

# Note from the Field

## Legal Cultures Clash in Iraq

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As 2003 dawned, the United States had not occupied an enemy nation in over fifty years.<sup>2</sup> On 20 March 2003, U.S. and British troops (Coalition) crossed the border into Iraq in a drive to remove the regime of Saddam Hussein from power.<sup>3</sup> In early April 2003, while the Coalition noose tightened on Baghdad,<sup>4</sup> U.S. Army judge advocates (JAs) from civil affairs units crossed into southern Iraq to evaluate and restore the Iraqi judicial system.<sup>5</sup>

The situation that the civil affairs attorneys found in southern Iraq was a landscape of smoldering and looted courthouses; rampant criminal activity from thousands of criminals that the Baathist regime released immediately before the war; and a legal system that was broken from years of corruption and political influence.<sup>6</sup> The arrest of looters and the physical repair of courthouses were concrete goals the Coalition accomplished over several months.<sup>7</sup> Yet, the most serious challenge in returning justice to the Iraqi people remains the establishment of a judiciary that holds the interests of the Iraqi people foremost in its heart.<sup>8</sup>

Initial assessments of the Iraqi courts revealed that the courts of general jurisdiction within each of Iraq's eighteen provinces were widely subject to political control and influence.<sup>9</sup> The Ministry of Justice in Baghdad had previously appointed judges based on party loyalty and their willingness to support Baath party policies through their rulings.<sup>10</sup> The individual judges appeared to possess strong professional credentials, as they were trained in one of three quality law schools in Iraq and possessed at least ten year's experience as practicing attorneys.<sup>11</sup> Accordingly, on paper, the Iraqi bench appeared strong.

Although the judges in Iraq possessed strong professional credentials, they had existed for thirty-five years in a system whose primary goal was self-preservation.<sup>12</sup> Those who demonstrated too much initiative or independence ran the risk of being viewed as a potential threat to the regime. Operating under a tight hierarchal structure, the chief judge in each province was expected to demonstrate unwavering obedience to Baathist policies and orders from Baghdad. Particularly in the south of Iraq, where the majority Shiite population presented a lingering threat to the Sunni-dominated bureaucracy in Baghdad, the slightest deviation from regime policies led to dismissal and imprisonment.<sup>13</sup>

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2. See generally ROBERT A. ROSENBAUM, ENCYCLOPEDIA OF AMERICAN HISTORY (2003).

3. Judy Keen & Caesar G. Soriano, *U.S. Begins Second Gulf War with a Surprise Missile Strike at Iraq Leaders*, USA TODAY, Mar. 20, 2003, at A1.

4. Dan Balz, *America's Support for War on Rise*, WASH. POST.COM, APR. 7, 2003, available at <http://www.washingtonpost.com/wp-dyn/articles/A51053-2003Apr7.html>.

5. See OVERSEAS PROSECUTORIAL DEVELOPMENT & TRAINING OFFICE OF THE U.S. DEP'T OF JUSTICE, REPORT OF THE IRAQ JUDICIAL ASSESSMENT TEAM (June 2003) (on file with the Center for Law & Military Operations, The Judge Advocate General's Legal Center & School, U.S. Army, Charlottesville, Virginia) [hereinafter DOJ ASSESSMENT].

6. See *id.* at 6.

7. See *id.* at 7.

8. See LIEUTENANT COLONEL CRAIG TREBILCOCK, LEGAL ASSESSMENT OF SOUTHERN IRAQ, 358TH CIVIL AFFAIRS BRIGADE 23 (2003) (on file with the Center for Law & Military Operations, The Judge Advocate General's Legal Center & School, U.S. Army) [hereinafter 358TH CA ASSESSMENT].

9. See DOJ ASSESSMENT, *supra* note 5, at 6-7.

10. *Id.* at 8, 96.

11. *Id.* at 99.

12. *Id.* at 95-96.

13. Interview with Haithem Mohound, Iraqi Judge, in Al Kut, Iraq (May 9, 2003).

After decades of living under such centralized control, the senior members of the Iraqi bench had become political functionaries who knew that their primary goal was obeying the regime, with their secondary duty being administering justice to the Iraqi people. In maintaining a judiciary that was politically obedient, however, the regime also triggered unanticipated secondary consequences. By placing the needs of the people in second place, the regime unwittingly planted the seeds for corruption and bias as the judges placed self-interest above other issues.<sup>14</sup>

