

HOW TO TRY SADDAM HUSSEIN
Unpunishable
by Samantha Power

IN a 1946 letter to Karl Jaspers, Hannah Arendt wrote of the impossibility of tailoring a process to fit the Nazi horrors. "The Nazi crimes ... explode the limits of the law," the German philosopher (and then-exile) wrote her mentor. "[T]his guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems. ... We are simply not equipped to deal, on a human, political level, with a guilt that is beyond goodness or virtue." Jaspers responded by chiding Arendt for ascribing a kind of "greatness" to Nazi crimes. "It seems to me that we have to see things in their total banality, in their prosaic triviality," he wrote, "because that's what truly characterizes them. Bacteria can cause epidemics that wipe out nations, but they remain merely bacteria." It was in this exchange that Arendt began mulling the concept for which she would become best known.

Before December 13, 2003, it would have been hard to imagine Saddam Hussein -- the man who butchered his daughters' spouses, sprayed deadly chemical poisons that peel off human skin, and chopped off the tongues of potential critics -- as banal. Because of his personal, hands-on relationship with murder and mutilation, Saddam was anything but a cog in the machine. He was the machine -- a machine that chewed up and spit out its own cogs. But, as it does with most of those who spend months co-habiting with mice, imprisonment has a way of making even the once-petrifying and mighty seem small.

Saddam's frail, dazed, Ted Kaczynski-like visage was a mesmerizing, potent analgesic for American and Iraqi nerves frayed by months of daily insurgent attacks. But the drama of the dictator's capture faded quickly, supplanted by the singularly perplexing question: "Now what?" What should the American and Iraqi authorities do with a man who -- with his massacres, his torture chambers, his cross-border invasion, and his plundering -- has exploded the limits of the law? Most Iraqis and one American president are currently focused on retribution (read: execution). But the punishment of Saddam will ultimately be less important than the judicial process that precedes it. And, although the United States will certainly be one of justice's many masters in Saddam's trial, it must subordinate its interests to those of the Iraqi people. The most important considerations should be those that all too rarely guide war crimes trials: How can the tribunal best empower, enlighten, and comfort those who will shape the future of the country?

For the trial to address these considerations, it must be held on Iraqi soil. The U.N. tribunals for the former Yugoslavia and Rwanda have a lot to teach about the downsides of remote justice. To their credit, the U.N. courts have convicted and incapacitated some of the twentieth century's most ghastly thugs (most of whom would otherwise remain at large). But what they have offered in international legitimacy and procedural propriety, they have lacked in local relevance. Victims and survivors find them painfully slow. Despite spending more than half a billion dollars, the Rwanda court has tried just 19 men since its founding in 1994. The Yugoslav court, which has cost some \$700 million, has by contrast been a paragon of efficiency, having tried more than 40 since it was established a decade ago. But even the Milosevic trial, which was once touted as the trial of the century, will soon drag into its third year.

Because the courts are located in The Hague and in Arusha, Tanzania -- many miles from the scene of the crimes they're judging -- and because the sessions are often tedious and rarely broadcast back home, survivors, bystanders, and fellow perpetrators pay almost no attention. (Contrast this with the Israelis glued to their radios during the 1961 trial of Adolf Eichmann in Jerusalem.) Worse, the U.N. Rwanda tribunal actually paid several suspected genocidaires as defense investigators -- a mistake no Rwandan human resource department would have made -- perhaps permanently alienating what should have been a captive Rwandan audience. And because these international courts have had to cater to their multi-national personnel, they have been far quicker to translate indictments and judgments into French and English than into Serbo-Croatian and Kinyarwanda.

Fortunately for the Iraqi people, three days before Saddam's arrest, the Iraqi Governing Council announced the establishment of a national tribunal. The Council even chose a site: Saddam Hussein's Baghdad Gift Museum, which once housed the opulent presents given to Saddam by the many heads of state who came wooing him. President Bush -- who is cool on international courts anyway and who now needs desperately to expose the crimes of Saddam's regime (the best remaining justification for the war) and to showcase displays of Iraqi sovereignty -- is unlikely to push for a foreign venue.

But, in their mutual eagerness to see Saddam tried in an Iraqi court, neither the Bush administration nor the current Iraqi authorities should regard the terms of the statute that established the tribunal as fixed. The law was prepared by the Council's 25 members, all of whom were hand-picked by the U.S. Coalition Provisional Authority. Neither the statute nor, by implication, the court has been vetted by the Iraqi people. The rules and objectives of the court must be reopened for debate so as to maximize Iraqi ownership of the trials it conducts. If not, the Iraqi public will not be prepared when the limits and trade-offs inherent in the judicial process reveal themselves.

Whatever the faults or growing pains of the U.N. courts, the Iraqi statute should in fact be revised to invite foreign participation. In an ideal world, for the sake of full-fledged local empowerment, the court would be composed strictly of Iraqi judges and lawyers. An international tribunal may have been essential for the Nazis because the majority of Hitler's crimes were committed against non-Germans and because the German legal system had been so corrupted, but Saddam struck mostly against his own, and Iraqis should decide his fate.

