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RECENT BOOKS ON INTERNATIONAL LAW: BOOK REVIEW: ENEMY OF THE STATE: THE TRIAL AND EXECUTION OF SADDAM HUSSEIN

By Michael A. Newton and Michael P. Scharf. New York: St. Martin's, 2008. Pp. x, 305. Index. $ 26.95.

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[*396] In *Enemy of the State*, Michael Newton and Michael Scharf have gone a long way toward capturing the challenges, the aspirations, and the shortcomings of the trial of Saddam Hussein. Newton, a professor at Vanderbilt University Law School, and Scharf, a professor at Case Western Reserve University Law School, have written a book that fills an important gap in the literature by recording the key daily events in the trial and by assessing the underlying legal issues. Their book stands as the first credible attempt to record the trial's history.

The book opens its discussion of the trial with a brief discussion of the invasion of Iraq and the efforts thereafter to capture Hussein. It describes his capture through the eyes of Michael Newton, who was in Baghdad conducting several weeks of training for the Iraqis who had been identified as [*397] possible judges for war crimes trials. He describes the Iraqi jubilation that resulted from Ambassador L. Paul Bremer's announcement of the

capture and from the video of U.S. military doctors examining Hussein. Use of this video was debated, both before and after the fact, by U.S. government lawyers who wanted to ensure that Hussein, who was presumed to be a prisoner of war, [1] was treated consistent with the Geneva Conventions, which require among other things that prisoners be protected, particularly against "insults and public curiosity." [2] The book then offers a brief accounting of the Baathist tyranny that Hussein managed, including his reaction to the assassination attempt against him in Dujail on July 8, 1982. Hussein's retribution against the town and people of Dujail, orchestrated by seven of his deputies, became the central crime prosecuted in the first trial before the Iraqi High Tribunal.

The third chapter details the negotiations that led to the formation of the Iraqi Special Tribunal pursuant to a statute promulgated by the Iraqi Governing Council, an Iraqi body formed during the occupation. The chapter discusses the various decisions that led ultimately to a hybrid court, an Iraqi court rooted in Iraqi law but also drawing upon international law and able to draw upon international judges. The court was renamed the Iraqi High Criminal Court (or more commonly the Iraqi High Tribunal) when the Iraqi parliament enacted a new statute for the court. The chapter also pays appropriate tribute to Iraq's proud legal traditions, which date back to the Babylonian king, Hammurabi, who promulgated one of the early comprehensive legal codes. The fourth chapter sets the stage for the Dujail trial and highlights the training that the authors provided to the judges selected for the Tribunal.

The largest part of the book (chapters 5 through 8) catalogs and analyzes the trial, the subsequent appeal, and the execution of Hussein. From their vantage point and through interviews with individuals present throughout the trial, the authors describe in detail the daily developments of the trial. They offer insights about the apparent strategies of the prosecution, Hussein and his henchman, and the various defense attorneys (those chosen by the defendants and those appointed by the court). They also record the key decisions by the judges and the political players around them. The authors were well positioned to critique the decisions made from the bench. In doing so, they convey a significant amount of information regarding the precedents in international criminal law from the days of Nuremberg to the trials of Rwandan and Yugoslavian officials.

Indeed, these portions of the book provide a critical record of trial events in an easily accessible and understandable format. Hussein's trial lasted approximately forty days, spread over a period of roughly thirteen months. Although intense media coverage attached to each and every trial day, it tended to be skewed toward theatrical and melodramatic moments, as opposed to presenting the facts and legal issues pertaining to the crimes charged. For example, on the sixth day of trial, the court heard hours of graphic testimony from various witnesses who had been brutally tortured by Hussein's regime. At the conclusion of this testimony, Hussein alleged to the presiding judge that his American captors had tortured him. Immediately, the press leapt from their seats and inundated the world with stories about Hussein's allegations of torture against the United States, with hardly a reference to the hours of testimony that had occurred earlier that day.