Over the past thirty-five years, the Iraqi courts have been characterized by bias and favoritism, with verdicts being routinely influenced by payoffs and tribal affiliations. During Coalition interviews with sitting Iraqi judges throughout southern Iraq in June and July 2003, virtually all judges acknowledged that widespread corruption characterized their system. The judges also acknowledged that a litigant's tribal and political connections under the old regime would frequently be a prime consideration in the outcome of both criminal and civil trials.<sup>15</sup>

The breadth and scope of the ingrained corruption in Iraq was a serious challenge for military attorneys charged with establishing a fair and de-politicized court system. In the wake of the U.S. military advance, military battalion commanders filled the roles of military governors, responsible for the safety and welfare of the Iraqi citizens within the provinces they occupied. Under the Hague and Geneva Conventions,<sup>16</sup> commanders also had the duty to ensure that Iraqi government institutions within the occupied territory were restored and that Iraqi domestic law was preserved.<sup>17</sup>

Under the mantle of authority to maintain civil order, Coalition commanders had the authority to remove government offi-

cial, such as judges, who were corrupt or inextricably linked to the human rights abuses of the Baath party. This was done in almost every one of the eighteen provinces, with roughly one-third of the sitting judges in Iraq being removed and replaced by local attorneys known to be of good character within their communities. Removals were done cautiously, however, and only after a careful review of any adverse evidence against the judge. This was necessary, as the Coalition learned early in the occupation that allegations of corruption were often premised on old personal grudges, inter-tribal rivalries, or on the desire of a particular attorney to gain a judgeship position for himself.<sup>18</sup>

As the military campaign against organized resistance came to an end in late April 2003, the White House established the Office of Reconstruction and Humanitarian Affairs (ORHA), which was later renamed as the Coalition Provisional Authority (CPA).<sup>19</sup> Desiring to return Iraqi institutions to civilian control as soon as possible, the CPA Director, Ambassador Paul Bremer, issued CPA Order 1, in which the CPA declared that all legislative, executive, and judicial functions of Iraq were now subject to the control of the CPA.<sup>20</sup>

Pursuant to that directive, the CPA established a Judicial Review Commission (Commission), comprised of Iraqi judges and Coalition civilian legal personnel to review the records of the sitting Iraqi judges. This Commission, which complemented the earlier actions of Coalition military commanders, examined the judge's fitness to remain from the perspective of judicial credentials, freedom from corruption, and their position within the Baath party prior to the war. The goal of the Commission, which continues to operate, is to leave Iraq with judges free of political influence and dedicated to the rule of law.<sup>21</sup>

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14. See 358TH CA ASSESSMENT, *supra* note 8, at 14, 17.

15. Interviews with Haithem Mohound & Hussein Kasham Ozaibi, Iraqi Judges, in Al Kut, Iraq (May 9, 2003) [hereinafter Mohound & Ozaibi Interviews]. *But see* DOJ ASSESSMENT, *supra* note 5, at 110, 112; 358TH CA ASSESSMENT, *supra* note 8, at 18 ("In general when the judges were asked about corruption by the legal assessment team they said that it had existed in the past but that they knew nothing personally about whether it still existed . . . The lawyers on the other hand said that there was much corruption . . .").

16. Hague Convention IV Respecting the Laws and Customs of War on Land, Annexed Regulations, Oct. 18, 1907, art. 29, 36 Stat. 2277, T.S. No. 539; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3, *opened for signature* Aug 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31.

17. The Coalition legally cancelled security laws and other Iraqi laws designed to preserve the Baath party in power, as inconsistent with the Coalition objectives of restoring peace to Iraq. However, the Coalition left the overwhelming majority of Iraqi domestic laws intact. Coalition Provisional Authority (CPA) Order No. 1, sec. 2, 16 May 2003; CPA Order No. 7, Penal Code, 10 June 2003; CPA Memo No. 3, Criminal Procedures, 18 June 2003, *available at* <http://www.cpa-iraq.org/>.

18. See DOJ ASSESSMENT, *supra* note 5, at 35-95.

19. Secretary of State Colin L. Powell, Statement Regarding the Safeguarding of Iraqi Antiquities and Cultural Property (Apr. 14, 2003), *available at* <http://www.globalsecurity.org/wmd/library/news/iraq/2003/iraq-030414-usia02.htm> (explaining that "the Office of Reconstruction and Humanitarian Affairs will help Iraqis and international experts in their efforts to restore artifacts and the catalogs of antiquities that were damaged by looters"); see Sharon Behn, *U.S.-led Occupation in Iraq Called 'Stumbling Block' to Entrepreneurs*, WASH. TIMES, June 18, 2003, *available at* <http://www.usiraqbc.com/Wash-Times-Art.htm> ("ORHA has since changed its name to the Coalition Provisional Authority (CPA)").

