THE CHOICE: JUSTICE OR REVENGE, POPULARITY OR PRINCIPLE

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The capture of Saddam Hussein marks a potentially decisive turning point in the War in Iraq. How decisive that proves to be and whether it turns out to be for good or ill will depend on the decisions that will be taken by the UK and U.S. governments in the next few days and weeks. The real issue is – what is to be done with Saddam Hussein? As the initial euphoria and (particularly U.S.) triumphalism subsides it will quickly become apparent that this turn of events presents as many problems as opportunities.

As a captured prisoner of war, Saddam as with any one else is entitled to certain minimum rights. These minimum rights are set out in the Geneva Conventions for the Protection of War Victims 1949, created in the immediate aftermath of world war two. The Conventions were designed to ensure precisely what the title suggests – that prisoners of War were treated with a minimum level of decency and respect, consistent with the basic values of civilised democracies. Indeed they went beyond that in trying to learn the lessons of history to ensure that a level playing field of basic rights were enforced regardless of who was victor or vanquished. A prisoner, even one as evil as Saddam Hussein, is entitled to these rights – indeed it is the adherence to such principles that helps to separate us from the Saddam Hussein's of this world.

Amongst the rights that are triggered by this situation are: the right against violence to life or person, in particular….mutilation, cruel treatment and torture (Article 3(1)(a); outrages upon personal dignity, in particular, humiliating and degrading treatment(A.3(1)(c)) and the right to be treated humanely regardless of race, colour, religion or faith, sex, birth or wealth (A. 3(1)). They extend to the right to basic health care (A.13) and rights to proper legal representation and trial (A.99 and 105). Some of these rights have already come into issue. For example the dissemination of video footage and photographs of Saddam is potentially in breach of A. 3(1)(c). However a counter argument that could justify it would be that the security situation is so precarious that unequivocally establishing that he had been caught would help to improve and stabilise it.

As ever in the aftermath of war the way in which these issues are decided will be determined by political as much as legal considerations. The overriding concern is how and where is Saddam going to be kept and tried? Is he to be transferred from the dark hole in Tikrit where he was found to the darker hole of Guantanomo Bay, beyond the reach of international law, international scrutiny and in breach of domestic and international rights? Will he have access to proper health care and independent legal representation or will he be subjected to the torture and inhumane and degrading

treatment to which the G-bay detainees are alleged to have been subjected? Will this be done in an open and transparent way with access given to independent international observers to establish what the true picture is or is this whole process to be carried out in a cloak and dagger way behind the barbed wire fencing of G – bay?

Most important of all is the question where is he to be tried and before what kind of tribunal of justice? The tribunals set up in the aftermath of world war two (Nuremburg), the war in the former Yugoslavia (ICTY) and the war in Rwanda (ICTR), provide instructive examples. There are some clear principles which have emerged. The tribunals must be just and seen to be just. This means that they must be seen as impartial and independent. To ensure this they should be under the direction of the United Nations rather than the occupying powers. There must be proper access to adequate legal representation and a proper level of equality of arms between the prosecution and defence in terms of the resources available in preparation of the case. The pool of lawyers should be suitably representative of the international community and most important of all the judges must also be suitably representative. In the ICTY for example Judges who have presided in cases have come from as far apart as China, Canada, Malaysia, South Africa, the U.K. and the U.S. Any appeals from the judges at trial are considered by fellow judges at appeal level and NOT by politicians as is the case for the military tribunals in Guantanomo Bay, where the final court of appeal is George Bush himself, who has already condemned the detainees as illegal combatants and evil men before the first trial has even begun! Last and by no means least, media reporting of any proceedings must be done in an open and transparent way free of any restrictions and avoid the farce of the military tribunals in G-bay where the tribunals have the power to restrict any and all reporting and access by the press and international observers. If this process is to be truly an exercise in international justice rather than the kangaroo form of justice proposed in G-bay, then these basic principles have to be adhered to.

There are therefore three clear options available. Firstly he could be tried in Iraq before a tribunal established either by the occupying powers or the Interim Governing Council. The draw back to this option is the impression that will be created that this is more to do with victor's revenge rather than international justice, particularly if the judges were drawn exclusively from the U.S., U.K. and Iraqis chosen by the occupying powers. It also presents very real problems in terms of security implications: how can any trial be conducted in Iraq involving Saddam with any degree of safety whilst Iraq remains effectively a war zone – such a tribunal would be a prime target for a plethora of terror groups and greatly delay the point at which ordinary Iraqi people can enjoy the political, social and economic stability that we take for granted.

The second option would be to set up an independent tribunal in a neutral third country and place the whole process under the direction of the United Nations as was the case with the ICTY in the Hague. This has all the advantages detailed above, including ensuring that the process is seen to be impartial, independent and suitably international. It would go a long way towards mending fences with those countries such as France and Germany who opposed the war and restoring the credibility and

reputation of the U.S. and U.K. with the international community as well as re – establishing the battered authority of the U.N.

The final option would be to refer the case to the newly established International Criminal Court. This could only be done in one of two ways: either the U.S. would have to hand Saddam over to the U.K. or the U.N. Security Council would have to refer the case to the ICC. The U.S. of course has not ratified the ICC and therefore has no right to refer cases itself, which is why it would have to refer the matter to the U.K. or the U.N. However this option presents a number of practical difficulties. Firstly the ICC can only deal with cases that involve crimes committed after 1st April 2002. This would therefore greatly limit what Saddam could be tried for. The reality is that the potential charges of crimes against humanity cover a period of well over two decades, including systematic torture and killing of his own people, the gassing of the Kurds in 1988, the Iran – Iraq war in the mid 1980s and the first Gulf War 1991 -1992. None of this could be addressed by the ICC. Perhaps what would be more decisive in dismissing this as a viable option is the inherent scepticism and hostility of the U.S. towards the ICC. It would be an act of political wisdom as much as legal necessity to ensure that the model adopted was as transparent as possible and consistent with the norms of international justice, if peace is to be secured, progress made in the Middle East and if the so called war against terrorism is to retain any semblance of legitimacy.

Any such trial is also likely to cause further acute embarrassment to the U.K. and U.S. Saddam is likely to use the platform of a trial to embarrass the west , (just as Milosevic has done at the ICTY), over the covert military assistance provided particularly by the U.K. and U.S. to Saddam over the years.

The process of trying to resolve the thorny issue of what is to be done with Saddam is likely to cause deep divisions between the way we approach our international duties and responsibilities and the way the U.S. does – it is the truth that dare not speak its name in the Blair-Bush relationship. The time of political reckoning has arrived for the Prime Minister: a choice between justice or revenge, popularity with his best friend George or adherence to international principles of the rule of law. How this issue is resolved will reveal whether or not Mr Blair is the equal partner that he claims or the poodle that everyone suspects that he is. The justification for going to war in the first place has now been all but completely undermined by the failure to find WMD and with it Mr Blair's reputation for probity and straight dealing almost fatally damaged. If we cannot revert at this late stage to basic democratic values of dignity, decency, principle and justice, then what on earth was the war in Iraq fought for?