

Ace in the hole; Saddam Hussein is ours, but what are we going to do with him

Chicago Tribune, 21 December 2003

The capture of Saddam Hussein and the establishment of an Iraqi special tribunal to try major criminals of the Baath regime within the same week might have been just happy coincidence, but the State Department was ready nonetheless.

Since 2002, post-conflict justice has been part of the Department of State's Future of Iraq project. The Transitional Justice Working Group prepared a comprehensive plan in January, which was modified in April after consultations with governmental and non-governmental organizations. It became the basis of the Governing Council's Dec. 10 decree. Between January and April of this year, three options were pursued: a Security Council-established tribunal as in the cases of Yugoslavia and Rwanda, a mixed international/national model as in the case of Sierra Leone, and a national model with some international support.

Each option has its advantages and disadvantages.

The Security Council model would have had the greatest international legitimacy, yet it would have had few chances of being adopted by the Iraqi Governing Council because the UN had no function in administering Iraq. It also would be slow to rev up, be very costly (so far the Yugoslavia and Rwanda tribunals have cost almost \$1 billion), and would not include the death penalty that most Iraqis expect because it has been part of their criminal law since the 1920s.

The mixed model, which would have a strong international and local flavor, requires the existence of a provisional government to enter into an agreement with the UN, and so far there is no such government. The death penalty would, again, be an issue.

The national model with international support is the most viable one.

First, it symbolizes that the people of Iraq are assuming responsibility for their past and for their future. Second, it can be a strong foundation for a system of government based on the rule of law, and that is indispensable for democracy. Third, it would send a powerful message to Arab and Muslim leaders, and to their people, that impunity for repressive leaders is no longer guaranteed. Fourth, the priority right of the Iraqi people to try those who committed so many crimes against them would be respected.

But even with this system, some questions remain, and they fall into two categories. The first is whether the special tribunal can offer due process and guarantee fairness to the accused. The second is whether it has the capacity to effectively handle these types of prosecutions.

A fair trial is necessary not only for the accused but also for the legitimacy of the entire enterprise, particularly to obtain the desired outcomes of democracy and the rule of law.

The first set of questions is the easier one to answer.

Much depends on judges

The statute of the special tribunal provides for due process guarantees in addition to what the 1971 Iraqi Code of Criminal Procedure offers. Much, however, will depend on the choice of judges. There are many Iraqi and Arab jurists who are competent and impartial. The argument made by some that judges from other parts of the world are needed is unconvincing. Arab judges are as good as others.

The choice of judges, however, must avoid those with Baathist influence, as well as those with anti-Baath prejudices. Judges must also have the appropriate judicial temperament and needed competence. These requirements are indispensable, and this is not satisfactorily addressed in the current decree. A better formula for selection and appointment should be found.

The other concern is with the effectiveness of investigation, gathering of evidence and preparation of trials. The Iraqi justice system does not have the expertise and capability to

handle cases involving a massive amount of evidence. That was never developed under Hussein. But training can solve that problem, provided there is enough external support.

The U.S. already has agreed to provide \$75 million for the tribunal. It also has several databases of Iraqi documents and substantial analyses of events, which it can make available to the Iraqi prosecutors.

Expert personnel from outside Iraq can be hired to supplement Iraqi investigators and prosecutors.

The disadvantage of having the U.S. heavily involved in this process is that it would overshadow the national character of the tribunal and taint its independence.

This is probably the most valid argument for providing the tribunal with an international character, and that still can be accomplished.

There are ways to address these problems.

Do not put the tribunal into effect until the provisional government is established in June. The new government will have legitimacy, and it can make changes in the present statute. This includes giving the tribunal more international characteristics.

A new mechanism for the appointment of judges is needed. The current one, whereby the Governing Council appoints the judges, has political overtones and detracts from the independence of the judiciary.

The new provisional government should delegate that function to the Superior Council of Judges, which historically administered judicial matters, after its reconstitution.

Training needed

In the meantime, the Governing Council and the Coalition Provisional Authority should institute an intensive training program for prosecutors and investigators to prepare the staff and establish an evidence-collection center.

The evidence must be secured, perhaps by contracting with an international organization,

or with a consortium of non- governmental organizations. Witnesses need to be protected.

Whatever mechanism is selected, it must be closely monitored. The rules of the tribunal also must be established before it goes into operation.

Post-conflict justice is indispensable in Iraq, and the Iraqi people must be directly involved in it. It is they who first of all must feel that justice has been achieved. But that requires two additional mechanisms to prosecutions.

There has to be compensation for the victims, and there has to be a truth commission to record history. Trials are not the best way to do that, and whenever it has been attempted, the trials became politicized. A truth commission will also allow the trial of the major offenders to focus on specifics and move quickly, avoiding the political grandstanding of the accused.

The decree establishing the special tribunal is an important first step.

The Iraqis and the international community can reflect on it until June, and the provisional government can improve it.

In the meantime, much can be done, but we need a positive spirit of cooperation among Iraqis, the U.S. and the international community. This is too great an opportunity for the entire region to waste.