Trying Saddam: The Iraqi Special Tribunal for Crimes Against Humanity, by Anthony D'Amato

Just five days after the establishment of the Iraqi Special Tribunal for Crimes Against Humanity, Saddam Hussein was captured hiding in a hole in the ground. He will now have the starring role of defendant at the new tribunal.\[1\] If this were a Hollywood movie, critics would complain that it was not true to life.

The case against Saddam could be open-and-shut. He ordered the murder of Kurds and many of his political opponents during his wars against Iran and Kuwait. Murder in these circumstances is a violation of international humanitarian law.

But murder will only be one of many counts against Saddam. A multi-count indictment might appear to be redundant from a legal point of view, but a trial is as much about educational psychology as it is about law. For one thing, as Professor Lon Fuller used to say, the trial brings home to the defendant the extent of his antisocial behavior better than any punishment. The defendant throughout the trial is paying close attention to the testimony, hoping to contradict it, and increasingly becoming convinced that the facts are going to convict him. The more the trial goes on, the less he can successfully resort to psychological denial. Something like this process seems to be going on in the trial of Slobodan Milosevic at the Hague Tribunal; now in its second year. The physical and psychological toll on the defendant is written plainly on his face and in his recurrent illnesses in the detention center. These illnesses are not fake; the Dutch doctors servicing the detention center (as I know from my own experience as a defense counsel there) are skeptical and meticulous.

A second reason for having a thorough trial even in an open-and-shut case is the educational effect upon public psychology. The important target audience is those Iraqi citizens who benefited from Saddam’s regime. Although Saddam built lavish palaces for himself, the people who built them were paid good wages. The merchants who displayed Saddam’s picture in their shops, and who had nothing but praise for his regime, did very well for themselves economically. The soldiers in his army and elite corps did quite well. All the relatives and close friends of leaders in Saddam’s government were enriched in various ways. Teachers, doctors, scientists, and other professionals were pretty much left alone so long as they never criticized the regime. These are the social leaders who will be watching the trial on public television and who will be listening to the evidence.

Trials have an inherent drama. Will the accused be convicted? Even if first-degree murder is an easy count, what about genocide? What about crimes against humanity? The verdicts on these crimes will remain in doubt until the final denouement. People will mentally evaluate the points scored by Saddam’s attorney who will challenge the evidence as it is slowly introduced at trial. And who will not be glued to the television set if and when Saddam himself takes the stand?

The Nuremberg precedent will surely be cited as a reason why the tribunal should include in Saddam’s trial a number of his associates - people whose faces appeared on the 55
playing cards handed out in Iraq last March (Saddam, as everyone knows, was the Ace of Spades.) At the trial of the major war criminals at Nuremberg, 22 German defendants, mostly Nazis, were sentenced at the end of the first trial. However, if Hitler had been alive, it is unlikely that he would have been tried along with the other defendants; he probably would have been tried separately and first. The reason is that Hitler’s presence then, and Saddam’s now, would give the other defendants a chance to say “He ordered me to do it, and we all know that anyone who disobeyed his orders was summarily executed.” Attacks by one defendant against another in a multi-defendant case can drive a wedge of prejudice through the prosecution’s case. To be sure, lawyers will recognize that “superior orders” is not a defense in cases of genocide, war crimes, or crimes against humanity. Indeed, the new statute of the Iraqi Tribunal explicitly provides in article 15, “The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.” Yet this rule of law will not necessarily stop a given defendant, who is after all on trial for his life, from blurtin out in open court and in front of the television cameras, “He told me to do it!” These are guerrilla tactics for the defense, to be sure, but what is a court to do? If it muzzles the defendants, the public will say that it’s a kangaroo court. If it holds them in contempt of court, that certainly will not deter them. Thus a gambler’s odds would favor an initial trial of Saddam Hussein alone.[2]

Apart from Saddam and his associates, who else might eventually be tried by the Iraqi war crimes court? Since the tribunal has jurisdiction only over Iraqi nationals or residents of Iraq, no American or British soldiers or their commanders can be tried there. This restriction is not consequential in my opinion, inasmuch as the Iraqi invasion of March 2003 was perhaps the most war-crimes-free military invasion in history. There were some scattered acts of negligence on the part of soldiers in active duty, but it would be hard to prove the degree of wanton negligence necessary to make a showing of intentional war-crimes culpability. However, the jurisdictional restriction to Iraqis may have been too cautious in that it disables the tribunal from trying Saudis or Syrians or even Al Qaeda members of other nationalities who may have assisted the Saddam regime in the commission of its crimes against humanity.

By contrast, another jurisdictional restriction is rather progressive from the point of view of the development of humanitarian law. The tribunal’s jurisdiction extends only to natural persons. This means, for example, that the Baathists as a religious entity can not be indicted. At Nuremberg, the Nazi Party was held to be a criminal conspiracy, perhaps as a way to make it easier to convict persons just because of their membership in the Party. But “guilt by association” usually serves no useful purpose; certainly, in the aftermath of Nuremberg and the reconstruction of Germany, the past of many former Nazis who had skills needed for reconstruction was conveniently forgotten.