In an effort to fill the gaps left by the media, Newton and Scharf break down each trial day

with a summary of key factual, legal, and political developments. Although various trial-day summaries discuss the histrionics that occurred throughout the trial, the authors credibly balance such material with a proper accounting of the trial's important substantive moments. This record alone makes [*398] *Enemy of the* State a worthy contribution to the literature; previously, the only summary was a perfunctory timeline that the British Broadcasting Corporation prepared shortly after the Dujail trial ended. [3]

That said, it is important to note that the factual record adduced in this portion of the book is divorced slightly from the legal context in which it arose. A more detailed description of the Tribunal's civil law grounding would have given readers trained in the common law a deeper understanding of certain trial nuances. Indeed, unlike the Anglo-American adversarial system, in which "truth" is derived by opposing parties delivering arguments and interpretations about evidence to a neutral fact finder--specifically, lay people untutored in law--the civil law system is built on the notion that expert judges resolve disputed issues of law and fact, and render determinations of guilt or innocence. [4] To that end, civil law judges are not referees between the prosecution and defense. They are "truth seekers" with years of specialized training, who are presumed to understand how to gather and weigh evidence such that a just result is obtained.

Accordingly, consistent with Iraqi law, Tribunal investigative judges filled many roles similar to common law prosecutors and defense counsel in that these judges gathered and compiled all of the evidence into an investigative dossier. [5] The actual trial began when the investigative judges passed the dossier to the Dujail trial chamber, comprising five independent trial chamber judges. [6]

Because the trial judges operated as fact finders and were presumed (as professionally trained "truth seekers") to have a better capacity than a lay jury to discern fact from fiction, Iraqi law permitted them to rely upon any evidentiary item contained in the investigative dossier--regardless of whether it was tested through cross-examination at trial. [7] Likewise, the Iraqi civil code provided the trial judges with broad powers to receive probative evidence from the parties at trial (either documentary or witness testimony) even if this evidence was not disclosed during earlier portions of the trial or even included in the dossier. [8] As a result, during the Dujail trial, both the prosecution and defense introduced documents, videos, witnesses, and other material that had not been previously disclosed.

Similarly, Iraq's Law on Criminal Proceedings permitted prosecutors, civil plaintiffs, defense counsel, and even the defendants themselves to question witnesses. [9] Although paragraph 168(B) of Iraq's Law on Criminal Proceedings required that trial participants pose questions to witnesses through the Tribunal itself, the trial judges usually refrained from enforcing this rule and permitted the litigants to question the witnesses directly. Unfortunately, Hussein repeatedly used the Tribunal's leniency with respect to this rule to hijack portions of his trial with political speeches.

Enemy of the State buttresses its comprehensive factual recitation of what occurred at trial with a cogent understanding and explanation of how the Tribunal fits within the continuum of other war crimes trials. More specifically, the Tribunal represents a recent trend in which

states that suffered from the horrors of war crimes, crimes against humanity, and genocide try the perpetrators of these crimes on their own soil. For instance, under [*399] Article 17 of the Rome Statute of the International Criminal Court, the ICC may exercise jurisdiction over a particular crime only if a state having primary jurisdiction proves "unwilling or unable" to conduct an investigation into the crime at issue. Likewise, with the work of the International Criminal Tribunal for the Former Yugoslavia set to conclude, the ICTY has referred multiple cases to the successor states of the Socialist Federation of Republic of Yugoslavia. The International Criminal Tribunal for Rwanda has also attempted to refer cases back to Rwanda for domestic adjudication, but legal challenges (to date) have prevented that from happening.

Though they acknowledge this recent trend, Scharf and Newton start at the beginning: Nuremberg. They outline many of the challenges that the organizers of previous war crimes trials faced, including how to structure the trials in a manner that promoted ethnic reconciliation while also ensuring that they credibly documented the horrors of a regime's crimes. The authors then describe how myths about the Nuremberg trials may have wrongly influenced American decision makers to establish the Iraqi Tribunal. Indeed, Newton and Scharf pointedly rebut criticisms regarding the public's perception about the fairness of Hussein's trial by noting that the Nuremberg trials were also widely discredited in Germany and abroad in the 1950s. In addition, Newton and Scharf balance criticisms that the trial did little to discredit Hussein--and instead created a platform for Hussein to boost his popularity among Iraqi insurgents and pan-Arab socialists--by observing that Slobodan Milosevic's popularity increased markedly during his ICTY trial. The authors go on to compare the overtly sectarian manner in which Hussein was executed with the debacle that ensued when Herman Goring cheated the hangman's noose by ingesting cyanide.

Interestingly, Newton and Scharf see these historical facts as supporting their position that the Dujail trial, although flawed like its predecessors, "earned a place in history" (p. 218) and established various important precedents, including its decision to hold Hussein and others accountable for the crime against humanity of "other inhumane acts . . . intentionally causing great suffering, or serious injury to body or to mental or physical health." The Tribunal's conviction of Hussein for this crime rested upon his decision to destroy Dujail's infrastructure, orchards, and date palms in order to punish the citizens of Dujail for the failed 1982 assassination attempt there.

