Ethics & International Affairs

2006
VOLUME 20
NUMBER 4

CARNEGIE COUNCIL
The Voice for Ethics in International Policy

Saddam Hussein's Trial Meets the "Fairness" Test

*Kingsley Chiedu Moghalu**

War crimes trials are often controversial, and few such trials in history have been more so than that of Saddam Hussein, the former president of Iraq. In this trial, controversy has raged over the very nature of war crimes justice, the relevance or otherwise of the legality of the invasion of Iraq and the subsequent formation of a war crimes tribunal to try the ousted Iraqi leader and his top lieutenants, and the courtroom problems of inherently political trials. Despite legitimate concerns in these areas, however, Saddam Hussein has received an appropriate and fair trial, both in light of the specific details of the judicial proceedings and in light of the political nature of war crimes justice in an anarchic system of states.

POLITICAL JUSTICE

War crimes justice is political justice. It is justice at the interface of law and politics. War crimes trials involve crimes committed for political reasons, by persons with political or military leadership roles or under their command, and the trials seek an outcome that is essentially political. Such outcomes include the removal of, or the establishment of particular kinds of, political order. Often, this outcome is achieved through the convenient individualization of guilt as a way of dealing with historical memory in situations where all the potential defendants, such as all Nazi or all Baathist leaders, cannot conceivably be put on trial, even though the destruction of their ideology or political order is what is sought by the trial. This establishment of guilt by proxy is unnecessary in domestic criminal trials, where the defendants are easily identifiable and their numbers manageable, but it is an essential component of political justice. War crimes trials deal with wider issues of societal order, while normal criminal trials address narrower questions of law and order within a

* The views expressed in this essay are the author's personal opinions.

generally agreed societal framework. For all these reasons, war crimes trials, which typically deal with situations involving multiple victims or *mass* atrocity, are fundamentally different from ordinary criminal trials in domestic legal systems.

The tribunals in which presumed war criminals are prosecuted have historically been established ad hoc. They are formed by the political decisions of a victor state or collection of victors in war (as in the case of the Nuremberg and Tokyo tribunals) or states acting through the political organs of multilateral international organizations, such as the United Nations Security Council (as with the tribunals for Rwanda and Yugoslavia). In all these cases the decisions are essentially driven by the wills of powerful states, and are often preceded by political debates. These debates, through which consensus is reached on the need for and the role of tribunals, are necessary because trying defeated leaders is essentially a political act. In contrast, no such controversies precede the trial of a serial killer or rapist in, say, the city of Denver, because by virtue of the sovereign powers vested in the Colorado and U.S. governments through their constitutions, the forums for such trials already exist and their jurisdiction is uncontested. The debates in such cases usually concern only the facts and whether guilt has been proved or not. In a war crimes trial, however, there are prior questions to be addressed: *should* the defendant be put on trial, and if so, *who* should try him? The impossibility of answering these questions without recourse to politics is one reason why, even in the case of the permanent International Criminal Court—a court established by willing states—roughly half of the world's countries have yet to sign on to its jurisdiction.

That war crimes trials such as those of Saddam Hussein are inherently political does not make them wrong. But it is important to understand them for what they truly are. The Nuremberg Trials of the Nazi leaders after World War II were undoubtedly morally justified by the horrendous nature of Nazi crimes, including the Holocaust. They were nonetheless political trials. It was the victors' justice, in which legalism was utilized by the Allied Powers to destroy Nazi ideology—by demonstrating to the German people and the wider world its chilling logical consequences—and to establish the foundation of a new political order in which Germany progressively became a liberal democracy.

The Tokyo trial of Class A Japanese war criminals served the same purpose. In an indication of its ultimately political motivation, General Douglas MacArthur, the American Supreme Commander for the Far East, decided to exempt Emperor Hirohito from prosecution since, it was believed, a trial of the

IRAQI OR FOREIGN JUSTICE?

