This article is the first in a two-part series

Justice the Day After

Long-standing efforts to bring the Iraqi leadership to justice have failed, leaving the strategy for dealing with any deposed rulers unclear.

By Chibli Mallat in Beirut (ICR No. 11, 08-April-03)

One of the many missing pieces in American strategy in Iraq is how to deal with the leaders of Iraq if and when they are caught. While "decapitation" is an integral part of the effort towards regime change, the policy is legally questionable in the absence of any indictment of those being targeted.

Morally, of course, it is unacceptable to bomb rank-and-file Iraqis while leaving those at the head of the hierarchy under some form of protection. But international law lags behind moral sensibility and the fate of Iraqi leaders who might be arrested is uncertain. Will they be sent to America? Tried in Iraq? Submitted to an international tribunal like Slobodan Milosevic and other Balkan leaders? Already the legitimacy of the whole war is under question and the arrest of any Iraqi officials will compound the conundrum.

As American tanks push into the heart of the Iraqi capital, reality has caught up with policy over what to do with Saddam Hussein and his aides. The reverse point is academic: while much can be heard in Baghdad about President George W. Bush as "war criminal", no serious international forum is available to judge any alleged violations by the coalition of the laws of war.

In a normal situation, any Iraqi leader should benefit from the same POW status as the soldiers who have already been arrested. But "the war for Iraq", as the conflict is called in Washington, is anything but usual: witness the request made to some of the surrendering soldiers to put on their civilian clothes and go home. A similarly approximative legal position will obtain should any of the top leaders, or local Ba'ath operatives, fall in the custody of British or American forces.

Why has nothing been done to anticipate this problem? It is not for failing to try in the 12 years since the clause on the responsibility for the war was dropped from UN ceasefire Resolution 687 which ended the Kuwait war on April 3, 1991. Everything would have been different if that clause, which put the responsibility for the invasion of Kuwait squarely on Saddam Hussein, had remained in the resolution. But there had been no model of an international tribunal since Nuremberg and British Foreign Office lawyers were worried about prosecuting high Iraqi officials whom they could not bring before a judge. This mistake still haunts international policy.

Germany suggested a tribunal for Iraq, but the call was drowned in Euro-Atlantic bombast about a war allegedly won even though those responsible for it remained in power. On April 5, 1991, Resolution 688 requested "that the Iraqi government cease the repression of its own population", which had risen up against the regime the previous month and was being brutally suppressed in the Kurdish north and Shia south. But more than a decade later, 688 has not been put in effect.

As the exile opposition in the West slowly regrouped, the largest opposition coalition, the Iraqi National Congress, began an effort to establish an international ad hoc tribunal to deal with the Iraqi leadership. A special committee compiled a list of 12 notorious characters, including the two sons of Saddam Hussein, his two sons-in-law and well-known figures like Ali Hassan al-Majid ("Chemical Ali") and Tariq Aziz, Iraq's peripatetic envoy. (American officials and Iraqi opposition leaders have since augmented the list, citing variously from a dozen to 2,000 high-ranking officials.) The INC study was published in May 1993, on the very day the Security Council unanimously established the International Criminal Tribunal for the former Yugoslavia.

Despite that obvious precedent, a similar tribunal could not be established for Iraqi leaders with a far heavier criminal record - in large part because of Middle Eastern diffidence towards a precedent which could threaten other Arab leaders, but also because of a lack of follow-up by the US administration and the Iraqi opposition.

In the summer of 1996, the issue surfaced again in London with the formation of an organisation - Indict - that sought to establish a special tribunal like those for the former Yugoslavia and Rwanda. Although endorsed by a large coalition, and funded by various governments and parties including the US Congress, Indict's initial success was blunted by poor chairmanship and divide-and-rule policies in the State Department and Central Intelligence Agency. The Clinton administration refused to do anything serious about Iraq for the full eight years of its mandate, and Indict's initial momentum was lost.

But as Indict's efforts were running into the sand, the Pinochet precedent in London opened another avenue for international justice: national tribunals. The most promising national route was Belgium, which in 1993 had passed a law allowing Belgian courts to try those accused of "serious violations of international humanitarian law" even if they were not in Belgium. Using this legislation, four Rwandans were tried, convicted and sentenced to long-term imprisonment.

In 2001 a number of Iraqis, mostly Kurds, filed a case against Saddam Hussein, Ali Hassan al-Majid and others. The case was significantly strengthened in February 2003 when the Belgian Supreme Court, in a judgement on a case brought against Ariel Sharon over the Sabra and Shatila massacre in Beirut's Palestinian camps, ruled that Belgian courts are indeed competent to try massive violations of international humanitarian law such as those committed by Iraq's leadership over three decades.

