

Saddam in the dock: Who will judge him?

by [Douglas Cassel](#) in the [January 13, 2004](#) issue

A half century after the Nuremberg trials, the United Nations set up war crimes tribunals, in 1993 for Yugoslavia and in 1994 for Rwanda. Five years ago diplomats agreed to create a permanent International Criminal Court, inaugurated this year, for war crimes, genocide and crimes against humanity. And tribunals of international and national judges currently prosecute atrocities in Kosovo, East Timor and Sierra Leone, with another planned in Cambodia.

All this international experience, one might suppose, would be brought to bear in the trial of Saddam Hussein.

Yet Saddam will not be tried by an international court. His case illustrates the debilitating compromises built into the International Criminal Court. To soothe government fears, negotiators made the ICC forward-looking only; it can try only crimes committed after its treaty went into effect in July 2002. Most of Saddam's horrors were inflicted well before then.

Even Saddam's most recent crimes will escape the ICC. The negotiators agreed to permit the ICC to hear cases only by consent of the country where the crime is committed, or whose citizen is the accused, or on referral by the UN Security Council. The locus of Saddam's recent crimes is Iraq, which is also the country of his citizenship. So the ICC would need the consent of either Iraq or the UN Security Council.

It will get no such consent. Neither the current Iraqi Governing Council (a handpicked creature of the American occupiers) nor any future, legitimate Iraqi government will agree to surrender Saddam to the ICC. In part this is because of national pride, but also because many Iraqis demand that Saddam face the death penalty, which cannot be imposed by international courts, given the strong opposition to it by European and other nations.

Nor will the UN Security Council refer the case to the ICC. The Bush administration, which adamantly opposes the ICC for ideological and political reasons, would veto a referral.

Iraqi and U.S. opposition similarly blocks the UN from creating a special international or mixed tribunal for Iraq. No special UN court could impose the death penalty, and Washington is not about to hand over its prize catch to judges from countries it does not trust.

It is in any event not a good idea to try Saddam in The Hague. Experience with the Yugoslavia tribunal shows that transporting investigators and witnesses between Sarajevo and The Hague, and translating testimony and documents from Serbo-Croatian into the UN working languages of English and French, contribute to high costs and long delays. Moreover, a distant trial conducted by foreign judges through translation has added fuel to Serb suspicions of an international plot against them.

Saddam will be tried, then, by a national court, either American or Iraqi. The option of prosecuting him before an American court—most likely a military commission—has been put to rest, one hopes, by President Bush's statement that Saddam's fate will be decided by the Iraqis. Any conviction by American military officers (let alone in a trial by commission using shortcut procedures) would convert this mass murderer into a martyr in much of the Arab and Muslim world.

Can the Iraqis pull off a trial of Saddam that is both fair and seen to be fair? Anything less risks being seen not as justice but as revenge.

Shortly before Saddam's capture the Iraqi Governing Council, after secret consultations with its American patrons, published (in English) a statute to create an Iraqi Special Tribunal for war crimes, genocide and crimes against humanity, as well as certain crimes under Iraqi law.

The first problem with this tribunal is its paternity. A trial of Saddam before a court created by the occupiers or their agents will be widely written off as victor's justice. And this tribunal wears its paternity on its sleeve. Unlike nearly all criminal courts in the world, which have jurisdiction over crimes committed on their territories, this one is allowed to prosecute only crimes committed by Iraqis, regardless of where. In other words, its jurisdiction has been gerrymandered to make sure that its American sponsors cannot be brought before it. No final decision on the court or trial should be taken before next June, when a new, hopefully more legitimate Iraqi government is

due to be elected or otherwise chosen by the Iraqis.

Equally worrisome is the impartiality of the judges. The statute disqualifies all Iraqi judges who were members of the Ba'ath Party, even though many joined not because they were partisans of Saddam, but merely for professional advancement. With Ba'ath judges disqualified, the pool of potential Iraqi judges consists largely of victims—lawyers imprisoned, tortured or forced into exile by Saddam, or whose family members were victims. Such judges can hardly be deemed impartial.

One solution is to allow foreign judges on the court—that is, to create a “mixed” national and international court, albeit under Iraqi rather than UN sponsorship. The statute does allow the Governing Council to appoint international judges if it deems necessary. But it does not require that any be appointed, let alone that a minimum number sit on the five-judge trial chamber and nine-judge appeals chamber that will hear each case.

The trial of the butcher of Baghdad is too important—for justice, for history and for its repercussions in the region and in the struggle against terrorism—to botch. The investigation of Saddam's countless crimes can and should proceed apace. But if his trial is to be credible, it must be sponsored by a new, more legitimate Iraqi government, with assured and extensive international participation.