

Center for Law and Military Operations (CLAMO) Note
The Judge Advocate General's Legal Center and School

Justice Under Fire

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Two years ago in the November 2003 issue of *The Army Lawyer*, this author examined the state of the Iraqi legal system on the heels of the initial U.S. occupation of that country.¹ The general conclusion at that time was that the Iraqi judiciary had an uphill battle to overcome its four decades history of corruption, political influence, and bias in order to establish the rule of law.² This article examines what additional progress, if any, has been made over the past two and one half years.

Since April 2003, significant financial and human resources have been placed at the disposal of the Iraqis for use in restoring their court system.³ The U.S. military, the State Department, the Justice Department, the American Bar Association, and myriad private entities have placed millions of dollars in reconstruction aid and thousands of professional work hours at their disposal.⁴ Even Kuwait, a former victim of Iraqi aggression, has provided support—providing legal books and training, and hosting the first visit of Iraqi jurists to Kuwait in March 2004 to promote interagency cooperation between the Kuwaiti and Iraqi Ministries of Justice.⁵ These actions have provided the Iraqis with the tangible tools needed to succeed in restoring the rule of law.⁶

Money and other tangible resources alone, however, cannot restore an independent judiciary in Iraq, nor are they a reliable measure of progress. In evaluating progress, it is important to recognize a significant factor that weighs heavily upon any fair measurement of Iraq's advances. Since August 2003, the Iraqi judiciary has not only been faced with the mission of reinventing itself from a political tool to a system of justice, but it has done so while being the specific military target of an insurgent destabilization campaign.⁷ Iraqi judges who have not been viewed as loyal to a particular faction or militia have often been targeted for elimination by Anti-Iraqi Forces (AIF) and other terrorist groups.⁸

If one uses purely objective measures, a strong case can be made for tremendous progress in the restoration of the Iraqi legal system. In terms of courthouses rebuilt and cases adjudicated, the numbers are strong.⁹ Whether or not justice exists in society, however, cannot be measured by bricks and mortar or by case processing statistics. The measurement of justice in Iraq is intangible, existing in the minds of the people over whom the system exerts authority. Justice is measured by whether the populace believes its members will receive a fair and impartial disposition of charges or grievances before the bench.

To evaluate progress in the Iraqi judicial system, one must first know the starting point from which reform will be measured. The Iraqi courts did not begin their current march toward legitimacy from a position of strength. The Iraqi

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¹ Lieutenant Colonel Craig Trebilcock, *Legal Cultures Clash in Iraq*, ARMY LAW., Nov. 2003, at 48.

² *Id.* at 50.

³ CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, LESSONS LEARNED FROM AFGHANISTAN AND IRAQ VOL. II, FULL SPECTRUM OPERATIONS (2 MAY 2003 – 30 JUNE 2004) 22-64 (2005).

⁴ See, e.g., Colonel Richard Whitaker, *Legal Operations in Northern Iraq*, PUB. LAW., Winter 2005, at 12-13; see also Informational Memorandum, Mr. Clint Williamson, Senior Advisor, Iraqi Ministry of Justice, to Ambassador Paul Bremer (20 June 2003) [hereinafter Informational Memorandum] (detailing the Ministry's request for \$40 million in funds to reconstruct judicial facilities) (on file with CLAMO).

⁵ See HUMANITARIAN OPERATIONS CENTER, STATE OF KUWAIT, 2003-2004 YEARBOOK 6 (2004) (on file with CLAMO).

⁶ In contrast, as of June 2003, twelve of eighteen courthouses in Baghdad were gutted, while seventy-five percent of the 110 court houses outside Baghdad were destroyed. No courts were operational. Informational Memorandum, *supra* note 4.

⁷ Thomas Shanker, *Chaos as a Strategy Against the U.S.*, N.Y. TIMES, Aug. 20, 2003, at A1.

⁸ "Judge Ismail Yussef Saddek was gunned down . . . in front of his house." *Second Anti-Saddam Judge Shot in Iraq*, SYDNEY MORNING HERALD (Austl.), Nov. 5, 2003, available at <http://www.smh.com.au/articles/2003/11/05/1067708244250.html>. "Qais Hashim Shameri was shot dead as he left his home . . ." *Baghdad Judge Shot Dead in Ambush*, BBC NEWS, Jan. 25, 2005, available at http://news.bbc.co.uk/1/hi/world/middle_east/4204533.stm. "Salem Mahmoud al-Haj Ali . . . was the third judge to be assassinated in Mosul since the U.S. invasion of Iraq in 2003. The Islamic militant group Ansar al-Sunnah Army claimed . . . to have carried out the killing." *Senior Iraqi Judge Shot and Killed in Car*, SAN DIEGO UNION-TRIB., June 17, 2005, available at www.signonsandiego.com/uniontrib/20050617/news_1n17_violence.html.