The Iraqi Special Tribunal (IST) was established by a statute enacted by the Iraqi Governing Council on December 10, 2003. The Iraqi Governing Council was wholly comprised of Iraqis but was established by the Coalition Provisional Authority. The IST is thus an Iraqi war crimes court. To be sure, the fact of the occupation leaves the IST open to charges that it is Esau's hand but Jacob's voice. But it is nevertheless not quite the same as the Nuremberg and Tokyo tribunals, which were entirely foreign in their conception and composition. The Iraqi Governing Council was made up mainly of dissidents opposed to the regime of Saddam Hussein who are also legitimate political leaders of Iraqi communities. Here, a people were empowered by foreign assistance to put on trial a man many Iraqis wished to see prosecuted if they could have their way. Call it a "mixed" victors' justice, then.

At the time the IST was established, debate raged in international policy and human rights circles about the appropriate forum in which to prosecute Saddam Hussein—an international tribunal established by the United Nations, a "hybrid" national-international tribunal with local and international judges in the model of the Special Court for Sierra Leone, or a pure Iraqi tribunal.

The argument in favor of an international trial of Saddam Hussein was that it would guarantee the application of international human rights standards, including the exclusion of the death penalty. But this position does not satisfactorily answer the question, Whose justice is it, anyway? Justice for the Iraqis who were the victims of the crimes for which Saddam Hussein is on trial, or justice for the "international community," even if such a trial is disconnected from the reality of Iraqi society?

Justice, especially war crimes justice, must be credible and relevant to the society of the victims (who have rights too) if it is to effectively accomplish its punitive, restorative, and transformational goals. The whole point of prosecuting Saddam Hussein is to make the point to present and future generations of Iraqis that political and military power is not a license for mass murder. This is why the forum in which Saddam Hussein was ultimately put on trial—an Iraqi court, in Iraq, by Iraqis, and in Arabic—is by far the most appropriate one.

Saddam's crimes were committed predominantly against his own Iraqi people, although Kuwaitis and Iranians were also victims of Iraqi war crimes in the Gulf War in 1991 and the Iran-Iraq War in the 1980s. A trial of Saddam Hussein that

bypassed this critical audience, either through a choice of an alien forum or language, would have had little impact in Iraq. In contrast, the wider sectarian violence in that country notwithstanding, most Iraqis have followed the trial with interest and full comprehension. After all, as the British journalist John Simpson noted in his reporting on the trial, at the Baghdad University law school before the U.S.-led invasion, the statue of justice at the building's entrance was that of Saddam Hussein himself holding the scales! If the Iraqi ruler was thus defined as *justice* itself, one can only imagine the deep psychological impact on his own people of their former dictator's trial in a local context.

The lessons of the international war crimes tribunals established by the United Nations Security Council in the early 1990s to prosecute the architects of ethnic cleansing in the former Yugoslavia and genocide in Rwanda are clear. These courts, for reasons that appeared persuasive at the time, were established in countries distant from the societies where the crimes they are judging occurred. They are manned exclusively by foreign judges as a matter of policy. Thus, while Iraqis have been able to participate directly at a psychological level in the trial of Saddam Hussein, in Rwanda and the former Yugoslavia the victims of genocides were on the outside looking in at the trials at Arusha and The Hague—and not always comprehending it all.

These trials have generally focused far more on the rights of the defendants, which are certainly important, but have neglected those of the victims to restitution and courtroom participation in addition to retributive justice, largely because of the legal tradition—the common-law system of proceedings—that is dominant in those trials. This is not to argue that defendants' rights are not important. But, where their rights clearly trump those of the victims, as at Arusha and The Hague, the conception of justice embodied in the trial is skewed toward *process* at the expense of *outcomes*.

