

The Iraqi High Tribunal and the Regime Crimes Liaison's Office

Major John C. Johnson, USAF¹

Introduction

On 5 November 2006, Saddam Hussein Al-Majid Al-Tikriti and six co-defendants were convicted of crimes against humanity by Iraqi judges sitting as the Iraqi High Tribunal in Baghdad.² The former President of Iraq had ruled the country for nearly twenty-four years and untold thousands had died by his order. Five years before, such a trial would have been difficult for many Iraqis to imagine, including the judges and attorneys in the courtroom. Moreover, the court that tried him—the Iraqi High Tribunal—was an innovation: an Iraqi court created to apply international criminal law.³ That such a trial was possible was due to the work of a multi-agency group of American civilian attorneys, Judge Advocates, paralegals, investigators, marshals, and other specialists in the Regime Crimes Liaison's Office—the RCLO.

This article describes the function of the RCLO and some of the challenges it has faced. In some respects, these experiences are unique to its work with the Iraqi High Tribunal; but in many ways they reflect common difficulties that Judge Advocates and others have experienced in reconstruction efforts overseas. However, in order to understand the RCLO, one must understand the genesis and structure of the Iraqi High Tribunal itself.

Background: The Ba'ath Regime in Iraq

The Arab Socialist Ba'ath Party came to power in Iraq in a July 1968 coup.⁴ In 1979, Saddam Hussein Al-Majid Al-Tikriti displaced Al-Bakr as head of the Iraqi Ba'ath Party and President of Iraq.⁵ Saddam Hussein purged the Ba'ath leadership and consolidated his hold on power.⁶ Under the Ba'ath regime, the party, police, and military security apparatus underwent enormous growth, stabilizing the regime's control over a country with considerable ethnic, religious, and social divisions.⁷

In 1980, Saddam Hussein led Iraq into a lengthy and costly war with Iran.⁸ The Iran-Iraq War merged with a long-running conflict between the Arab-dominated government in Baghdad and Kurdish guerillas in northern Iraq.⁹ In the course of the war, Iraqi forces notoriously used chemical weapons against Iranians and Kurds, and attacked Kurdish civilians and villages with conventional military forces.¹⁰ Attacks against the Kurds continued for some time after the August 1988 cease-fire with Iran.¹¹

¹ Written while assigned as an attorney-advisor with the Regime Crimes Liaison's Office at the U.S. Embassy, Baghdad, Iraq. Currently assigned as Chief, Operations and International Law Division, The Judge Advocate General's School, Maxwell Air Force Base, Ala.

² Kirk Semple, *Saddam Hussein Is Sentenced to Death*, N.Y. TIMES, Nov. 5, 2006, http://www.nytimes.com/2006/11/05/world/middleeast/05end-saddam.html?_r=1&ref=world&oref=slogin.

³ See *Law of the Supreme Iraqi Criminal Tribunal*, AL-WAQA'I AL-IRAQIYA, Oct. 18, 2005 [hereinafter IHT Statute], available at http://www.iraqihightribunal.org/doc/legal_doc_uk-3.pdf (Int'l Ctr. for Transitional Justice trans.).

⁴ KANAN MAKIYA, *REPUBLIC OF FEAR: THE POLITICS OF MODERN IRAQ* 30 (1998). The Ba'ath had briefly seized power in Iraq as part of a violent coup in February 1963, but were forced out of government later that year. *Id.* at 29–30. Makiya's book, though somewhat dated, is strongly recommended for anyone with an interest in the history, philosophy, and structure of the Ba'ath regime in Iraq.

⁵ *Id.* at 70.

⁶ *Id.* at 70–72.

⁷ See *id.* at 5–45. The majority of Iraqis are Arabs, but approximately one-quarter are Kurds, and smaller ethnic minorities including Turkmen and Assyrians comprise approximately 5% of the population. See *Iraq*, ENCYCLOPEDIA BRITANNICA ONLINE, <http://www.britannica.com/eb/article-22936> (last visited July 11, 2008) [hereinafter *Iraq* BRITANNICA]. *Id.* The population is overwhelmingly Muslim (with small numbers of Christians and other minorities), but split between Shia (approximately 60% of Muslims) and Sunni (approximately 40% of Muslims). See *id.*

⁸ MAKIYA, *supra* note 4, at 258.

⁹ See *id.* at 22–24; HUMAN RIGHTS WATCH, *GENOCIDE IN IRAQ: THE ANFAL CAMPAIGN AGAINST THE KURDS* (1993), available at <http://hrw.org/reports/1993/iraqanfal/>.

¹⁰ See *id.*

¹¹ See *id.*

The war resulted in hundreds of thousands of Iraqi casualties, extensive economic damage, and no significant territorial gains; yet the Iraqi Army emerged in 1988 larger and better-equipped than before.¹² On 2 August 1990, Iraq invaded Kuwait.¹³ The United Nations responded with Security Council Resolutions 660¹⁴ and 661,¹⁵ condemning the invasion and imposing economic sanctions on Iraq.¹⁶ Following United Nations Security Council Resolution 678, a multinational coalition led by the United States defeated Iraq and expelled its forces from Kuwait in February 1991.¹⁷ In the wake of this defeat, popular uprisings in the Shia-dominated provinces of southern Iraq and the Kurdish-populated areas of northern Iraq threatened the Ba'ath regime.¹⁸ Despite its losses and disorganization in the war, the regime was able to methodically crush this resistance and regain control of the provinces.¹⁹ Moreover, it carried out a brutal “cleansing” campaign in those areas.²⁰ Thousands were executed outright; many thousands more were arrested and disappeared, detained and tortured, or forced to flee their homes.²¹