⁹ See 358TH CIVIL AFFAIRS BRIGADE REPORT TO COMMANDER 1ST MARINE EXPEDITIONARY FORCE, LEGAL ASSESSMENT OF SOUTHERN IRAQ 6 (Aug. 2003) [hereinafter LEGAL ASSESSMENT OF SOUTHERN IRAQ] (on file with CLAMO).

judiciary suffered from a lack of independence during thirty-five years of Saddam Hussein's rule, operating within the construct of reliance by Saddam upon his Special Security Tribunals.¹⁰

The judges in place when the United States invaded Iraq in March 2003 were in positions of power, due in large part because they learned how to survive within a treacherous and sometimes violent system.¹¹ Such survival came about from obedience to the centralized authority of Saddam's tightly controlled Ministry of Justice, not by the judges holding themselves out as champions of justice. The majority of those judges remain on the bench today, including Ba'athist judges who were originally removed by the Coalition Provisional Authority (CPA) under Ambassador Bremer only to be later reinstated by the Iraqis.¹² Despite the appointment of a small number of new judges by coalition authorities, much of the judicial reform effort has been directed at rehabilitating those who had previously held power under Saddam.¹³

As the judiciary began recovering from massive destruction and looting of the court facilities following the fall of the Ba'athist regime in April 2003, efforts to establish the rule of law were immediately handicapped by the insurgency that flared up in August 2003.¹⁴ Judges who had little familiarity with the concepts of judicial independence and impartiality after decades of Ba'athist control were asked by the CPA and civil affairs operators to employ such concepts at the very time when embracing those values made one a target for personal violence.¹⁵ As detailed below, some Iraqi judges have broken from their Ba'athist historical roots in placing concerns for self-preservation above the good of the people. Many, however, have not.

Another challenge to fairly evaluating judicial reform in Iraq is that circumstances vary greatly depending upon one's geographic location within the country. The closer a person is to Baghdad, the greater the semblance of an independent judiciary. The overwhelming presence of U.S. forces in Baghdad help reinforce the stability of the central Government,¹⁶ and accordingly, provides a positive atmosphere for the greatest progress in judicial reform. Even in Baghdad, however, judges live with the specter of violence hanging over their actions. "Judges throughout Iraq start their daily trek to the court house, not knowing if they will see their families again. Though threats are routine, so is the way judges accept the fact that intimidation is just part of their job."¹⁷

The greater the distance from Baghdad, the greater the negative influence that militias and insurgents, operating outside the Iraqi Government structure, tend to have on the development of an independent judiciary.¹⁸ The stability of the Iraqi courts is currently an uneven patchwork quilt. No one generalization can accurately describe the reality of the widely diverging levels of progress within the eighteen provinces. According to an official in the northern Kurdish area of northern Iraq, who was detained for writing comments perceived to be anti-Kurdish on the internet, "There is an absence of law. The law now, it's big fish eats the small fish."¹⁹ In Anbar province, a volatile province in the Sunni Triangle, there are no functioning criminal courts (due to instability), although there is a full complement of judges on hand.²⁰ And yet, in Babil province, in the Shiite south, general progress toward the rule of law has been made, despite concerns by judges for their personal security.

Why this difference? Although there are varied political and cultural factors, progress toward an independent Iraqi judiciary is most closely linked to the state of security throughout the country. The ultimate success or failure in restoring the rule of law to Iraq is inextricably linked to the security atmosphere. Much progress has been made in Iraq in renovating the

¹⁰ Interview with Colonel Michael Cleary, Senior Legal Advisor, Justice Attaché, U.S. Embassy, Baghdad (Aug. 26, 2005) [hereinafter Cleary Interview II] (on file with CLAMO).

¹¹ LEGAL ASSESSMENT OF SOUTHERN IRAQ, *supra* note 9, at 6.

¹² Interview with Iraqi attorney, F. Fatin, Esq. (Sept. 12, 2005) (on file with CLAMO).

¹³ LEGAL ASSESSMENT OF SOUTHERN IRAQ, *supra* note 9, at 10.

¹⁴ See Cleary Interview II, *supra* note 10.

