



## The Eichmann Precedent

Hannah Arendt's *Eichmann in Jerusalem* explains why trying Saddam in Iraq could help that nation build its democracy.

By Leora Bilsky

THE BUSH ADMINISTRATION FAVORS a trial of Saddam Hussein in Iraq by the Iraqi people. Many Europeans and international human rights organizations prefer to judge him in an international tribunal. Because Europeans and Americans seem to concur about the contribution that the trial can make to nation-building and the transition to democracy in Iraq, their disagreement about the trial's location is seen as an extension of their dispute about whether the war should have been started. But it is really a principled disagreement about a democracy's source of legitimacy.

Europeans argue that only an international body can accord Saddam the guarantees of a fair trial. They believe that such a trial could help promote democracy in Iraq by exposing the country to international precedents and legal rules. Americans, on the other hand, believe that democracy requires self-rule. Within this framework, they say, a judgment on Saddam by his own people is a crucial step, even if a trial may compromise the defendant's rights.

To see which argument is stronger, it helps to go back to the trial of Adolf Eichmann, and the reflections on it by the political philosopher Hannah Arendt.

DURING WORLD WAR II, EICHMANN

was in charge of the Nazi security police's Jewish Department. It was his job to oversee the transfer of Jews from the countries annexed and conquered by the Nazis and from Germany itself to concentration and extermination camps in the East. In this role, he was responsible for the deaths of millions. After the war, he escaped from



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Germany under a false identity, but he was captured in Argentina by Israeli agents in 1960. An ardent debate arose about Israel's right and ability to judge Eichmann on behalf of the victims.

Arendt, a German Jew, was living in France when World War II broke out. Interned in southern France along with other stateless Germans in 1940, she escaped and reached America in 1941. She made her name in 1951 with *The Origins of Totalitarianism*, the first thorough

account of the historical and philosophical origins of the totalitarian state, one that drew parallels between Nazi Germany and Stalinist Russia.

In 1961, Arendt was sent by *The New Yorker* to cover the Eichmann trial in Jerusalem. Her reports, which harshly criticized the Israeli prosecution, were later published in revised and expanded form in the book *Eichmann in Jerusalem*. She disagreed especially with the decision to cast the trial's spotlight on the Jewish Holocaust and its victims. Arendt believed that, instead of employing a category created by Israeli law, "crimes against the Jewish people," the prosecution should have based its case on the category of "crimes against humanity."

Arendt didn't doubt the wisdom of using a legal process against Eichmann or the right of Israel to judge him. In her correspondence with the philosopher Karl

Jaspers, she wrote that the law was the best tool available "to judge and pass sentence on something that cannot even be adequately represented either in legal terms or in political terms." Though the crimes were committed in Europe, Arendt accepted the jurisdiction of Israel's court. The Nazis' attempt to eradicate the Jewish people justified a trial of Eichmann by a tribunal from the victims' new political community.

But Arendt's critique of the Israeli court reflected

a liberal suspicion about political trials ("show trials," she called them) and about dealing with political questions through legal proceedings. Even when a trial is necessary to restore the rule of law after a period of lawlessness, as the Nuremberg trials did following the Nazi reign, there is always the danger, Arendt worried, that a trial will mythologize the horrible. In Eichmann's case, this could keep the world from facing up to the broad challenges posed by totalitarian states.

In addition, the focus on the Holocaust carried severe dangers for the Israeli political system. Instead of promoting pluralistic politics, it divided the world between Jews and others. In particular, by emphasizing the ties between Nazi leaders and the Palestinian leader Haj Amin al-Husseini, the mufti of Jerusalem between World War I and II, the Eichmann trial linked the Holocaust and the Israeli-Palestinian conflict. Whereas international jurists worried about the damaging precedent the trial might set for international law, Arendt was more concerned about its effects on Israel's young democracy.