Though hampered by continuing sanctions, a deteriorating economy, and “no-fly” zones in the north and south, the Ba'ath regime remained in power for another twelve years.²² During this time it continued its heavy-handed repression of any perceived or imagined threats.²³ The regime finally fell in April 2003 following the United States-led invasion.²⁴ As a result, Saddam Hussein and numerous other regime leaders ended up in the custody of the United States military.²⁵

A Question of Justice

The question arose: What should be done with the leaders of the former regime? Although the Ba'ath regime had enjoyed the support of some Iraqi citizens, the majority of Iraqis—in particular, the Shia and Kurdish populations—had suffered greatly.²⁶ The regime's atrocities were well-known inside Iraq; indeed, they contributed to the pervasive climate of fear that sustained the regime.²⁷ Justice and popular sentiment called for an accounting of these crimes, at least with regard to the senior leaders most responsible.

However, the administration of such justice raised a number of questions. Who should conduct such proceedings? Several possibilities involved competing advantages and disadvantages—delay, feasibility, expense, international and domestic legitimacy. The coalition or the United States might have tried some of the regime leaders for war crimes and other offenses.²⁸ Alternatively, an international tribunal might have been created on the Yugoslavian or Rwandan model.²⁹

¹² See *Iraq* BRITANNICA, *supra* note 7.

¹³ See *Iran-Iraq War*, ENCYCLOPEDIA BRITANNICA ONLINE, 2008, <http://www.britannica.com/EBchecked/topic/293527/Iran-Iraq-War#> (last visited Aug. 5, 2008).

¹⁴ S.C. Res. 660, U.N. Doc. S/RES/0678 (Aug. 2, 1990), available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/575/10/IMG/NR057510.pdf?OpenElement>.

¹⁵ S.C. Res. 661, U.N. Doc. S/RES/0678 (Aug. 6, 1990), available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/575/11/IMG/NR057511.pdf?OpenElement>.

¹⁶ See *Iraq* BRITANNICA, *supra* note 7.

¹⁷ See S.C. Res. 678, U.N. Doc. S/RES/0678 (Nov. 29, 1990), available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NRO/575/28/IMG/NRO5728.pdf?OpenElement>; *Iraq* BRITANNICA, *supra* note 7.

¹⁸ See *Iraq* BRITANNICA, *supra* note 7.

¹⁹ See HUMAN RIGHTS WATCH, *ENDLESS TORMENT: THE 1991 UPRISING IN IRAQ AND ITS AFTERMATH* (1992) [hereinafter *ENDLESS TORMENT*], available at <http://hrw.org/reports/1992/Iraq926.htm>.

²⁰ See *id.*

²¹ See *Iraq* BRITANNICA, *supra* note 7.

²² See *id.*

²³ See *id.*

²⁴ See *Iraq War*, ENCYCLOPEDIA BRITANNICA ONLINE, <http://www.britannica.com/EBchecked/topic/870845/Iraq-War#> (last visited Aug. 5, 2008).

²⁵ See *Iraq* BRITANNICA, *supra* note 7.

²⁶ M. Cherif Bassiouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal*, 38 CORNELL INT'L L.J. 327, 330 (2005) (citing U.S. Dep't of State, Fact Sheet: Past Repression and Atrocities by Saddam Hussein's Regime (Apr. 4, 2003)).

²⁷ See MAKIYA, *supra* note 4, *passim*.

²⁸ Certain actions by Saddam Hussein and other regime figures during the Iran-Iraq War, the invasion of Kuwait, the Gulf War, the 2003 invasion of Iraq, and perhaps other events may constitute “grave breaches” of international humanitarian law. See generally KARIM KHAN & RODNEY DIXON, *ARCHBOLD*

Perhaps some hybrid combination of an international and Iraqi tribunal could have been explored.³⁰ However, the Iraqi people themselves had suffered enormously and had the most immediate interest in the fate of their former rulers; allowing an Iraqi court to try the regime leaders could help satisfy a long-denied desire for justice. Depending on the nature of the proceedings, it could also carry greater legitimacy inside and, ideally, outside Iraq.³¹

However, relying on Iraqi courts could create certain legal problems. Iraq had existing codes of criminal law and procedure that had been in place for over three decades.³² But under existing Iraqi criminal law, obedience to orders is a defense to criminal liability.³³ Indeed, it was more than just a legal principle; obedience to orders was a value strongly ingrained in Iraqi society under Saddam Hussein's rule. Since everyone knew Saddam Hussein had been the supreme leader of Iraq, in many cases regime officials could credibly argue they were simply following orders when they participated in various atrocities. It might be possible to change the law, but giving such a change retroactive effect would obviously be problematic.³⁴

In the end, the authorities created a new court: an Iraqi court administering *international* criminal law—the Iraqi High Tribunal.

The Iraqi High Tribunal

In December 2003 the Iraqi Governing Council created the Iraqi High Tribunal (IHT)—originally known as the Supreme Iraqi Criminal Tribunal (SICT), then the Iraqi Special Tribunal (IST)—through a delegation of authority by the Coalition Provisional Authority (CPA).³⁵ The Iraqi Interim Government and the Iraqi National Assembly later amended and affirmed the statute creating the IHT.³⁶ According to this statute, the IHT exercises jurisdiction over Iraqi citizens or residents who committed genocide, crimes against humanity, war crimes, or certain violations of Iraqi law between 17 July 1968 and 1 May

INTERNATIONAL CRIMINAL COURTS: PRACTICE, PROCEDURE & EVIDENCE 530–70 (2d ed. 2005) (listing and discussing the elements of war crimes in various international criminal courts).