More than a decade of international war crimes trials later, the jury is in: these tribunals are out of touch with the societies for which they were ostensibly created, and their achievements and impact have been stunted by this fundamental disconnect. In striving for perfection—which invariably has not been attained—their proceedings became protracted to the point of near farce, as eloquently demonstrated by the four-year trial of Slobodan Milosevic at The Hague, which ended inconclusively with the defendant's death and no verdict in sight. There is surely something incomplete about international war crimes trials in which the rights of the defendant appear to be far more important than those of hundreds

of thousands of victims and survivors and become the sole yardstick for assessments of such trials.

The answer, then, is not to consistently seek international trials even when the circumstances call for alternative approaches, but instead to utilize, wherever possible, local justice that meets standards that can be objectively regarded as adequate. As U.S. President George Bush put it in relation to the trial of Saddam Hussein, such a trial should "withstand international scrutiny." The IST statute incorporates international humanitarian law in addition to Iraqi law. Clearly, despite difficult beginnings, the Iraqi tribunal has sought to conduct Saddam Hussein's trial in a manner that is credible without sacrificing its authentic Iraqi character, which is its only hope of long-term relevance in a country torn by fundamental divisions and sectarian violence stoked, ironically, by the invasion and occupation.

FAIR TRIAL RIGHTS

Saddam Hussein's rights have, for the most part, been respected in his trial. From the perspective of some international human rights observers, the most objectionable aspect of the trial is that Saddam will face the death penalty if convicted. This is a difficult issue to grapple with, as the death penalty is the subject of extensive philosophical debates that go well beyond the scope of this essay. The United Nations and several European and other states, consistent with evolving norms of international human rights, oppose capital punishment. All the UN-sanctioned war crimes tribunals exclude it from their penal universe. The U.S. government, on the contrary, favored its application in trials at the IST. It is an open question how the inclusion of the death penalty affects the assessment of the trial, for, while there are several valid arguments against capital punishment, it remains a sovereign choice exercised by several countries.

But perhaps the most important point is that, for Iraqis, this dilemma was nonexistent. For them, justice for Saddam Hussein *is* the death penalty upon conviction for the killing of 148 Iraqis in the village of Dujail in 1982 or the use of chemical weapons on Kurdish Iraqi citizens during the al-Anfal campaign in 1989, all crimes with which he has been charged. Without the death penalty a war crimes prosecution of Saddam Hussein would have no legitimacy in the eyes of Iraqis. This factor, among others, made the trial of Saddam Hussein by an Iraqi tribunal rather than an international one inevitable.

Another key issue is that international human rights standards require that the accused person in a criminal trial have the right to counsel. Saddam Hussein has exercised this right throughout his trial, though it appears to have been breached when, in the pretrial phase, he was arraigned before the IST without the benefit of legal assistance and representation. As is well known, three lawyers in Saddam Hussein's defense team have been assassinated in the context of the political and sectarian violence that has wracked Iraq. These assassinations are not the result of Iraqi government policy or even encouragement, however, but have more to do with the breakdown of order and random insecurity in the country. The government and the IST have a responsibility to offer effective protection to Saddam Hussein's defense team, but there is no evidence pointing to a lack of will on the tribunal's part to afford him the right to a defense. The trial process itself, including the appointment of defense lawyers by the court for the defendant following a sustained walkout by him and his defense team, bears out this conclusion.

The next factor to consider in assessing Saddam Hussein's trial is that of courtroom decorum and the extent to which judges can, or should, exercise control over the dynamics of courtroom proceedings. Putting ex-leaders on trial for war crimes is never a cakewalk. From Arusha, Tanzania, where Rwanda's ex-leaders have been on trial for the past decade, to The Hague, where Slobodan Milosevic ran rings around his trial, articulate and intelligent former leaders have sought to undermine the credibility of their trials. They have painted the proceedings as victors' justice, gone on hunger strikes, made rambling, lengthy speeches, and staged cacaphonous walkouts.