¹⁵ *Id.*

¹⁶ Despite the presence of U.S. forces, judicial personnel in Baghdad do not have a guarantee of security. In early March 2005, a judge appointed to the special tribunal to try Saddam Hussein, and his son, were killed by gunmen as they left their home. *Killings Make Iraq Judges More Fearful*, WASH. TIMES, Mar. 2, 2005, available at <http://www.washtimes.com/upi-breaking/20050302-105216-6445r.htm>. Recently, Iraqi Chief Judge Medhat al-Mahmoud was the target of an unsuccessful assassination attempt via a remotely detonated bomb against his motorcade. E-mail from Colonel Larry Rubini, formerly CPA Ministry of Justice, Senior Legal Advisor, to LTC Craig Trebilcock (3 Jan. 2006) (on file with CLAMO).

¹⁷ Interview with COL Michael Cleary, Senior Legal Advisor, Justice Attaché, U.S. Embassy, Baghdad (Aug. 18, 2005).

¹⁸ Anthony Shadid & Steve Fainaru, *Militias on the Rise Across Iraq*, WASH. POST, Aug. 21, 2005, at 3.

¹⁹ *Id.*

²⁰ See Cleary Interview II, *supra* note 10.

physical infrastructure of the courts and providing the judiciary with the tools with which to build an independent judiciary. The continued growth and development of that system cannot be assumed, however, even if built upon such a foundation. The days of intimidation and undue influence under Saddam have not faded from the memory of the Iraqi judges and it would be unrealistic to expect these men, who survived under Saddam by being compliant, to fully embrace serious legal reform when someone new is holding a rifle to their heads.

As stated by a judge advocate responsible for judicial reconstruction in the volatile Anbar province:

In the final analysis, the only measurable [way] progress will be made, is through a genuine commitment to improvement from the Iraqi citizens working with [the judiciary, pretrial detention facilities, and the Iraqi police]. This commitment will take tremendous courage and risk on their part because individuals cooperating with the coalition forces are considered traitors by those who terrorize this region each day. There are countless examples of Iraqis being attacked or murdered for cooperating or even giving the appearance of cooperating with the coalition forces.²¹

The relationship between security and the establishment of the rule of law in Iraq is a symbiotic one. The rule of law cannot establish strong roots in a nation where the price of doing one's job as a judge means death. And yet, the people of Iraq will not have the faith to resist that insurgency and support the judiciary (as well as other Iraqi government institutions) unless they see marked evidence that those institutions have evolved so as to warrant the sacrifice.²²

Another of the challenges facing the courts is that the police forces in many of the towns where the provincial courts sit remain rife with corruption and political allegiances.²³ Basra, the major Shiite city, regarded since 2003 as a relatively stable oasis amidst the sectarian violence elsewhere in Iraq, is becoming increasingly destabilized by an estimated 200-300 police officers known as the Jameat who murder and torture at will in support of their factional political goals.²⁴ Judges operating in such an atmosphere are certainly cognizant of their own safety when seeking to exercise their judicial authority—a reality that cannot help but retard progress toward the rule of law.

The Iraqi civilian population is still cautious in placing its confidence too fully in the revamped Iraqi judiciary. The initial euphoria regarding the fall of Saddam's political machinery in the Shiite south has been replaced with caution and wariness in the minds of the public. One source of public concern is that, "most of the corrupt judges, who had been dismissed by the Judicial Review Committee established by Ambassador Bremer in 2003, were reinstated by the Chief Justice of the Judicial Council [following a reversal of the de-Ba'athification policies in April 2004]. They are very well known by the people."²⁵ This unwillingness of the Ministry of Justice to remove former Ba'athist elements from the bench leads many Iraqis to wonder if the courts can be trusted. Many Iraqis also still fear that their judicial system will not convict Saddam Hussein, despite bold assertions to the contrary by the prosecutors involved in gathering evidence.²⁶ These lingering concerns promote a wait and see attitude toward the courts by many Iraqis.

There is hesitancy within the judicial ranks as well—as to whether the rule of law will take root in the new Iraq. Some judges who claim to pursue action against corruption within the Iraqi government allege that they have been demoted or removed for being too effective in their positions.²⁷ These allegations further erode public confidence in the judicial process, whether true or not, in an already wary populace who feels the ongoing insurgent violence has "affected the judges badly."²⁸ Violence as a tool to affect the outcomes of judicial proceedings is not limited to the insurgents as perpetrators, nor to the courts as targets. The murder of two of Saddam Hussein's attorneys during their defense of the former ruler²⁹ sadly reflects

²¹ Memorandum, Major Craig E. Bennett, International Law Officer, 304th Civil Affairs Brigade, to Staff Judge Advocate, 1st Marine Division (25 Feb. 2004) (on file with CLAMO).