²⁹ See Statute of the International Criminal Tribunal for the Former Yugoslavia, Feb. 2006, [hereinafter ICTY Statute], available at <http://www.un.org/icty/legaldoc-e/index-t.htm> (then follow “Statute of the Tribunal” hyperlink); Statute: International Criminal Tribunal for Rwanda (ICTR), 2007, [hereinafter ICTR Statute], available at <http://69.94.11.53/ENGLISH/basicdocs/statute/2007.pdf>.

³⁰ See *How the Mighty are Falling*, ECONOMIST, July 5, 2007, available at http://www.economist.com/world/international/displaystory.cfm?story_id=9441341 (listing many of the various international tribunals created around the world under the auspices of the United Nations, regional international organizations, national authorities, and combinations thereof).

³¹ See KHAN & DIXON, *supra* note 28, at vii (“The primary responsibility for punishing crimes of international concern such as genocide, crimes against humanity and war crimes belongs to national criminal jurisdictions”); Michael A. Newton, *Symposium: Milosevic & Hussein on Trial: Panel 3: The Trial Process: Prosecution, Defense and Investigation: The Iraqi Special Tribunal: A Human Rights Perspective*, 38 CORNELL INT’L L.J. 863, 895 (Fall 2005) (“The Iraqi people almost universally support the concept of prosecuting Saddam and other Baathist officials inside Iraq rather than simply allowing and external tribunal to exercise punitive power” (citation omitted)).

³² IRAQI PENAL CODE WITH AMENDMENTS (3d ed. 1969), [hereinafter 1969 IRAQI PENAL CODE], available at http://www.iraqihightribunal.org/doc/legal_doc_uk-6.pdf (last visited Jan. 19, 2008); LAW ON CRIMINAL PROCEEDINGS WITH AMENDMENTS NO. 23 of 1971 [hereinafter 1971 IRAQI CRIMINAL PROCEDURE CODE], available at http://www.iraqihightribunal.org/doc/legal_doc_uk-5.pdf.

³³ 1969 IRAQI PENAL CODE, *supra* note 32, ¶ 40. Paragraph 40 provides:

There is no crime if the act is committed by a public official or agent in the following circumstances:

- (1) If he commits the act in good faith in the performance of his legal duty or if he considers that carrying it out is within his jurisdiction.
- (2) If he commits the act in performance of an order from a superior which he is obliged to obey or which he feels he is obliged to obey. It must be established in these circumstances that the belief of the offender in the legitimacy of the act is reasonable and that he committed the act only after taking suitable precautions. Moreover, there is no penalty in the second instance if the Code does not afford the official an opportunity to question the order issued to him.

Id.

³⁴ See International Covenant on Civil and Political Rights 1966, Dec. 16, 1966, art. 15, [hereinafter ICCPR], available at <http://www2.ohchr.org/english/law/ccpr.htm> (“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”). Iraq ratified the ICCPR on 25 January 1971, and has remained a party since the treaty came into effect on 23 March 1976. Office of the United Nations High Commissioner for Human Rights, *International Covenant on Civil and Political Rights New York, 16 December 1966*, available at <http://www2.ohchr.org/english/bodies/ratification/4.htm> (last visited July 11, 2008).

³⁵ See LAUREL MILLER, UNITED STATES INSTITUTE OF PEACE SPECIAL REPORT: BUILDING THE IRAQI SPECIAL TRIBUNAL: LESSONS FROM EXPERIENCES IN INTERNATIONAL CRIMINAL JUSTICE 2 (June 2004), available at <http://www.usip.org/pubs/specialreports/sr122.html>.

³⁶ See IHT Statute, *supra* note 3.

2003—the period of Ba’ath rule in Iraq.³⁷ The IHT statute defines genocide, crimes against humanity, and war crimes in a manner generally consistent with customary international law.³⁸

Thus the IHT is an Iraqi court that applies international criminal law. Precedent for such a body exists in the criminal tribunals that followed the Second World War, as well as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), International Criminal Court, and similar bodies.³⁹ One obvious difference between the IHT and the ICTY and ICTR is that the IHT is a national court rather than an international tribunal.⁴⁰ National courts may, of course, enforce international law, including international criminal law.⁴¹ Customary international law has recognized the crimes of genocide, crimes against humanity, and war at least since the 1940s.⁴² Trying members of the former regime for these international crimes avoids both the obedience to orders issue and the ex post facto problem under Iraqi law.⁴³ However, the IHT has faced and continues to face a number of other significant challenges.

Though separate from the regular Iraqi court system, the structure of the IHT reflects Iraq’s civil law orientation. The Tribunals are composed of an Investigative Chamber, Trial Chambers, an Appeals Chamber, a Prosecution Department, and an Administration Department.⁴⁴ The Investigative Chamber consists of investigative judges and their staff who investigate cases that come under the IHT’s jurisdiction.⁴⁵ The investigative judge is responsible for organizing the evidence in a referral file and drafting an indictment for the Trial Chamber.⁴⁶ The Trial Chambers are composed of a panel of judges who hear and decide cases referred to trial.⁴⁷ The Appeals Chamber is composed of nine judges who rule on the parties’ appeals of decisions at the investigative and trial levels.⁴⁸ The President of the IHT, who possesses considerable authority for the operation of the Tribunal, is elected by the appellate judges from among their number.⁴⁹ The Prosecution Department represents the interests of the government and people of Iraq, though in practice they wield far less power than prosecutors in the United States and other common law countries.⁵⁰ The Administrative Department is responsible for the administration of the IHT, including safeguarding evidence and transporting and protecting victims and witnesses.⁵¹ A Defense Office under the Administration Department supplies appointed counsel for defendants, who may also have privately-retained counsel.⁵²

³⁷ See *id.* art. 1.