But, alas, Iraqis don't reside in an ideal world, and foreign involvement will be essential. The simple reason is that finding a batch of independent, respected, homegrown lawyers to staff the bench and the prosecutor's office will be extremely difficult. Most prosecutors and judges in Iraq today are tainted -- tainted because they served in the Baathist regime, because they were brutalized by it (how can a regime's victims impartially try its perpetrators?), or because they fled and are Iraqi exiles, seen by some as American stooges. Even if enough acceptable lawyers were found, very few would have experience prosecuting or presiding over criminal trials of this complexity -- trials that will cover the past 35 years and require interviewing hundreds of witnesses, reviewing thousands of pages of records, and gathering forensic data from the estimated 260 mass graves scattered throughout the country. Foreign participation can erase the

appearance of victims' justice and help assure the fairness and quality of the trials by employing judges who cut their teeth presiding over the Byzantine war crimes trials of the '90s.

There is at least one encouraging precedent for mixing foreign and domestic jurists. The trial chamber of the hybrid court in Sierra Leone contains one Sierra Leonean appointee and two U.N. appointees – one African (from Cameroon) and one Canadian. The Appeals Chamber contains three U.N. and two Sierra Leonean positions. In Iraq, for the sake of local legitimacy, the balance should be reversed in favor of Iraqi nationals, with three judges hailing from Iraq and two from outside. Non-Western judges, such as Khalida Rachid Khan from Pakistan, who serves on the Rwanda court, and Mehmet Güney from Turkey, who works for both the Rwanda and Yugoslav tribunals, as well as judges from the region, such as Amin el-Mahdi from Egypt, who serves at the Yugoslav court, should be especially encouraged to apply.

Iraqis will be empowered and not insulted by internationalization if it is they who make the foreign appointments. If the few international judgeships were handed out on the same basis as Iraqi reconstruction contracts ("to the occupiers go the spoils"), then the tarnish of victims' justice would only be replaced by that of victor's justice. Because the United Nations is considered by Iraqis to be implicated in the sanctions policy of the '90s, the diplomats in Turtle Bay should not select judges for possible appointment. Rather, interested international jurists should apply directly to the Iraqi regime that will succeed the Governing Council in July.

But, even if its staff includes seasoned foreign professionals, the Iraq court will need time to get its sea legs. There is, of course, great temptation to rush Saddam to justice. Two days after his arrest, a member of the Iraqi Governing Council said he expected the trial to take place "in the next few weeks" and to lead to swift conviction and execution. The faster Saddam can be tried, the thinking goes, the quicker the Iraqis can be reassured that their erstwhile leader will never return to power and can thus begin building a post-Saddam society. Moreover, the faster he is tried, the lower the likelihood that he will die in captivity – either of natural causes (seven months of bobbing among 30 holes can't be easy on a 66-year-old) or of suicide, as Hermann Goering managed in Allied custody after World War II and as Saddam must surely have contemplated.

Still, those eager to tie the hangman's noose should note the extent to which even the well-funded U.N. tribunals, filled with practiced specialists in international criminal law, bungled their early cases, litigating extraneous time-consuming facts and issuing shoddy indictments that later had to be scrapped. The Iraqi court will make its own mistakes, and, despite the risks of delaying the country's trial to end all trials, the proceedings will be too closely watched and cherished to risk the rush. In fact, Saddam should not be the first Iraqi in the dock – it would be better to botch the prosecution of the six of hearts than the ace of spades.

By slowing down, the authorities will also have a chance of shoring up local security and developing a witness protection program. Iraqi society is so divided that, while the trial of Saddam may eventually create a shared and cathartic record of his mayhem, it will also illuminate the society's religious, ethnic and political divisions, triggering violent demonstrations and encouraging resistance. It is almost impossible to conceive of how a police force that can't yet protect itself from suicide bombers will be able to convincingly assure those already brutalized

by Saddam that their testimony will not lead to further victimization. A witness protection program, complete with counseling for those who agree to relive the hell of the past, has to be a key component of any tribunal.

Although the Bush administration has identified its most wanted by issuing the card deck, it is the Iraqi court that should decide whom it will try. So far, no limit has been set on the number of Iraqis who will be judged along with Saddam. Because the statute covers crimes committed from 1968 until 2003, the court could conceivably make its way up or down the chain of command and operate indefinitely. But once atrocities on this scale have been committed and allowed, any justice mechanism introduced must be selective. At present, coalition officials are holding 5,500 security detainees across Iraq. An effort to try them all would be immensely destabilizing and would dilute the quality of the justice dispensed.

A clear cap should be set on the number of suspects to be prosecuted (even Nuremberg tried only 22 leading Nazis). Otherwise, the court may contribute to, rather than diminish, the local fondness for vengeance. For those who do not make the hit list, a truth commission that invites testimony in exchange for amnesty should supplement the tribunal, allowing Iraqis to come forward to testify to the terror and indignity they endured, to receive public recognition for their suffering, to create a public record of everyday horrors, and to aid in society-wide de-Baathification.

The only predictable outcome of the Iraq trial is that nobody -- in Iraq, in the United States, in the Middle East, and in the international public gallery at large -- will find it suited to the gravity and barbarity of Saddam's assault on humanity. As Arendt wrote several years after her exchange with Jaspers, "Totalitarian regimes have discovered without knowing it that there are crimes which men can neither punish nor forgive. When the impossible was made possible, it became the unpunishable, unforgivable absolute evil which ... anger could not revenge, [and] love could not endure." Saddam Hussein made the impossible possible, but his citizens and successors now have the chance to do the same. If Iraqis can emerge from the coming trials with the dignity, wisdom, and commitment to the rule of law that Saddam denied them, that will be their greatest revenge.

From **The New Republic**

Post date: 12.29.03 Issue date: 01.12.04