

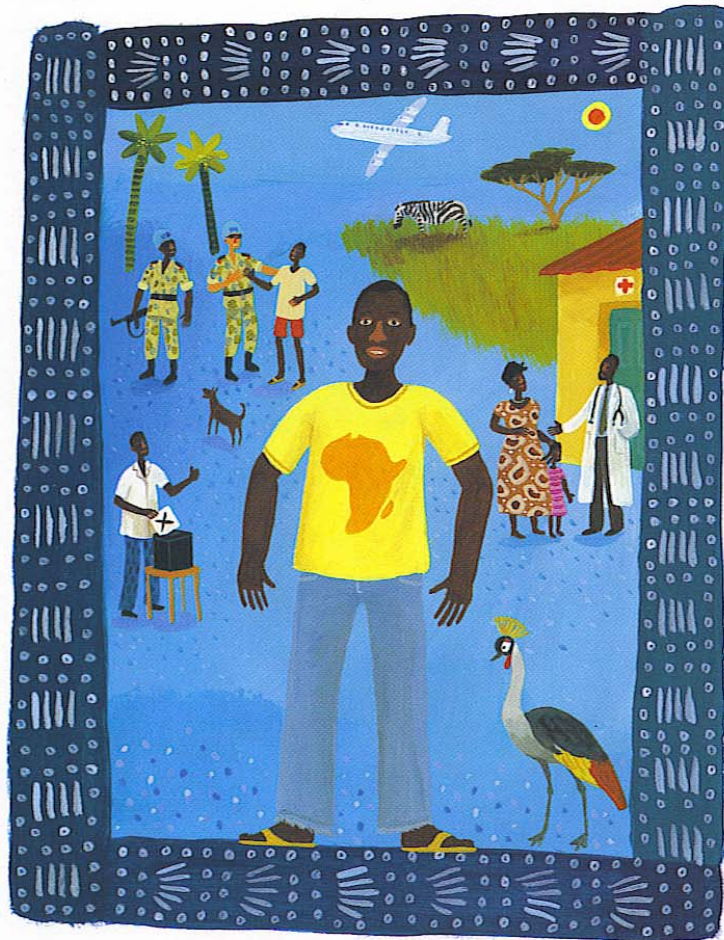
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## OUT OF AFRICA

*Grass-Roots Progress Offers Reason for Hope*



# SPEAKING OUT

## *Saddam Hussein's Trial: Due Process or Victor's Justice?*

By JASON D. SÖDERBLOM

By the time this issue of the *Foreign Service Journal* appears, six months will have passed since the capture of Iraqi dictator Saddam Hussein. After the initial flurry of celebration, he has virtually disappeared from the scene while undergoing interrogation by American military and intelligence officials. But how and where his trial is eventually conducted will largely determine whether world opinion views the verdict as legitimate — and will influence how history judges the U.S. role in Iraq.

All that is certain at this writing is that Saddam Hussein will eventually stand trial before a special Iraqi tribunal, as President Bush has already pledged, and that Iraqis will decide his fate. The core charges will probably include the big three: war crimes, crimes against humanity and genocide. Other former members of the Iraqi Ba'ath government and others accused of crimes against humanity and genocide will also be tried in the Iraqi Special Tribunal.

On the surface, this would seem to be an emotionally satisfying method of proceeding. After all, the crimes took place in Iraq, so why not hold the trial there? Certainly the victims of Saddam's crimes deserve to see justice done and have it seen to be done.

But a local trial is not the best way to accomplish those twin goals, for the following reasons.

### **A Question of Legitimacy**

First and foremost, any court convened and backed by an occupying

*The Iraqi Special Tribunal does not meet Washington's stated objective of conducting a process that "withstands international scrutiny" — at least as presently constituted.*

army will be seen as meting out victor's justice — an expression of power politics, not the rule of law.

Large swaths of the Arab and Muslim worlds are already predisposed to view the tribunal as illegitimate precisely because the U.S. backs it, no matter how many procedural safeguards are built into the process. (Coincidentally or not, the court's formation was announced by the Iraqi Governing Council just a week before Saddam's capture.)

This is even more true because the Bush administration has shown little interest in conducting fair trials in other contexts. For example, the breach of international humanitarian and human rights law (e.g., the U.N. Covenant on Civil and Political Rights, and the Third Geneva Convention dealing with prisoners of war — both ratified by the U.S.) at Guantánamo Bay is manifest.

This impression is further reinforced by the tribunal's narrow scope

of jurisdiction. Most nations' criminal courts can prosecute all crimes committed in their territories, whatever the nationality of the perpetrator; indeed, that is one of the manifestations of sovereignty. The Iraqi Special Tribunal, however, can only prosecute Iraqi nationals and residents. The scope of its territorial jurisdiction has been manipulated to ensure that American citizens cannot be tried for their possible role in aiding and abetting the regime's human rights violations.

This restriction undercuts the Bush administration's stated desire for a complete and uncensored record of Iraqi atrocities and Saddam Hussein's role in them. It will therefore be seen as a way for Washington to avoid inconvenient questions about its long-standing ties to the former regime.