³⁸ See *id.* arts. 11–13. Moreover, IHT judges may refer to the decisions of international criminal courts to interpret Articles 11, 12, and 13, dealing with genocide, crimes against humanity, and war crimes. *Id.* art. 17(2).

³⁹ See ICTY Statute, *supra* note 29; ICTR Statute, *supra* note 29; KHAN & DIXON, *supra* note 28, at 22–42.

⁴⁰ See IHT Statute, *supra* note 3.

⁴¹ Indeed, where feasible, national courts are the preferred venue for international crimes prosecutions. See KHAN & DIXON, *supra* note 28, at vii (“The primary responsibility for punishing crimes of international concern such as genocide, crimes against humanity and war crimes belongs to national criminal jurisdictions.”); Newton, *supra* note 31, at 863–97.

⁴² See KHAN & DIXON, *supra* note 28, at 13.

⁴³ See ICCPR, *supra* note 34, art. 15; 1969 IRAQI PENAL CODE, *supra* note 32, ¶ 40.

⁴⁴ IHT Statute, *supra* note 3, art. 3.

⁴⁵ See *id.* arts. 8, 18.

⁴⁶ *Id.*

⁴⁷ See *id.* arts. 3, 20–24. Each Trial Chamber elects one of their number President (also known as the Chief Trial Judge), who presides at trial and supervises the Chamber’s work. *Id.* art. 3.

⁴⁸ See *id.* arts. 3, 25.

⁴⁹ See *id.* art. 3. The appellate judge elected IHT President is also President of the Appellate Chamber. *Id.*

⁵⁰ See *id.* arts. 9, 20–26. For example, the investigative judge rather than the prosecutor is primarily responsible for investigating the case, preparing the evidence, and drafting the indictment. See *id.* art. 18. The prosecution role at trial is also more limited. For example, in the case currently in trial, the Chief Trial Judge has conducted the direct examination of the witnesses and asked the vast majority of the questions. *But see* Rules of Procedure and Gathering of Evidence with Regard to the Supreme Iraqi Special Tribunal R. 57 (18 Oct. 2005) [hereinafter IHT Rules of Procedure], available at http://www.iraqihightribunal.org/doc/legal_doc_uk-4.pdf (indicating that the party calling the witness would conduct the direct examination).

⁵¹ See IHT Statute, *supra* note 3, art. 10; IHT Rules of Procedure, *supra* note 50, Rules 13–15.

⁵² IHT Rules of Procedure, *supra* note 50, R. 30.

The Regime Crimes Liaison's Office

The IHT is an Iraqi court, staffed by and under the authority of the Government of Iraq (GOI).⁵³ However, the need for substantial United States assistance was clear from the outset. From its beginning the IHT faced major challenges that the United States was uniquely positioned to help it address. Among other requirements, the IHT needed to obtain offices, a courthouse, and equipment adequate for its size and purpose. It needed access to the detainees and evidence that were largely in the custody of the United States military. In addition, although the judges and attorneys assigned to the IHT were trained in Iraqi law, until 2003 they had little experience with or exposure to the substantive international law principles they were now called upon to apply. Therefore, the IHT needed significant training and advice regarding international law, as well as assistance in other specialized areas such as, among other things, forensics, investigating mass graves, and courthouse security. Finally, because the IHT, like other agencies of the GOI, operates in an environment that continues to have a heavy United States military presence, it needed a reliable point of contact with the U.S. Government.

Thus on 13 May 2004, National Security Presidential Directive 37 (NSPD 37) created the Regime Crimes Liaison's Office (RCLO), headed by the Regime Crimes Liaison (RCL), to support the IHT.⁵⁴ Specifically, the RCLO's purpose is to:

- a. Help establish a fully functioning, independent IHT to investigate and prosecute former Iraqi regime and ASBP members for crimes within IHT jurisdiction, including genocide, crimes against humanity, and war crimes;
- b. Assist IHT investigators, prosecutors, and investigative judges by providing training, investigative, and technical support necessary to ensure fair and impartial IHT proceedings; and
- c. Serve as the United States Government's liaison to the GOI regarding IHT investigations and prosecutions.⁵⁵

Originally part of the CPA, following the June 2004 transfer of sovereignty to the GOI, the RCLO's functions moved to the Department of State, acting through the Chief of Mission at the embassy in Baghdad.⁵⁶

The RCLO is a multi-agency organization. Although it falls under the Department of State, NSPD 37 directs the Attorney General to appoint a RCL and the Department of Justice (DOJ) to provide "a team of advisors" and "administrative support" personnel to deploy to Iraq.⁵⁷ The NSPD 37 calls on the Secretary of Defense to "provide legal support, as appropriate," and the Department of Defense (DOD) to provide the RCLO with access to and transport of Iraqi detainees under its control, as well as "departmental expertise in military history, law of war, and international law issues, as appropriate."⁵⁸ In practice, each military service (Army, Navy, Air Force, Marine Corps) has supplied a Judge Advocate to serve alongside DOJ lawyers as attorney-advisors to the IHT, and the DOD has filled certain other RCLO positions as well. At its height, the RCLO included dozens of personnel, including attorneys, investigators, paralegals, support personnel, mass graves teams, U.S. Marshals, and translators. In addition, the RCLO paid for a number of contractors to provide video recording and broadcasting, construction, housing, security, and other services. Over time, the RCLO staff and budget has been reduced and responsibilities increasingly transferred to the IHT and GOI.

