in a military court or tribunal. (He even included, among such crimes, the destruction of the oil fields, though that was largely regarded as a deterrent, not a plan.) Even as the war got under way, says Kenneth Anderson, an international-law professor at American University who discussed post-Saddam justice with administration officials from various agencies, "there were military lawyers with the troops in Iraq tracking every weapon fired at U.S. troops. Not just to figure out where the chemical weapons might be but also to gather evidence tracing responsibility back to the commander in charge of that region."

Crimes against humanity -- especially crimes committed by Saddam's regime over the course of the last 30 years -- pose the more difficult problem. Because the crimes in question were not perpetrated against Americans, America's interest in seeing them prosecuted is far less compelling than it would be in the case of battlefield atrocities. The main benefit, presumably, would be the chance to influence public opinion, in Iraq or the wider world. But if the best

anyone can hope for is a guilty verdict that much of the world will, in any case, regard as rigged, is it worth the burden -- the hassle, really -- of undertaking the prosecutions?

Following this logic, in recent months an unexpected argument has begun to be heard, from deep in the administration, for not going it alone. According to one senior official, the Bush administration is currently considering turning select members of the Iraqi leadership over to a Kuwaiti court, or a mixed Iraqi-Kuwaiti court, which could prosecute war crimes the Kuwaitis suffered during 1991. "It shifts the focus," says Anne-Marie Slaughter, dean of the Woodrow Wilson School of Public and International Affairs and an advocate for the I.C.C. "It allows a group of Arabs to try Arab war criminals. It would address the dangerous perception that this is U.S. imperialism. You can see it making sense if you think that you can go back and make the world focus on 1991."

Another plan that seems to be gaining steam, however, is just to turn the whole process over to the Iraqis, offering guidance only behind the scenes. "The Iraqis are the ones who will ultimately have to live with the consequences," says a senior administration official, "and they should be able to make their own decisions about the trade-offs in these complex moral questions." Whatever they choose, he says, "I think it's better for the society in whose name the crimes have been committed to make the decision." That argument, however, may change when the first Iraqi generals start looking to trade intelligence information for immunity. Iraqi courts, focused on prosecuting Saddam's henchmen, would presumably be less interested in such deals than would Americans. And the independence of the Iraqi courts might not survive that conflict.

Still, there has been at least some movement to prepare Iraqis for their own court. Back in September, the State Department convened a group of about 30 "free Iraqis" in Sicily called the Transitional Justice Working Group, a branch of the larger Future of Iraq project. The members of the working group included a number of expat corporate lawyers, as well as Charles Forrest of Indict and Cherif Bassiouni, a respected legal scholar who was born in Egypt. Together, they came up with a plan to prosecute Iraqi war criminals in Iraq and under Iraqi law.

The plan reflects concerns that are strikingly different from those of the international legal community. Whereas advocates of bringing prisoners to The Hague worry that any trial run by Americans would be (or at least be perceived as) unduly harsh, the working group was worried that American justice would be too mild -- that it would appear the Americans were protecting them with their version of due process," according to Salem Chalabi, a London-based lawyer.

Nor did the working group place much stock in the powers of the international community to bring the Iraqi regime to justice. "The international community has done nothing on human rights abuses in Iraq," says Sermid al-Sarraf, an attorney in California who attended the Sicily conference. "And Milosevic is a boy scout compared to what Saddam's done to his people and his region."

A plan for an Iraqi-run court has certain practical drawbacks, chiefly the time it would take to get it up and running. David Scheffer, former United States ambassador at large for war crimes issues, points out that trying the former regime on its own turf "means you have these very destructive individuals still in Iraqi territory," possibly maintaining a hold over the popular

imagination. "There is value to showing justice at home -- I don't want to underplay that," he adds. "But there is considerable doubt that you could have a credible domestic court process quickly in a country trying to drag itself out of more than 30 years of lawlessness." Complicated legal questions arise as well when time goes on: according to the Geneva Convention, P.O.W.'s can be held until "the cessation of hostilities." After that they must be charged with a specific crime or be released.

But the Iraqi exiles have another urgent interest in keeping the trials under Iraqi (or Iraqi-American) control, one that would put them at odds with the United Nations: they want to make sure that those found guilty can suffer the death penalty. Chalabi, whose uncle Ahmed Chalabi is a leading American candidate to lead postwar Iraq, couches it in terms of cultural sensitivity: "As Westerners and so on, we'd like not to have the death penalty," he says. "But it's part of Iraqi criminal code, and you can't eradicate it easily. It's deeply ingrained in Iraqi culture."

Of course, the death penalty is deeply ingrained in American culture as well. And that might be among the more compelling reasons that the current administration would endorse an Iraqi court. It also assures that they will insist on retaining control, or at least primary oversight, for whatever trials ensue. "There's the sense," says Kenneth Anderson, "that it would be the grossest act of colonialism for the U.N. to come in and rob the Iraqis of the death penalty at the time when it's most appropriate."

Or, as David Rivkin, a Washington attorney who is a veteran of both the Reagan administration and that of George Bush Sr., says, in response to concerns about the quality of the Iraqi judiciary, "Try them for a week, give them a chance to say what they have to say and then execute the senior ones. Is there any doubt they're guilty?"

With the goal of preparing Iraqi judges to handle the coming prosecutions, the State Department is playing host to a group of expat Iraqi jurists in a Washington hotel. There, representatives of the Department of Justice will lead a crash course in international law. The schedule reads as follows: Day 1: International law. Day 2: International human rights law. Day 3: Due process, investigations. Day 4: Due process, the trial. Day 6: Military justice. Day 7: Ethics. Day 8: Judicial administration. Day 9: Train the trainers.

As Professor Bassiouni points out, that's a far cry from the way America rebuilt the judicial system of other vanquished enemies. By 1942, he says, three years ahead of D-Day, the United States was already planning the denazification of Germany. The Transitional Justice Working Group, by contrast, was formed only eight months ago. And the jurists in question may not be quick studies. "Somebody who came out of an Iraqi legal education in the Saddam regime did not come out with an education that was, shall we say, intellectually open," Bassiouni says pointedly.

Bassiouni favors a tribunal that employs Iraqi judges along with experienced jurors from other Arab nations, with plenty of guidance from international experts. Even that model, he concedes, would have certain drawbacks in a country that's been through as much as Iraq. But he offers a powerful reminder of just how important it is to try to find the right approach. "If we assume 500,000 people were tortured," he says, "another 100,000 people killed, under the Baathist

regime, all of those victims' families are going to expect some type of justice. Where is that going to happen? If it doesn't happen, will we see revenge killings breaking out across Iraq? If occupation forces prevent them, won't the people say, 'Didn't you come to bring us justice, and now you're preventing us from having it?'"

Susan Dominus, a contributing writer for the magazine, last wrote about the mother of the accused terrorist Zacarias Moussaoui.