This holding is significant because extensive destruction of property (when occurring as part of a widespread or systematic attack against a civilian population) was previously penalized only under the enumerated act of persecution. By holding Hussein accountable for this crime under the crime against humanity of "other inhumane acts," the Tribunal circumvented the heightened *mens rea* requirement that would have attached had it charged these acts as the crime against humanity of persecution. This new, different charge was important since Hussein perpetrated this act with the intent to punish the citizens of Dujail and not merely to discriminate against them on racial, religious, or political grounds.

In addition, the Tribunal's detailed holdings with regard to whether Hussein's punishment was ex post facto were important because the Tribunal was able to tie each and every

enumerated crime against humanity, as charged against each particular defendant, to its mirror crime set forth in Iraq's Penal Code. By pointing out that each defendant in the Dujail case would have suffered liability for similar crimes under domestic Iraqi law, the Tribunal was able to demonstrate that the defendants were aware or should have been aware of the criminality of their acts at the time that the crimes were perpetrated. The Tribunal thereby avoided any issues with respect to *nullum crimen sine lege*.

That being said, further examination of some of these issues may be warranted. For example, consider Newton and Scharf's discussion of the Tribunal's decision addressing its own "legality." They describe the opinion's references to UN Security Council Resolutions 1483 and 1511, which emphasized the importance of accountability for crimes committed by the previous regime, and acknowledged the role of the Iraqi Governing Council during the occupation of Iraq. They aptly conclude that the "legality portion of the Dujail judgment is an important example of modern state [*400] practice that will guide future postconflict occupations," noting that the opinion "reinforces the premise that the law of occupation should not be interpreted to doggedly elevate the provisions of prior-existing domestic law and the structure of domestic institutions above the pursuit of justice" (p. 177). Their discussion may understate, however, the somewhat elliptical nature of the Tribunal's legal foundation.

The Coalition Provisional Authority (CPA) issued an order on December 10, 2003, authorizing the Iraqi Governing Council to promulgate a statute establishing an Iraqi Special Tribunal to "try Iraqi nationals or residents of Iraq accused of genocide, crimes against humanity, war crimes or violations of certain Iraqi laws." [10] In that order, the CPA administrator noted that he was acting pursuant to his authority under the laws and usages of war and consistent with the relevant UN Security Council resolutions, including 1483, 1500, and 1511. [11] The CPA cited the language of Resolution 1483, in particular, which "affirm[ed] the need for accountability for crimes and atrocities committed by the previous Iraqi regime," and acknowledged that the Governing Council had expressed a "desire to establish a Special Tribunal to try members of the Ba'athist regime accused of atrocities and war crimes." [12]

Given that the law of war discourages radical changes to the occupied country's laws, the CPA perceived that much of its authority to make changes to Iraqi law resided in Resolution 1483. In particular, the CPA focused on the language instructing the secretary-general's special representative to work with the CPA, the Iraqi people, and others to "advance efforts to restore and establish national and local institutions for representative governance, including by working together to facilitate a process leading to an international recognized, representative government of Iraq." However, that language was directed at the special representative as the primary actor, [13] and CPA consultation with the special representative was limited. [14] The CPA effectively inverted the paragraph by taking the lead in these efforts. In addition, that particular paragraph of Resolution 1483 did not include a "decision" of the Security Council--only a request--and therefore could arguably not benefit from the Chapter VII authority invoked in the resolution.

Nonetheless, as documented by the authors and others, [15] Iraqis played a central role in

fashioning the Tribunal's first statute and would subsequently ratify the acts of the CPA and the Governing Council. That council adopted a provision in the interim constitution (formally called the Law of Administration for the State of Iraq for the Transitional Period) that carried forward the CPA orders. [16] In addition, following the occupation, [*401] the Iraqi elected parliament adopted a very similar statute, and subsequently the Iraqi people adopted by constitutional referendum a constitution authorizing the Iraqi High Tribunal to continue its work. [17] As a result, there should be no doubt as to the Tribunal's legitimacy.