RCLO Attorney-Advisors

The RCLO is not merely comprised of attorneys; numerous individuals from multiple agencies have contributed to the RCLO's mission in a variety of ways. One of the most important forms of support to the IHT, and the role of Judge

⁵³ See IHT Statute, *supra* note 3. Judges and prosecutors are nominated to the IHT by the Supreme Judicial Council of Iraq and appointed by the Presidency Council. *Id.* art. 4. The Statute provides for the possibility of non-Iraqi judges on the Tribunal, but to date all IHT judges and prosecutors have been Iraqis, and there seems to have been little interest in appointing foreigners. See *id.* art. 3. The IHT Statute also allows for non-Iraqi "persons of high moral character, honesty and integrity" to serve as experts to assist the Prosecution, Investigation, Trial, and Appellate Chambers. *Id.* arts. 7-9; see IHT Rules of Procedure, *supra* note 50, R. 21.

⁵⁴ THE WHITE HOUSE, NATIONAL SECURITY PRESIDENTIAL DIR./NSPD-37 (May 13, 2004) [hereinafter NSPD 37].

⁵⁵ *Id.*

⁵⁶ See *id.*; Press Release, Rebecca Ford Mitchell, Embassy of the United States, Baghdad, Iraq, Early Transfer of Iraqi Sovereignty Driven by Readiness, Security (June 28, 2004), available at http://iraq.usembassy.gov/iraq/transfer_of_iraq0628.html.

⁵⁷ NSPD 37, *supra* note 54.

⁵⁸ *Id.*

Advocates assigned to the RCLO, has been the work of the attorney-advisors. Attorney-advisors have fulfilled three major functions with respect to the IHT: advice, training, and logistic support.

Attorney-advisors have observed the operations of the IHT, consulted with IHT judges and attorneys, and provided detailed advice in every phase of a case. The IHT statute specifically permits the involvement of such non-Iraqi advisors and experts.⁵⁹ Consistent with the IHT rules of procedure, attorney-advisors are limited to advising one chamber of the IHT—investigative, trial, appellate, or prosecution—at least with respect to a particular case.⁶⁰ Attorney-advisors are, as the title implies, advisors; the Iraqi judges and attorneys decide how they will proceed in each situation.⁶¹ Not infrequently, IHT judges have either not sought or declined to follow the advice of the RCLO, as is their prerogative.

Attorney-advisors have also provided training to IHT judges and attorneys. Much of this training is of the “on-the-job” variety, discussing points of law and procedure in the context of specific cases. However, attorney-advisors have also arranged formal training on international law and other subjects, either by the RCLO itself, or by bringing outside experts to Baghdad, or by facilitating trips by IHT members to meet experts in other countries. As the RCLO draws down in size, training may be its most important legacy with the IHT.

Attorney-advisors also provide important logistic assistance to the IHT. Examples include arranging investigative interviews of detainees, coordinating between the IHT and defense counsel, and managing an enormous amount of evidence, including a huge number of documents and recordings obtained from the former regime. Although this logistic role may not require as much legal expertise as advising or training the IHT judges and attorneys, for cultural and professional reasons it is helpful for attorneys to be involved in these matters.⁶² For example, attorney-advisors may be best positioned to appreciate the importance of ensuring defense counsel receive opportunities to meet with their clients. Moreover, as a practical matter, controlling movement of and access to evidence and detainees gives the attorney-advisors more leverage with the IHT, and therefore a better opportunity to be heard.

Challenges

This brings us to some of the challenges the RCLO has faced. The security environment has imposed significant constraints. Fortunately, levels of violence in Iraq have generally declined recently, and the RCLO and the IHT courthouse are located in a relatively secure area.⁶³ However, Iraq remains a dangerous place to live and work. This reality impacts the IHT and RCLO in a variety of ways. Those Iraqis who choose to be a part of the IHT unfortunately do so at some personal risk. Security concerns can affect the willingness of witnesses to cooperate with investigators, or to travel to the IHT courthouse to testify, or to publicly reveal their identities. Security concerns complicate travel within Iraq, including the transportation and housing of witnesses and defense counsel and the movement of detainees and defendants.⁶⁴ Security concerns can interfere with the normal work schedules of IHT judges and attorneys. They can limit the degree to which counsel are permitted to communicate with their clients.⁶⁵ In short, security is a paramount concern, and security requirements can cause significant disruptions and delays in the judicial process.

Differences in the basic structure of the American and Iraqi legal systems also present some difficulties. The Iraqi legal system is based on the civil law or inquisitorial model, as opposed to the common law or adversarial system that is familiar to the American bar and public.⁶⁶ Major differences of the Iraqi system compared to the American system include, for example,

⁵⁹ IHT Statute, *supra* note 3, arts. 7–9; IHT Rules of Procedure, *supra* note 50, R. 21.

⁶⁰ IHT Rules of Procedure, *supra* note 50, R. 21 (“Anyone who is assigned as a Non-Iraqi Advisor/Expert to one functional area of the Special Tribunal may not concurrently act as an advisor to another functional area of the Special Tribunal.”).

⁶¹ *See id.* (stating that non-Iraqi experts and advisors provide “confidential, non-binding expert advice and recommendations”).

⁶² From a cultural standpoint, Iraqi judges and attorneys may find dealing with fellow attorneys more palatable than consulting with laypersons. From a professional standpoint, attorneys may best be able to appreciate the significance of certain “logistical” matters.