Thus, similar occurrences in the trial of Saddam Hussein—and the judges' efforts to restore discipline to the proceedings—are not unique. Dramatic television images notwithstanding, no objective observer can interpret the assertion of judicial control over such proceedings as a violation of the defendant's rights or a descent of the trial into a farce. Indeed, it is the responsibility of the presiding judge to ensure the right balance between the defendant's rights and the need for expeditious justice, for justice delayed is also justice denied. In this context, the trial of Saddam Hussein holds up better than that of Milosevic.

The standard of proof for convictions in war crimes trials is also pertinent. In the international war crimes tribunals at Arusha and The Hague, in which the common-law legal tradition is dominant, the standard used is proof beyond a reasonable doubt. In the Iraqi tribunal, under Iraqi law, it is proof to a standard

of "moral certainty." Despite the difference in wording, in practice there is little if any substantive difference. The Iraqi tribunal is modeled on the "inquisitorial" civil law system in which investigative judges prepare cases based on evidence, and thus have a much more active initial role than judges in the "adversarial" common-law tradition, in which the role of the defense counsel is much more robust while the judge appears more neutral. This is thus a matter of legal systems. There are several legal traditions and they are not illegitimate—or necessarily violate the defendant's rights—simply because we may be unfamiliar with them; this is a cultural problem rather than a legal one.

CONCLUSION

In conclusion, then, the trial of Saddam Hussein passes the test of fairness. The statute of the Iraqi Special Tribunal provides the necessary safeguards—a public trial, a right to counsel, a presumption of innocence of the accused, a right to confront witnesses, and the right of appeal. To be sure, the trial has not been perfect, but then war crimes trials never are. There is always room in a criminal trial—even in domestic trials, let alone international ones—for the wisdom of hindsight. It was a mistake, for example, not to have provided Saddam with the services of counsel before his pretrial arraignment, and greater effort should have been made to protect the judge and the defense lawyers who have been assassinated during the course of the trial. But, if we were to say that the political context of Saddam Hussein's trial or its genesis in his defeat in a war makes it illegitimate, we might as well conclude that all such trials, including those at Arusha and The Hague, which have also been criticized for their political selectivity in determining who is brought to trial for war crimes, are kangaroo courts.

To hold such a position would discount the objective reality of the crimes committed—and for which the victims demand justice. Saddam Hussein's trial is no exception. A wider contextual reality is that because, unlike in the domestic sphere, there is no overarching sovereign in the international society of states, war crimes trials are often either a product of political consensus among groups of states or a straightforward weapon of the strong against the weak. Often, they are both. But this is a truth that does not negate the crimes of tyrants such as Saddam Hussein, who also frequently happen to be rulers of weak states.

There lies the rub: Who will try the infractions committed by powerful states? For the foreseeable future, the internal democratic or judicial processes of

powerful states are best positioned to act as an effective check on arbitrariness. The decision of the United States Supreme Court in *Hamdan v. Rumsfeld*, ruling that the military commissions set up by the U.S. government to prosecute terrorist suspects are not authorized by law, and that the provisions of Common Article 3 of the Geneva Conventions relating to the treatment of prisoners of war apply to suspects captured in the war against terrorism, demonstrates this prospect.

This concluding point is pertinent because it brings us back to where we began—the nature of war crimes trials as political justice, in which power relations undeniably play a major role. There is simply no solution to this problem in the foreseeable future except the prospect of self-enforcement of humanitarian law by the domestic institutions of a great power. The point addresses, even if imperfectly because we live in an imperfect world, the central argument against the trial of Saddam Hussein—that his trial is "unfair" because he was ousted by a superior military power, or because he was not prosecuted before an international tribunal. As I have demonstrated, these are political, not legal, arguments. Some critics who make the point, however, deny the political nature of their argument, and interpret political or ideological positions as legal ones.

In contrast, I have sought to establish the objective point that, because all war crimes trials are political, the test of fairness in the trial of Saddam Hussein must factor in this inherent characteristic of such trials. Within that context, the real issues are those of whether the procedure utilized was a fair one (it generally has been) and whether the trial is also "fair" to the victimized individuals and society as well as to the defendant (it is, because Saddam Hussein is facing justice at home), and whether the guilt of Saddam Hussein for the grave crimes alleged against him is convincingly established.