As *Enemy of the State* draws to a close, Newton and Scharf weigh the fundamental fairness of the trial. They rightly establish "fairness" as the standard by pointing to the oft-used Supreme Court conclusion that a "defendant is not guaranteed a perfect trial, just a fair one." [18] They assess the evidence, highlighting the government documents and Hussein's testimony, including his own devastating declaration that "Saddam was a leader and says, 'I'm responsible'" (p. 142). They conclude that even an American court would have dismissed the Tribunal's "alleged judicial blunders" as "harmless error" (p. 226). They argue persuasively that "'different' does not always mean inferior" (p. 227). Nevertheless, their conclusion concerning the Tribunal's fundamental fairness does not quite square with their analysis of how the trial was politicized.

Newton and Scharf describe many of the political tides that washed over the Tribunal, emanating from both the Iraqis and the Americans. On the Iraqi side, they describe how the first presiding judge, Rizgar Mohammed Amin, resigned for "administrative reasons" and was replaced by another judge, Ra'ouf Abdul Rahman. The authors list the various reported explanations for Judge Rizgar's resignation and then conclude rightly that "whatever the reason, this changing of the guard midway through the trial further eroded the international perception of the [Tribunal's] legitimacy" (p. 128).

The authors also mention in passing the rumors that one of the Tribunal's five judges hearing the Hussein case was replaced during their deliberations "in order to achieve a more severe sentence for the defendants." At least one news report and a law review article appear to confirm that Iraqi officials threatened the judge with the loss of his job, pension, and secure housing due to allegations that he had been" 'relatively soft' during deliberations on the verdicts and sentences for the eight Dujail defendants and was leaning against a death sentence for Mr. Hussein." [19] If true, this overt political interference with the court's deliberations regarding the guilt or innocence of the defendants would seemingly strongly affect any conclusion regarding the Dujail trial's fundamental fairness.

In describing the rush to an appellate conclusion and Hussein's execution, the authors suggest that the short appellate decision (eighteen pages, a stark contrast to the trial chamber's 298-page decision) might "have been a product of a desire to reach a speedy outcome, or it might merely have reflected the swift agreement of the judges on the legal issues that they confronted" (p. 194). Yet, they do not offer a convincing analysis as to which of these two possibilities most likely explained the rapid appeal and execution of Hussein. Looking at the proceedings as a whole, it seems reasonable to infer that the Iraqi government engaged in a concerted effort to intrude on the constitutional and legal protections built into the Tribunal and the Iraqi legal system.

Even so, the Iraqis were not alone in having political ambitions involving the Tribunal. Newton and Scharf note that the Americans favored holding Hussein's trial first because, in part, a "trial that highlighted the terrible things Hussein had done would help legitimize the controversial 2003 invasion, especially since no weapons of mass destruction had been discovered in the months since" (p. 209). In fact, some U.S. officials placed great emphasis on commencing the trial as soon as [*402] possible, sometimes without regard to the quality of the proceedings that would ensue. While in Baghdad in February 2004, then Deputy Secretary of Defense Paul Wolfowitz questioned other U.S. officials about the trial preparations, wondering whether the United States was being too fastidious and thinking about the situation too much like a trial attorney. He also questioned the need for a forensics team, noting that from a public information point of view, such a team was not needed.

In a similar vein, Newton and Scharf recount the Tribunal's decision to issue a verdict against Hussein and his codefendants on November 5 without a written decision. They note that pundits "speculated that the trial chamber had prematurely announced its verdict before the opinion was ready as a favor to President Bush in order to give his Republican Party a triumph with respect to its Iraq policy two days before scheduled U.S. congressional elections" (p. 172). The written decision followed about two weeks later, on November 22. While attributing this unusual sequencing to the Tribunal's public commitment to issue a decision on November 5--instead of to politics--the authors observe that the sequencing "provided great fodder for conspiracy theorists."

The end result of the Newton and Scharf's efforts is clear. They have assembled the most definitive and authoritative account of the Dujail trial yet available. By providing comprehensive timelines and summaries of each trial day, with accompanying legal and factual commentaries that place the Dujail trial in its proper historical context, *Enemy of the State* should serve as a starting point for any serious scholar or practitioner who wishes to understand the goals, aspirations, and failures of that trial. Their assessment of the political dynamics that potentially threatened to undermine the trial was not reconciled, however, with their final conclusions about the trial. In this context, we should note that the historical record continues to unfold. As more and more is known, as scholars gain better perspective on this period, and when events on the ground in Iraq become more settled (which may not be for many years), one will be in a better position to assess the importance, fairness, and impact of the Dujail trial on Iraq and world affairs. In the meantime, *Enemy of the State* is the benchmark by which other accounts of the trial should be measured.