⁶³ *See, e.g.,* Assoc. Press & Kim Gamel, *US Death Toll in Iraq at Lowest Point*, TIME, Aug. 1, 2008, <http://www.time.com/time/world/article/0,8599,1828680,00.html?xid=feed-cnn-topics> (describing a “drastic decline in violence” in Iraq over the preceding year).

⁶⁴ Three defense counsel were assassinated during the first trial at the IHT. *See Timeline: Saddam Hussein Dujail Trial*, BBC NEWS, Dec. 4, 2006 [hereinafter *Timeline*], http://news.bbc.co.uk/2/hi/middle_east/4507568.stm.

⁶⁵ Security concerns related to attorney-client meetings, and in particular the passing of notes and other information between detainees and the outside world, have been a long-standing issue at the IHT.

⁶⁶ *See* Common law, ENCYCLOPEDIA BRITANNICA ONLINE, <http://www.britannica.com/eb/article-9108636/common-law> (last visited July 11, 2008); Civil law, ENCYCLOPEDIA BRITANNICA ONLINE, <http://www.britannica.com/eb/article-9108635/civil-law> (last visited July 11, 2008).

the figure of the investigating judge, the absence of case law as legal precedent, the more active role of the trial judge, and more passive role of the prosecutor and defense counsel.⁶⁷ The IHT statute brings this structure to the Tribunal, and the Iraqi judges bring this mindset with them as well.⁶⁸ This reality can have significant consequences. Attorney-advisors need to beware attempting to artificially impose all the trappings of American-style common law proceedings onto an Iraqi civil law system.⁶⁹ Iraqi judges and attorneys are aware of the differences, and sometimes suspect the RCLO lawyers of mixing American apples with Iraqi oranges in their legal advice. That being said, in some respects customary Iraqi legal practice may not meet standards of due process set by international convention or the Tribunal's own governing sources of law.⁷⁰ The RCLO has pressed the IHT to reform its practice in such areas.

The Iraqis' inexperience with the details of international criminal law, or even the broad concepts of international law itself, is a significant obstacle. Granted, this difficulty is one of the primary justifications for the RCLO.⁷¹ Yet it is difficult to exaggerate the scope of the challenge. This inexperience is not surprising. Under the former regime, international law was about the last source of guidance to which an Iraqi judge could be expected to refer.⁷² Understandably, the IHT judges are sometimes prone to lapse into their familiar modes of operation, even when the new IHT statute,⁷³ IHT rules of procedure and evidence,⁷⁴ and Iraqi Constitution⁷⁵ might dictate otherwise. International criminal law in particular is a specialized and evolving body of law, and one in which attorney-advisors themselves have not always been well-versed prior to their arrival at the RCLO.

Relatedly, language is a difficult and persistent obstacle. The RCLO has always included a number of skillful translators, individuals who have exposed themselves to personal risk by working closely with the Americans. Nevertheless, the need for oral and written translation between Arabic and English⁷⁶ significantly slows the RCLO's work and can lead to misunderstandings. Because the IHT and RCLO deal with some relatively fine points of law, the difficulty is amplified. Communicating accurately and effectively under these circumstances requires careful attention by the translators and attorneys alike.

Legal technicalities aside, significant cultural differences impact the RCLO. Attorney-advisors must adjust to a difference pace of doing business. Directness or conciseness may be perceived as rudeness and thus counterproductive. Many hours may be spent in meetings with apparently very little being resolved. Relatedly, and unfortunately, during decades of Ba'ath rule, independence and initiative were often not rewarded, to put it mildly.⁷⁷ In addition, Iraqis may be sensitive to status in ways that are not immediately evident to Americans. For example, going to see someone in their office may imply the visitor has an inferior status. Therefore, judges or prosecutors may be reluctant to seek information from personnel perceived to be lower in the hierarchy, even if they require information or material from them. Similarly, IHT

⁶⁷ See IHT Statute, *supra* note 3; IHT Rules of Procedure, *supra* note 50; 1971 IRAQI CRIMINAL PROCEDURE CODE, *supra* note 32.

⁶⁸ See IHT Statute, *supra* note 3; IHT Rules of Procedure, *supra* note 50.

⁶⁹ For example, in the IHT courtroom the accused does not sit with his defense counsel. This may strike some Americans as odd, or even troubling, but is quite normal for Iraqis and is not necessarily inconsistent with a fair trial.

⁷⁰ See ICCPR, *supra* note 34; IHT Statute, *supra* note 3; IHT Rules of Procedure, *supra* note 50. Examples of potentially problematic IHT practices include inadequate attention to detainee challenges to pretrial confinement; insufficiently specific indictments; representation of multiple defendants by the same counsel; temporary replacement of Trial Chamber judges during trial; removal of defendants and defense counsel from courtroom; and double jeopardy. See ICCPR, *supra* note 34, arts. 9, 14, 15.

⁷¹ See NSPD 37, *supra* note 54.

⁷² The Arab Socialist Ba'ath Party was created as a secular, Arab nationalist party, and the Ba'ath have long viewed "imperialism" and the perceived international order as forces to be struggled against. See MAKIYA, *supra* note 4, at 249–50 (discussing the Ba'ath view of twentieth-century imperialism). The innate Ba'ath hostility toward international authorities intensified in the repressive wartime, sanctions-laden atmosphere of Saddam Hussein's regime. *Id.*

⁷³ IHT Statute, *supra* note 3.

⁷⁴ IHT Rules of Procedure, *supra* note 50.

⁷⁵ IRAQI CONSTITUTION 2005 [hereinafter IRAQI CONST.], available at http://www.iraqihightribunal.org/doc/legal_doc_uk-8.pdf.