THERE ARE TWO IMPORTANT DIFFERENCES between the Eichmann and Saddam cases, each of which helps the case

would be likely to turn the proceedings into a trial over the American invasion into Iraq and to claim that he was being subjected to victor's justice, as former Yugoslavian leader Slobodan Milosevic has done in his war crimes trial in The Hague.

The second difference is that the dangers facing Iraq today are more profound than the ones that confronted Israeli society during the Eichmann trial. It was held 13 years after the establishment of Israel, within a functioning legal system. By contrast, the trial of Saddam will constitute an important step in rebuilding the political and legal systems of Iraq.

This makes it clear that trying Saddam in Iraq holds risks. Using the trial to recount the bloody history of his regime could be divisive, especially if he vilifies

## Giving Saddam the chance to defend himself in a fair legal proceeding may make his trial an effective symbol of the return of the rule of law to Iraq.

for trying Saddam in Iraq. First, although Eichmann was responsible for the "final solution" of the Jewish problem in Europe, he was an administrator, not a political leader like Saddam. Eichmann's crimes were carried out against Jews throughout Europe while Saddam's were largely committed against Iraqis in Iraq. As much as Saddam is hated by Iraqis, his crimes are also a blow to national pride. Given the additional support Saddam has in other pockets of the Arab world, he might attempt to turn the proceedings into a "show trial," using it as a platform for his political defense. Eichmann, by contrast, chose to hide behind his role as an administrator, raising the legalistic defense that he was simply obeying superiors' orders. Saddam doesn't have that option.

Bringing the trial of Saddam to an international tribunal, as Europeans prefer, might allow prosecutors to offer a strong legal case focusing on Saddam's infringements of international law in his wars against Kuwait and Iran. Yet this direction would open the door wider for Saddam. He

Iraqi groups as part of his defense. The court could minimize the chances of that happening by appointing non-Iraqi judges to serve with Iraqis in judging Saddam, which would make particular sense if he is tried for crimes against humanity. Iraqi society needs to take account of Saddam's crimes against his people, but the risks described above could be limited if the court took a more legalistic approach, not allowing historical digressions by the prosecution or the defense, for example.

Politics however, cannot be kept out of the trial without abandoning some fundamentals of the rule of law, like allowing the defendant to cross-examine witnesses for the prosecution. The challenge is to choose where to draw the line between rights of the defendant and of his victims. How much digression from strict procedure should the court allow in accommodating victims of Saddam and the new Iraqi government? A line drawn by an international court might make for a constructive legal proceeding, but it would have little to contribute to democracy in

Iraq. The people in Iraq must draw their own line. Using the trial to demythologize Saddam by treating him like any other criminal—and allowing the judgment against him to remain in doubt until the trial's completion—might, paradoxically, be the best way to promote a politics of restraint and enhance democracy in Iraq.

Last would come the question of how to punish Saddam, if he is found guilty. Iraqi law from the Saddam era allows the death penalty, and the country's longtime tyrant seems to deserve that sentence. On the other hand, the trial of Saddam also presents an opportunity to turn away from violence. Human rights organizations contend that only an international tribunal that forbids the death penalty can contribute to the transition to democracy in Iraq and the return of the rule of law.

Here, too, the Eichmann precedent offers perspective. At the time of his trial, strong opposition to the death penalty was voiced both within and beyond Israel. Many people argued that no punishment was adequate for Eichmann's crimes, and others feared that the moral superiority created by giving him a trial would be lost by imposing the death penalty. Neither the Israeli court nor the country's political authorities were impressed by these arguments. Eichmann drew the death penalty, but imposing it on him had an unexpected mitigating affect. The penalty is forever tied in Israeli memory to him as the ultimate Other. In a country that has since suffered from relentless waves of terror and that has tried and punished many terrorists, the court and the political authorities have yet to give a death sentence in a case that didn't involve the Holocaust.

Saddam's ultimate punishment remains to be seen. But giving Saddam the chance to defend himself in a fair legal proceeding may make his trial a particularly effective symbol of the return of the rule of law to Iraq. ■

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