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Not the Court of First Resort

Many voices have been raised in the past week insisting that Saddam Hussein be tried by an international tribunal rather than a domestic one.

The argument is that the Iraqi judicial system just isn't up to the job. Leading human rights groups as well as a number of distinguished international judges say that only a U.N. tribunal can guarantee a genuinely fair trial and confer legitimacy on the proceedings.

Although its proponents may have the best of intentions, this position sounds remarkably paternalistic. It also reflects a model of international criminal justice that is strikingly at odds with the system created by the International Criminal Court (ICC).

Three days before Hussein's capture, the Iraqi Governing Council announced creation of a special tribunal to try members of the Baathist regime for a wide range of crimes under both international and Iraqi law. The statute that created this tribunal provides for extensive international assistance from lawyers, judges, forensic evidence specialists and investigators of all sorts. Under pressure from international human rights groups, the statute was further amended at the last minute to provide for the addition of foreign judges.

But even these provisions did not go far enough for various spokesmen of human rights groups here and in Europe. They insisted on a full-scale international tribunal. The question is, why? If the suspicion is that the tribunal will look like the puppet court of a puppet government, then the solution is to appoint a few foreign judges. In addition, the presence of foreign helpers and observers will guarantee plenty of publicity.

The deeper issue here is the fundamental presumption underlying the International Criminal Court: that the court of first resort for any perpetrators of genocide, crimes against humanity and serious and systematic war crimes should be the defendant's own country. It is a premise born of the belief that the first, best option for justice, healing and long-term political stability is for a people to try their own. Ideally, then, Chile should have tried Augusto Pinochet; Cambodia should have tried Pol Pot; Rwanda should have tried its perpetrators of genocide.

For this reason, the ICC statute provides that jurisdiction over any defendant accused of genocide, crimes against humanity or grave war crimes first goes to the courts of the defendant's own country. Only if that country proves "unable or unwilling to prosecute" is jurisdiction transferred to the ICC.

There is an alternative model, of course -- one in which the victors try the vanquished. This is certainly better than no trials, if it is done at all fairly, as it was at Nuremberg. But this

presumes, as Nuremberg did, that the defendants' principal crimes were against other nations. The Nazis were not tried for genocide and mass murder of the Jews, Slavs, Roma, homosexuals and political opponents of every stripe, but for crimes against peace.

To insist on an international tribunal in Iraq has two dangerous implications. One is that this really is about war on Iraq by the international community, most notably the United States. The second is that we may talk about Iraqi democracy, but we are not willing to let the Iraqis make their own inevitable mistakes -- as every other democratic country in the world has done on its path to self-government. We cannot really risk having their methods and their judgments differ from our own when our own are styled as an "international consensus."

One of the most powerful arguments for the International Criminal Court is not that it will be a global instrument of justice itself -- arresting and trying tyrants and torturers worldwide -- but that it will be a backstop and trigger for domestic forces for justice and democracy. By posing a choice -- either a nation tries its own or they will be tried in The Hague -- it strengthens the hand of domestic parties seeking such trials, allowing them to wrap themselves in a nationalist mantle. The dynamic in Serbia would have been very different, for instance, if parties seeking to bring Slobodan Milosevic to account had been able to argue that as the result of a treaty Serbia had signed, Serbs themselves would either try him or cede that power to an international tribunal.

Here we have a chance to strengthen the hand of the forces that opposed Saddam Hussein for decades. Saddam, after all, did not use regular courts and lawyers for his murderous campaign against all who opposed him even to the slightest degree. Many ordinary Iraqis were not directly tainted, and they are anxious to have their voice back.

Let them try. Let us help them. But let the Bush administration also reconsider the potential future value of the International Criminal Court.