⁷⁶ And Kurdish, in some circumstances.

⁷⁷ See MAKIYA, *supra* note 4, at 99. Makiya writes:

A society like Iraq has choked off all the avenues by which anything other than mediocrity can flourish. Its share of good and caring minds belong now to a different world. Those who did not sell out are either dead, or locked into the Sisyphus-like labours of exile politics.

Id. Makiya wrote in the past from the perspective of an exile looking from the outside at the opaque surface of Saddam Hussein's Iraq; but his description captures the nature of a lingering problem. *Id.*

judges may resent being summoned to a location for a meeting or for training. These are but a couple of examples; religion, ethnicity, tribe, social status, gender, and other factors are all constantly at work on or below the surface of human interactions.

Finally, institutional pressures and political considerations complicate the RCLO's work. The new Iraqi Constitution declares that no power is above the judiciary except the law,⁷⁸ and the IHT rules of procedure enjoin IHT judges to be independent and impartial.⁷⁹ However, the ideal of judicial independence is sometimes challenged by the political realities of contemporary Iraq. It would be unrealistic to expect the IHT judges to be entirely insensitive to the views of the various agencies, organizations, groups, and individuals, inside and outside Iraq, who have an interest in the IHT's operations and who can make their views known in a variety of ways. Similarly, sometimes IHT judges may interpret the advice of the RCLO or actions of the United States Government as "interference" rather than assistance.

IHT Proceedings

As of January 2008, the IHT has concluded two trials, and a third is ongoing. The first IHT trial, known as the Dujail trial, commenced on 19 October 2005.⁸⁰ It dealt with the execution of 148 Iraqi Shia from the town of Dujail following an assassination attempt on Saddam Hussein in 1982.⁸¹ The Dujail trial attracted enormous attention in Iraq and in the world because Saddam Hussein was among the eight defendants.⁸² A number of difficulties attended the proceedings, notably the assassination in separate incidents of three defense counsel, including Saddam Hussein's lead attorney.⁸³ The trial concluded on 5 November 2006 with the conviction of Saddam Hussein and six co-defendants.⁸⁴ Once the appeals were complete, Saddam Hussein and three other defendants had been sentenced to death; two other defendants were sentenced to fifteen years of imprisonment.⁸⁵ International reaction to the trial, verdict, and sentences was mixed.⁸⁶

In the meantime, the IHT's second trial had commenced on 21 August 2006.⁸⁷ Saddam Hussein and Ali Hassan Al-Majid—better known internationally by the sobriquet "Chemical Ali"—were among the seven defendants in the Anfal trial.⁸⁸ Although this trial was less well-known outside Iraq than Dujail, the Anfal case was of a much larger scale.⁸⁹ The Anfal campaign was a series of conventional and chemical attacks carried out by the Iraqi army against Kurdish communities in northern Iraq beginning in the later stages of the Iran-Iraq War.⁹⁰ Kurds were subjected to systematic murder, torture,

⁷⁸ IRAQI CONST., *supra* note 75, art. 19(1).

⁷⁹ IHT Rules of Procedure, *supra* note 50, R. 7.

⁸⁰ *Ad-Dujayl Case*, Iraqi High Tribunal Website, http://www.iraqihightribunal.org/en/iht_cases.php?id_cases=10 (last visited July 11, 2008) [hereinafter *Ad-Dujayl Case*].

⁸¹ *Id.*

⁸² *See id.*

⁸³ *See Timeline*, *supra* note 64.

⁸⁴ *See Ad-Dujayl Case*, *supra* note 80.

⁸⁵ *See id.*

⁸⁶ *See, e.g., Saddam Sentence: Reaction in Quotes*, BBC NEWS, Nov. 5, 2006, http://news.bbc.co.uk/2/hi/middle_east/6118298.stm. International human rights organizations were among the most critical of the proceedings. *See, e.g., 18 HUMAN RIGHTS WATCH, JUDGING DUJAIL: THE FIRST TRIAL BEFORE THE IRAQI HIGH TRIBUNAL*, Nov. 2006 [hereinafter *JUDGING DUJAIL*], available at <http://hrw.org/reports/2006/iraq1106/iraq1106web.pdf> (alleging "serious administrative, procedural, and substantive legal defects in the trial"); Press Release: Iraq: Amnesty International Deplores Death Sentences in Saddam Hussein Trial, Nov. 5, 2006, available at <http://www.amnesty.org/en/report/info/MDE14/037/2006> (stating the Dujail trial was a "shabby affair, marred by serious flaws"). On the other hand, many political authorities, including a number of leaders whose governments oppose the death penalty, were more circumspect. *See Clark Backs Saddam Verdict but Opposes Death Penalty*, NEW ZEALAND HERALD, Nov. 6, 2006, http://www.nzherald.co.nz/section/2/story.cfm?c_id=2&ObjectID=10409377; *Saddam Sentence: Reaction in Quotes, supra*; *Saddam Trial 'Heroic', Says Howard*, THE AGE, Nov. 6, 2006, <http://www.theage.com.au/news/world/saddam-trial-heroic-says-howard/2006/11/06/1162661578964.html>; Canadian Press, *Tories' McKay Circumspect on Saddam Verdict*, CTV NEWS, Nov. 5, 2006, http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20061105/hussein_mackay_061105/20061105?hub=Canada.

⁸⁷ *See Anfal Case: Related Press Releases*, Iraqi High Tribunal, http://www.iraqihightribunal.org/en/iht_cases_press.php?id_cases=11 (last visited July 11, 2008).