Ariel Sharon has been indicted, despite the fact that he is formally immune until he leaves office, and Brig. Gen. Amos Yaron, commander of the troops that surrounded the Beirut camps, also faces prosecution.

Today Israel's prime minister, Ariel Sharon, and Iraq's president, Saddam Hussein, find themselves on the same side to prevent international justice from obtaining. The indictment of Iraq's top leaders could now offer a serious basis for addressing their criminal record - said by a UN Rapporteur to be the heaviest since the Second World War.

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This article is the second in a two-part series.

Justice and the Day After - the Trials

The US is likely to insist on Iraqi courts under its authority, or US-based trials, but an international court remains the best option.

By Chibli Mallat in Beirut (ICR No. 12, 09-April-03)

With the Iraqi regime disappearing into thin air, but none of its leaders indicted, there is an urgent need to address the problem of what to do with those responsible for serious violations of humanitarian law when they are finally arrested. In the United States, the power behind the war and - inevitably - the post-war, opinion is divided, with some appearing to favour an international tribunal and others a military court on US soil.

The oldest model of an international court for a special ad hoc tribunal for Iraq would be that of the Nuremberg and Tokyo trials, modified by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the Balkans. An ICTI seemed a few weeks ago to be favoured by Ari Fleischer, the White House's spokesman. While Nuremberg and Tokyo were created by the Allies, the ICTY and its Rwandan counterpart, the ICTR, were established by the Security Council. This was a blessed but fugitive moment of unity in the United Nations that has never been seen again.

While miracles cannot be discounted - the United States seeing an ICTI as a way forward to legitimacy at UN level - the likelihood of the Security Council acting is slim these days. The other possibility is to reinforce the current International Criminal Court, but this requires a leap of faith in Washington, which has so far rejected the new global tribunal.

Because the Security Council route is unlikely at present, justice for the people of Iraq may well fall back to national, or mixed, tribunals, established by those who might get hold of persons accused of massive crimes.

National tribunals are of two sorts: those in a relatively neutral forum, as in Belgium, and those where the prosecution appears to be on the same side as the victorious party - whether that victorious party is national, in this case the "Iraqi opposition", whatever this might mean, or international, in this case the United States and United Kingdom.

In all cases, another difficult question arises about the number of Iraqi leaders, Ba'ath party or government officials who might be tried. The number matters, and is an unsolved problem. The ICTY has tended to concentrate on the top leaders, leaving "small" and "medium" fish free from prosecution. Two tribunals were set up for the Rwandan genocide: the international one, which concentrated on the prime movers of the genocide, has been notoriously inefficient; the national one, which had a broader range, has a backlog of several thousand cases.

It is difficult to see how justice can be obtained in Baghdad. A new government might pursue criminal justice on a wide scale, or it might not rally enough legitimacy to pursue justice in any convincing manner. Despite the better efforts of a group within the Iraqi opposition to address this problem in a long paper on "transition", its report has a blind point - the tragic record of the Kurdish leadership during internecine fighting that took some 5,400 lives in northern Iraq in 1994-1996 - sometimes in atrocious circumstances. None of those who committed these atrocities has been brought to justice. Justice for all, and not just for victims of Saddam's regime, is imperative if Iraq is to begin closing the most recent chapter of its tragic history.

Even more problematic would be finding Iraqi judges who would be up to the task in a country where the rule of law has been undermined for half a century.

The US could institute a Guantanamo Bay-like process, or even military courts on US soil or possibly in Iraq, and recent reports have suggested this is now the preferred way forward of the US State Department. As in Guantanamo Bay, many questions would be raised. But a British court has already underlined Guantanamo Bay's violations of international humanitarian law and one hopes that a British presence would deter the United States from a course that is universally perceived as failed justice.

It is possible to conceive of a mixed international tribunal drawn from the countries belonging to "the coalition of the willing". This would lessen, but not entirely do away with, the negative image of victors' justice.

My own preference would be for the United States to reconsider seriously the value of the International Criminal Court. Despite the administration's reservations, this is the best way to vindicate its war in Iraq in the context of "liberating Iraqis from dictatorship". It would open the files of one of the most brutal regimes of the 20th century to the widest audience possible, as presently embodied in the ICC.

If an ICC route is not possible, then a special ad hoc tribunal could be set up on the Yugoslav model for Iraq (or even better, for the Middle East as a whole), if the UN can be so persuaded. Alternatively, the Belgian route, to which should be added other jurisdictions capable of trying those responsible for atrocities, could proceed.

With the case against Saddam Hussein and his aides getting tried in parallel with the case already underway in Belgium, where Israeli Prime Minister Ariel Sharon is accused of war crimes in Beirut's Palestinian camps in 1982, the acute double standards which have plagued the Middle East for a century might start being challenged to see not only that justice is done - but is seen to be done.

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