Contributors

Allen Buchanan is Professor of Public Policy Studies and Philosophy at Duke University. His research is in political philosophy, with a focus on international issues, and bioethics, with a focus on the ethics of genetic interventions with human beings. He is the author of *Marx and Justice: The Radical Critique of Liberalism* (1982); *Ethics, Efficiency, and the Market* (1985); *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (1991); and *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (2003). He is also coauthor (with Dan W. Brock) of *Deciding for Others: The Ethics of Surrogate Decision Making* (1989) and (with Dan W. Brock, Norman Daniels, and Daniel Wikler) of *From Chance to Choice* (1999).

Martin S. Flaherty is Co-Director of the Crowley Program in International Human Rights and Leitner Family Professor of International Human Rights at Fordham Law School in New York City. He has taught at Princeton in the Program in Law and Public Affairs at the Woodrow Wilson School, as well as in China, Korea, and Northern Ireland. A former law clerk for Justice Byron R. White and Member of the Council on Foreign Relations, he has led or participated in human rights missions to Northern Ireland, Turkey, Hong Kong, Mexico, Malaysia, Kenya, and Romania. His writings on U.S. constitutional and foreign relations law, legal history, and international human rights have been published in such journals as the *Yale Law Journal*, *Columbia Law Review*, and *Michigan Law Review*.

Robert O. Keohane is Professor of International Affairs, Princeton University. He is the author of *After Hegemony: Cooperation and Discord in the World Political Economy* (1984) and *Power and Governance in a Partially Globalized World* (2002). He is the coauthor (with Joseph S. Nye) of *Power and Interdependence* (third edition, 2001), and (with Gary King and Sidney Verba) of *Designing Social Inquiry* (1994). He has served as the editor of the journal *International Organization* and as the president of the International Studies Association and the American Political Science Association. He is a member of the American Academy of Arts and Sciences and the National Academy of Sciences.

David Mellow is Instructor of Philosophy at the University of Calgary and writes in the area of applied ethics. In 2003, he completed his Ph.D. dissertation at the University of Calgary on just war theory, and he continues to write and publish on that topic. He is also currently exploring issues related to the topic of filial obligations.

Kingsley Chiedu Moghalu is the author of *Global Justice: The Politics of War Crimes Trials* (2006) and *Rwanda's Genocide: The Politics of Global Justice* (2005). He recently served as a member of the Redesign Panel on the United Nations Internal Justice System appointed by the secretary-general as part of the reform of the UN, and was Legal Advisor to the International Criminal Tribunal for Rwanda from 1997 to 2002. He has also worked for the United Nations in New York, Croatia, Cambodia, and Geneva, and his op-ed commentaries have been published in

the *International Herald Tribune*, *Washington Post*, and other publications. He holds a Ph.D. from the London School of Economics and Political Science, an M.A. from the Fletcher School of Law and Diplomacy at Tufts University, and the LL.B. from the University of Nigeria, Nsukka.

Gerhard Øverland is Postdoctoral Fellow at the Ethics Program at the University of Oslo and Visiting Scholar at the University of California, Berkeley. He specializes in moral and political philosophy and the ethics of war. His work has been published in the *Journal of Moral Philosophy*, *Public Affairs Quarterly*, and *Ethics*.

Miranda Sissons, an Australian, is Senior Associate and Head of Iraq Program at the International Center for Transitional Justice (ICTJ). She is a specialist in human rights and international humanitarian law (IHL) in the Middle East. Before joining the ICTJ, she worked as a researcher and consultant at Human Rights Watch; helped develop Arab civil society networks on the International Criminal Court; and served in the Australian diplomatic service. She has authored numerous publications on human rights and IHL issues in the Middle East and elsewhere. She holds a B.A. from Melbourne University and an M.A. in international relations from Yale University, where she was a Fulbright Scholar.