⁸⁸ *See Anfal Case*, Iraqi High Tribunal, http://www.iraqihightribunal.org/en/iht_cases.php?id_cases=11 (last visited Jan. 20, 2008) [hereinafter *Ad-Dujayl Case*].

⁸⁹ *See id.*

⁹⁰ *See Dave Johns, The Crimes of Saddam Hussein: 1988: The Anfal Campaign*, FRONTLINE WORLD, Jan. 24, 2006, http://www.pbs.org/frontlineworld/stories/iraq501/events_anfal.html.

starvation, deportation, and mass executions that took an estimated 100,000 to 180,000 lives.⁹¹ When the trial concluded on 23 June 2007, Ali Hassan Al-Majid and two other defendants were convicted and sentenced to death; two defendants were convicted and sentenced to life imprisonment; and one defendant was acquitted at the request of the prosecution.⁹²

The third trial, relating to the regime's suppression of the 1991 post-Gulf War uprising in the southeastern provinces of Basra and Maysan, is currently underway.⁹³ Like the Anfal trial, the 1991 case is very broad in scope; fifteen defendants are charged with crimes against humanity relating to indiscriminate killing, execution, torture, confinement, and persecution affecting many thousands of people.⁹⁴ At least a dozen other cases of varying scope are pending referral to trial or are under investigation by the IHT.

Conclusion

Despite the obstacles, over time the RCLO has developed a close working relationship with the IHT, and attorney-advisors have advised, assisted, and supported their Iraqi colleagues' efforts to render justice with unfamiliar tools in a difficult environment. In recent months, the RCLO has increasingly transferred responsibilities to the IHT. The IHT's ability to bear these increasing burdens thus far is a positive reflection of the efforts of the RCLO.

The IHT's work has been criticized in some quarters.⁹⁵ Indeed, it may not have always matched the hopes of the attorney-advisors. Evaluating every criticism or controversy is beyond the scope of this article. However, the accomplishments of the IHT and RCLO are best appreciated from a broader perspective. In a country with essentially no tradition of effective democratic rule, where violence has been the medium of politics, where dissent and independent thought have been ruthlessly punished for decades, and where violence and conflict still plague the population, the IHT's commitment to public trials guided by the rule of law is a major achievement.⁹⁶ Importantly, it is also an Iraqi achievement, albeit one made possible by the RCLO. To paraphrase T.E. Lawrence, it may be better to let the Iraqis do it tolerably than have foreigners do it perfectly.⁹⁷ In the end it is the Iraqis' struggle, their challenge, and the RCLO has existed to help the Iraqis shape a better future for their nation.

⁹¹ See *id.*

⁹² Omar Sinan, *Iraq to Hang 'Chemical Ali'*, ST. PETERSBURG TIMES, June 25, 2007, available at http://www.sptimes.com/2007/06/25/Worldandnation/Iraq_to_hang_Chemica.shtml. Saddam Hussein was not among those convicted, of course, having been executed the preceding December. See *Anfal Case*, *supra* note 88.

⁹³ See Mike Wooldridge, *High-Profile Trial Divides Iraq*, BBC NEWS, Aug. 21, 2007, http://news.bbc.co.uk/2/hi/middle_east/6957683.stm.

⁹⁴ See ENDLESS TORMENT, *supra* note 19.

⁹⁵ See, e.g., Bassiouni, *supra* note 26, at 358–88 (questioning the legitimacy of the establishment of the original IHT statute and procedural and substantive provisions); Human Rights Watch, *Iraq: Anfal Proceedings Raise Concerns*, Mar. 25, 2007, available at <http://hrw.org/english/docs/2007/03/23/iraq15555.htm> (expressing concern over the indictment and inability of defense witnesses to testify in the Anfal trial); JUDGING DUJAIL, *supra* note 86 (alleging “serious administrative, procedural, and substantive legal defects in the [Dujail] trial”); Dave Johns, *Defining Justice: Victors' Justice*, FRONTLINE WORLD, Jan. 24, 2006, http://www.pbs.org/frontlineworld/stories/iraq501/defining_victors.html (summarizing international criticism of the IHT).

⁹⁶ See Tom Parker, *Symposium: Milosevic & Hussein on Trial: Panel 3: The Trial Process: Prosecution, Defense and Investigation: Prosecuting Saddam: The Coalition Provisional Authority and the Evolution of the Iraqi Special Tribunal*, 38 CORNELL INT'L L.J. 899, 909 (Fall 2005). Parker writes of the IHT:

This is an Iraqi court seeking to address the needs of Iraqi victims and to apply international legal standards. Taken in isolation, whatever your political point of view, it is difficult to see how this could be regarded as a bad thing. Even though this may not be the best case scenario for some, surely it is better than the alternative: deadlock, inaction, and impunity. Every international tribunal established to date has struggled with limitations of one sort or another and yet rightly we persevere. The great lesson of international criminal justice has been that we should not allow the best to become the enemy of the good.

Id.

⁹⁷ In 1917, T.E. Lawrence wrote a guide for British officers serving in southwest Asia which included the following advice: “Do not try to do too much with your own hands. Better the Arabs do it tolerably than that you do it perfectly. It is their war, and you are to help them, not to win it for them.” Robert L. Bateman, *Lawrence and His Message*, SMALL WARS J. BLOG, Apr. 27, 2008, <http://smallwarsjournal.com/blog/authors/robert-bateman/>. Bateman actually criticizes this sort of invocation of this quote outside of the particular context in which it was written; but Lawrence's words fit the RCLO nonetheless. *Id.*