²² "The test of the effectiveness of the judiciary is how it faces the insurgency. Also whether judges dispose of their criminal and insurgency cases without regard to the threats made against them." Cleary Interview II, *supra* note 10.

²³ Shadid & Fainaru, *supra* note 18.

²⁴ Richard A. Oppel, Jr., *Hiding as Police, Militias Hold the Power in Basra*, SEATTLE TIMES, Oct. 9, 2005, available at http://seattletimes.nwsources.com/html/nationworld/2002549373_militias09.html (originally printed in the *New York Times*).

²⁵ Interview with F. Kareem, Ministry of Justice (Sept. 12, 2005) [hereinafter Kareem Interview] (worked within the CPA controlled Ministry of Justice during 2003-2004) (on file with CLAMO).

²⁶ *Id.*

²⁷ See Scott Peterson, *Demoted Iraqi Judge Fears for his Country's Future*, CHRISTIAN SCI. MONITOR, Nov. 1, 2004, available at www.csmonitor.com/2004/1101/p11s02-woiq.html.

²⁸ Kareem Interview, *supra* note 25.

²⁹ See *Saddam Trial Lawyer Is Shot Dead*, BBC NEWS, No. 8, 2005, available at http://news.bbc.co.uk/2/hi/middle_east/4417948.stm.

the continued presence of elements in Iraqi society who wish to resolve grievances with violence as opposed to the rule of law. Accordingly, if one evaluates the progress of Iraqi judicial reform by the degree of public confidence in the judicial institutions, it is fair only to state that the ongoing insurgency is retarding both the progress of the courts and their reputation in the eyes of the Iraqi people.

Despite the above public concerns, there are positive signs of progress. That judges still endure significant risk to their personal safety in order to accomplish the ideal of an independent judiciary creates a basis for optimism. In the words of the Justice Attaché to the U.S. Embassy in Baghdad during 2005, “Iraqis are literally dying for the chance to achieve an efficient and effective court system in a democracy of their own choosing.”³⁰

Another positive development is that the Iraqi Government has taken necessary foundational steps for the Iraqi judiciary to assert its authority in the future. The 13 July 2003 establishment of a governing council and the 1 June 2004 founding of the Iraqi Interim Government were major steps in restoring sovereignty to Iraq and autonomy to its courts.³¹ The more recent October 2005 Iraqi Constitutional referendum established another necessary step toward the rule of law.³²

Despite the intimidation and violence directed at judges by insurgents, there are also rewards for those with the resolve to seek positive reform. As related by the recent Senior Legal Advisor, Justice Attaché at the U.S. Embassy in Baghdad:

An example of courts facing their challenge is the court in Hillah (Babil Province). As I interviewed the provincial Chief Judge, Chief Prosecutor, and Chief Investigative Judge, they mentioned that one had his son murdered, another had been wounded in an assassination attempt, and another had been recently assigned an extra large [personal security detachment] due to the death threats. However, their perseverance was rewarded when the Higher Judicial Council rewarded them with the privilege of establishing an anti-terrorism court in Hillah. Several other jurisdictions have been rewarded in the same method.³³

Any “chicken and egg” analysis, asking which must come first—security or reform—misses the mark. Both must trudge forward in tandem, occasionally making progress and occasionally enduring setbacks, without losing sight of the objective. The rule of law will not succeed in Iraq without a more stable security environment, just as a more stable security environment will not endure without the rule of law.

Progress has been made, but nearly three years after the U.S. invasion, it is fair only to claim that the opportunity for the rule of law still exists—not that the goal has been achieved. The will for continuing self-sacrifice from Iraqi jurists, the Iraqi people, and security forces is necessary for success. The rule of law will be established only when Iraqi judges may apply the rule of law to a given case, without self-interest or fear for their survival. Until that day, however, the end state for the Iraqi judicial system is still up for grabs.

³⁰ Cleary Interview II, *supra*, note 10.

³¹ On 8 June 2004, the U.N. Security Council, acting under Charter VII of the United Nations Charter recognized that “by 30 June 2004 the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty.” S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004).

³² See Qassim Abdul-Zahra, *Iraq Tries to Protect Voters*, YORK DAILY NEWS (Pa.), Oct. 9, 2005, at A4.

³³ Cleary Interview II, *supra*, note 10.