20. CPA Order No. 1, *supra* note 17, para. 2.

21. See DOJ ASSESSMENT, *supra* note 5.

During the initial days of the occupation, many judges refused to resume their seats on the bench without express orders from the Iraqi Ministry of Justice (which no longer existed at that point). Fear that the old regime would return, coupled with the culture of bureaucratic stagnation for thirty-five years, left many judges unable or unwilling to resume their jobs. This presented a serious challenge to the Coalition, as returning security and justice to the streets of Iraq, which were filled with looters, was the number-one goal in the April and May time frame.<sup>22</sup>

Coalition military attorneys, who were responsible for restoring the judicial system, encountered a culture where many of the Iraqi judges did not possess a sense of ownership or professional pride in the institutions in which they served. Years of service under a regime where personal and political survival was the prime goal had caused the judges to not develop any fiduciary sense of responsibility for their courts. Rather, the main goal of many Iraqi judges was to use their position to secure as much personal gain as possible. As Coalition JA personnel sought to discuss restoring court operations, senior Iraqi judges focused on obtaining personal cell phones, sport utility vehicles, and air conditioning as a prerequisite to working. As jails burgeoned with looters and the criminals previously released by Saddam Hussein, many courts remained closed as the judges sought to maximize personal privileges.<sup>23</sup>

It quickly became apparent to the Coalition that if the Iraqi court system was to have any legitimacy in the post-Saddam era that an infusion of fresh blood was necessary. Corrupt, entrenched, and self-serving judges were stripped of their positions by Coalition military commanders and replaced with younger, ambitious, and dedicated members of the local Iraqi legal unions.<sup>24</sup> The first vestiges of democracy in Iraq, in fact, took place in the context of replacing corrupt judges. Through May and June, committees of local legal union members and other community leaders were encouraged to make their own selections for judges. Military judge advocates supervised these judicial selections to ensure that Baath party members did not again coerce their way into power. The Iraqis, however, made their first independent choice of government leaders in over three decades in selecting their own provincial judges.<sup>25</sup>

The new Iraqi judges serving in the post-Saddam era face tremendous pressures. They face pressure from Iraq's powerful tribal structure and other interested parties to perpetuate a court system based on favoritism. They face danger to their person by those who are aggrieved by their refusal to compromise their verdicts, as well as from pro-Baathist elements of the population who seek to intimidate any Iraqi officials cooperating with the Coalition. The Chief Judge of Babil Province, sixty miles south of Baghdad, was unsuccessfully targeted in his home by a rocket-propelled grenade (RPG) as a result of his dedication to reform. Judges sitting on the new Central Criminal Court in Baghdad have received death threats, but continue to dispense justice. The new Chief Judge in Ad Diwaniyah, a provincial capital southeast of Baghdad, personally defended his courthouse from looters in April and May 2003, sitting on the bench during the day and serving as an armed security guard for the courthouse at night. In facing these dangers, yet continuing to take the bench, these judges have demonstrated strength of character and a dedication to the law, which was completely absent under the old regime. This new breed of Iraqi judges is the foundation on which the future success of Iraq's ability to break free from their Baathist history will rest. Coalition forces can provide the security to temporarily stabilize Iraq, but the Iraqis themselves will have to choose to accept this opportunity, with its risks and potential rewards, and rise above the corruption of the recent past.<sup>26</sup>

The pitfalls to an independent Iraqi judiciary are many. Physical danger, a culture of self-interest, and a centralized bureaucratic mentality could drag the system down despite the best efforts of the Coalition to support it. The new judges in Iraq must decide if they are willing to forego personal profit, favoritism, and the comfort of position in favor of the personal pride inherent in wresting their legal system away from its past. This is not a change that will occur in one or two years, as the roots of thirty-five years of corruption run deep. The Coalition can bring the opportunity for change to the Iraqi people, but its newly selected judges will have to embrace the difficult route to the rule of law for their judicial system to succeed. If the courage of these new judges in standing up to armed looters and RPG attacks in order to do their job is a litmus test, then there is room for great optimism that Iraq will succeed in establishing a fair and impartial judicial system.

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22. Secretary of Defense Donald Rumsfeld, Dep't of Defense Daily Briefing (May 15, 2003), available at <http://usinfo.state.gov/topical/pol/terror/texts/03051503.htm>.

23. Interview with Major Sean Dunn, JA, USMC, in Al Kut, Iraq (June 5, 2003).

24. Iraqis refer to their province level bar associations as legal unions. See 358TH CA ASSESSMENT, *supra* note 8, at 6.

25. *Id.* at 15-16.

26. Mohound & Ozaibi Interviews, *supra* note 15.