A "fair trial" requires the telling of the whole story. Iraqi history deserves a complete record of events, the most accurate narrative that can be unearthed. If that means giving Saddam a forum to publicly adduce evidence of his previous liaisons with U.S. governments (particularly during the 1980s, when he began acquiring and using biological and chemical weapons with Washington's acquiescence, if not aid), then so be it. Establishing good governance and an effective judiciary requires that Iraq start its post-Saddam era with a clean slate.

The statute establishing the Iraqi Special Tribunal is void of any serious attempt to ensure impartiality. It will effectively impose a blanket disquali-



fication on all judges who were members of Saddam's Ba'ath party. To be sure, many of the Ba'athist judges should indeed be disqualified. Yet some who went on to become judicial officers joined the party not as partisans but because it was the only road to professional advancement in a one-party state. Doug Cassel, the Director of the Center for International Human Rights of Northwestern University School of Law, describes the dilemma clearly. "Once all Ba'ath judges are disqualified, who will be left? Mostly judges who were victims of Saddam's regime. They or their family members were imprisoned, tortured or forced into exile by Saddam. No credible legal system allows victims to sit as judges in the trial of the alleged perpetrators."

Perhaps most troubling of all, the tribunal does not require that defendants' guilt be proven beyond a reasonable doubt, contrary to the legal standard employed in the U.S. and in most developed countries. Its standards of criminal responsibility make superiors responsible for crimes by their subordinates, and also allows soldiers to be convicted simply for following orders. International law since the Nuremberg trials has not allowed a defence of "just following superiors' orders," although it may mitigate a prison sentence. The problem is the manifest double standard employed by the U.S. Washington does not apply these same standards to its own military, so why impose them upon Iraqis?

**"Rule of Law" vs.  
"Rule by Force"**

For all these reasons, the Iraqi Special Tribunal does not meet Washington's stated objective of conducting a process that "withstands international scrutiny" — at least as presently constituted.

An alternative course would be to move the trials to an international

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forum, such as the International Criminal Court, as the U.N. Security Council has the authority to do. However, even if the U.S. did not veto such an initiative, the ICC only has jurisdiction over crimes committed after the court came into existence (July 1, 2002). Thus, it could not try Saddam and other defendants for some of their most notorious crimes, including the use of chemical weapons on Iraqi Kurds in 1988.

The Bush administration has now irrevocably committed to submit Saddam to the Iraqi Special Tribunal for trial. Fortunately, there is still time for Iraqi officials to take advantage of the safeguards already built into the tribunal's operating procedures to strengthen both the reality and perception of due process. For example, the statute creating the tribunal explicitly permits the appointment of non-Iraqi judicial officers per Article 4(d) of the Statute of the Iraqi Special Tribunal, and also provides for the court to have international advisers and monitors present during trials (though they cannot participate in the proceedings themselves). Such appointments would assist in the perception of a fair trial. But, it is unfortunate, to say the least, that international judges are not permitted to act in an investigative capacity.

Iraq should consider taking additional steps to enhance transparency.

The best outcome would be the adoption of a hybrid court of Iraqi judges and international judges such as that used in the Special Court for Sierra Leone. This might provide an outcome that satisfies the international community, including Iranians and Iraqis. Such a court would need to have retroactive powers, however, as does the Special Court for Sierra Leone.

Unfortunately, it seems clear that the Sierra Leone model will not be followed in Iraq. But at a minimum, the Iraqi Governing Council could appoint both Iraqi and international judges to the Trial Chamber and the Appeals Chamber, at the discretion of the Governing Council. Such a set-up — a sort of "quasi-hybrid" tribunal — could strike a balance between reviving Iraq's judicial system and ensuring compliance with rule of law standards. On the one hand, the tribunal would serve a rehabilitative role by involving Iraqi judges. On the other, the active participation of respected international judges would provide the crucial perception and legitimizing fabric of fairness and impartiality. It would also convincingly acknowledge that not all of Saddam's victims were Iraqi.

**The Quasi-Hybrid Tribunal as  
an Antiterrorism Initiative**

The vision for a strong rule of law in Iraq is further motivated by the United States and its coalition partners' search for security. We have witnessed many violent counterterrorism initiatives aimed at aggressively responding to global terrorism and other legal belligerence. Yet there is a noticeable absence of the coalition of the willing nations to engage in coherent antiterrorism strategies. Such strategies are ultimately aimed at preventing belligerence before it occurs. For at the core of antiterrorism is a uniform adherence to the notion of rule of law and all that it entails.

SPEAKING OUT



*Any court convened and backed by an occupying army will be seen as meting out victor's justice.*

We must understand that as Iraqis awaken from the nightmare that was Saddam Hussein, global leadership through the rule of law is more important than ever. To promote a contrived trial of Saddam and other Ba'th Party members will set a dangerously low standard for future Iraqi governments. We must be wary of reinventing Iraqi cronyism in whatever guise, however convenient it may be simply to go through the motions of a trial to dispose of Hussein and his henchmen. Democracy deserves better.

The U.S. and the Iraqi Governing Council must therefore respond to Saddam's "rule by force" governance by demonstrating their commitment to the "rule of law." Any court that seeks to prosecute Saddam must be convened upon legitimate authority. It must be independent and impartial, and it must afford due process of law. Anything less will not only violate international law, but will undermine efforts to revive respect for the rule of law in Iraq. ■

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