An important, but curable, drawback of the Statute of the Iraqi Tribunal is the impression it conveys of ‘prosecutor’s justice’. There is very little mention of the role of, or accommodations for, defense counsel. It seems that every new international tribunal is fixated on the task of convicting criminals, and has to learn all over again the importance
to its world image of having a ‘level playing field’ between prosecution and defense. For if defense counsel are not well qualified and independent, the tribunal will suffer in the mind of the public.

In this connection, let me recount briefly my initial impressions of the International Criminal Tribunal for Former Yugoslavia when I arrived at The Hague as lead counsel for Milan Kovacevic, the first person charged by the Tribunal with the crime of genocide. After getting a visitor’s pass, I went to the office of the Registrar, where I was told to wait outside until someone came to see me. The only place to wait was the dark, cavernous entry foyer where there were uncomfortable steel benches and various soft-drink machines. Presently a clerk from the Registrar’s office came to see me with some forms that I had to fill out. She sat on one of the benches and did not invite me to go with her to her office. Then the prosecutor on my case came in, introduced himself, and raised the question of whether my client was willing to plead guilty and cooperate with the prosecutor’s office in return for consideration during sentencing. “Where’s your office?” I asked; “Can’t we talk there?” He told me that the prosecutors occupy the entire third floor of the building, and that the premises are off limits to everyone else. I said “You mean I can’t go there and watch all your people throw paper airplanes at me?” “No,” he said humorlessly, “it’s off limits to civilians.” He had been a JAG officer in the U.S. Army before taking up a job at The Hague.[3]

Not only were the prosecutors safely ensconced on the top floor above the judges and courtrooms, but they also wore UN badges that enabled them to fly on military planes during their fact-finding missions in Yugoslavia. Some weeks later I asked for a similar temporary badge so that I could fly in a military plane to Belgrade, I was informed that I would have to risk my life by driving there or take public transportation. I suppose it was a sub-text that if I didn’t return alive, no one would miss me. Indeed, the chief Registrar was obviously partial to the judges and the prosecutors. Although it was a formal part of her job to treat prosecutors and defense counsel equally, there was no mistaking the attitude written across her features that folks like me were at best a necessary evil. We were there to subvert the work of the tribunal, to free murderers, thugs, and genocidaires, and to earn blood money in the process. When I said rather firmly that I regarded myself as an officer of the court and that my role was to help see that justice was done, all she said was that she didn’t ask me to take this job, and if I didn’t like it, I could go back to Chicago.

The harder the working conditions for defense counsel at international criminal tribunals, the less persuasive will be the final opinions of the judges and the less respect will be accorded their judgments. Defense counsel in the Yamashita Case in 1945 were given insufficient time to prepare; the result was a decision on command responsibility that has come back to haunt American military leaders today. The Nuremberg tribunal’s unjust decision against Admiral Doenitz has ever since been a black mark against public receptivity of the Nuremberg results; again, defense counsel was overworked and underpaid. Fortunately, the situation of defense counsel in Iraq may soon be modified. Under Article 37 of the new Statute, the Iraqi Governing Council has the power to establish other rules and procedures for the tribunal.
Overall, however, the Statute of the new Iraqi tribunal is a fine accomplishment. We should be grateful that there apparently was no pressure to establish instead a Truth and Reconciliation Commission, for whatever the merits of truth commissions may be, the fact is that they do not operate to deter future war criminals. Iraq's enactment is a very important step forward for the cause of international human rights. Bringing heads of state to accountability for criminal behavior seemed, for many years after Nuremberg, to be a one-sided, one-shot event. In just the last ten or fifteen years, to everyone's surprise, the idea has changed the fundamental expectations of people everywhere toward their own governmental leaders.

Notes

1. As I write this on the day Saddam’s capture was announced, the United States has so far not said that he will be turned over to the new Iraqi tribunal. President Bush’s brief report to the nation did not mention the issue. The United States may be waiting to see the composition of the Tribunal before making its decision. It may be ‘holding back’ Saddam in order to have more leverage on the selection of judges, prosecutors, and advisers. It’s also possible that immediate pressure from the new Governing Council may force an earlier resolution of the issue. However, I am confident that Saddam will end up before the Iraqi Tribunal.

2. After the trial is well underway, other trials against other leaders can begin.

3. I describe the complex plea bargaining in a separate article, Defending a Person Charged With Genocide.

Anthony D'Amato is the Leighton Professor of Law at Northwestern University School of Law. He was lead counsel for Milan Kovacevic, the first person charged with the crime of genocide by the International Criminal Tribunal for the Former Yugoslavia at The Hague.

December 15, 2003