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Tribunal on trial

Americans training the court that sentenced Saddam say it functions fairly despite 'growing pains'

By [Erik Holmes](#)

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The execution of Saddam Hussein in Baghdad on Dec. 29 placed the Iraqi High Tribunal at the center of the world's attention.

American and Iraqi officials hailed Saddam's trial and execution by the tribunal as a milestone for the fledgling Iraqi state, while human rights groups decried the trial as flawed and the execution as unprofessional and inhumane.

Behind the scenes at the IHT, which sentenced Saddam and two others to death in November for murdering 148 Iraqi civilians in Dujayl in 1982, is a small cadre of American military and civilian lawyers, some permanently assigned or deployed and others who come in temporarily to carry out special training.

With the omnipresent sounds of mortars and small-arms fire in the background, the Americans train Iraqi judges and lawyers in international law and help the tribunal turn the balky wheels of justice.

The American legal staff works out of the U.S. Embassy's Regime Crimes Liaison Office, which has about 100 lawyers and support personnel assigned to assist the tribunal.

"We provide the IHT with the support and capacity-building necessary to advance justice and to conduct trials of the most heinous crimes known to man," Col. Patricia Wildermuth, an Air Force reservist serving as the RCLO's international law adviser, said in an e-mail from Baghdad. "When this court closes down, the judges, attorneys and support personnel will return to the regular Iraqi court system with a real appreciation of international law and how it relates to their own system."

Unlike the Central Criminal Court of Iraq, which prosecutes terrorists and insurgents detained by the coalition, the tribunal prosecutes only high-ranking officials of Saddam's regime suspected of crimes against humanity.

Most of the regime's crimes are believed to have been perpetrated by the Iraqi military under civilian command, so the RCLO's four judge advocates — one from each of the services — bring to the group a crucial understanding of military concepts and the laws of war.

One of the most important of these concepts, Wildermuth said, is command responsibility, through which commanders can be held responsible for atrocities committed by their subordinates.

Maj. Gen. Charlie Dunlap, the Air Force's deputy judge advocate general, recently led a seminar on the topic with Iraqi judges and lawyers as part of a training course held Dec. 11-14 in Baghdad. Dunlap was the senior member of a group of judge advocates from all the services who conducted the training.

The course was organized by the Defense Institute for International Legal Studies, a Defense Department group that helps other nations develop their legal systems.

"We didn't come in as the Americans with all the answers," Dunlap said. "We came in as fellow lawyers who were exchanging perspectives on the challenges of these types of trials."

The devil is in the details

Much of the training conducted by Dunlap's group and the RCLO staff focuses on the nuances of international law, such as international treaties, the interplay between differing systems of law and international fair-trial standards.

Most lawyers and judges — Iraqi and American — have little or no experience in this area, said retired Army Lt. Col. Mike Newton, a Vanderbilt University law professor and international law expert who advises the tribunal.

"It's an area that domestic judges just don't study and just don't understand," he said, "on top of which you have a body of law that's heavily influenced by military concepts ... [such as] unnecessary suffering, proportionality, those kinds of things. You put those together and ... any judge has a lot to learn."

One area of international law Dunlap's group focused on is proving each of the numerous elements of a complicated charge such as genocide.

"We talked a lot about analysis of the elements of the crime," Dunlap said, "making the point that an individual may be a very bad person but not guilty of a particular offense because one or more of the elements wasn't proven. These international law offenses can be very technical."

American military officials say that while their goal is to put war criminals in prison, it is also essential that the tribunal's trials be fair to the defendants. To that end, the RCLO and Dunlap's group provide training to defense attorneys as well as judges and prosecutors.

Dunlap said the group he led recommended ways a defense counsel might raise issues likely to be accepted by Iraqi judges. Among their tips: submitting written briefs and remaining respectful of judges, rather than imitating the showmanship often employed by American defense attorneys who have appeared in Iraqi courts.

Defending the system

Despite what the JAGs say is a good-faith effort to help the tribunal function fairly and transparently, its performance in Saddam's trial has been condemned by leading human-rights groups such as Human Rights Watch and Amnesty International.

In a lengthy report criticizing Saddam's trial, Human Rights Watch charged that the Iraqi government prejudiced the proceedings and destroyed the tribunal's independence by allowing judges to be removed at the government's discretion. One judge was removed during the trial and another resigned after facing public criticism from Iraqi officials.

Tom Parker, who served in Iraq in 2003 and 2004 as the United Kingdom's Special Adviser on Transition Justice and as head of the Coalition Provisional Authority's Crimes Against Humanity Investigation Unit, said "the degree of political interference ... has been the most troubling aspect of the trial process."

But he still considers Saddam's trial and the IHT successes.

"You have to look at the IHT in the context of judicial practice in the region," Parker said in an e-mail. "It ... compares favorably to trials held in most surrounding states such as Iran, Syria, Kuwait and Saudi Arabia. It probably falls short of the standard set by the Yugoslavia Tribunal in The Hague, ... but I think it has performed as credibly, if not more so, than attempts at internationally backed justice in Rwanda and Cambodia."

International law experts hail the United Nations-sponsored International Criminal Tribunal for the Former Yugoslavia, which is prosecuting dozens of war crimes committed in Bosnia, Serbia and Croatia during the 1990s, as a model of international justice. The Rwanda and Cambodia tribunals, also sponsored by the U.N., are prosecuting those responsible for the genocides in those countries in 1994 and the late 1970s, respectively.

Amnesty International has criticized the defense provided Saddam. The organization has noted that three of Saddam's lawyers were assassinated during the trial and claimed that complaints by his lawyers about the trial proceedings were never adequately addressed. Human Rights Watch has charged that the tribunal withheld key evidence from the defense and violated the defense's right to question witnesses.

But Newton, the law professor, said the most significant problems with the defense were the fault of Saddam's attorneys, not the tribunal.

“The IHT on paper absolutely grants the full range of rights to defendants,” he said. “Did Saddam have the right to present a defense? You bet he did. His lawyers boycotted proceedings at several points. The court can’t make those lawyers come to court and do their jobs.”

Scott Horton, an international law expert who has worked as a defense attorney in a lower Iraqi court, said what outrages critics of the tribunal is that Saddam was sentenced to death and executed under a system that even its proponents admit is a work in progress.

“Lots [of people] feel really queasy about the death penalty; not per se, but it’s that there’s a war going on,” he said. “The fact that the war is going on makes it very, very hard for people to put together a proper defense. ... The quality of justice being administered is inferior ... and we shouldn’t be having the death penalty until the system is normal.”

Wildermuth, the RCLO’s adviser, admits that the tribunal has flaws — she points in particular to inefficient court management and a lack of modern technology — but she insists that the tribunal is a fundamentally fair institution capable of dispensing justice.

“The legal process, although cumbersome and lengthy, is fair,” she said. “The recent [written opinion issued in Saddam’s conviction] underscores that the IHT dispenses justice on the basis of fair trial rights and a dispassionate and professional analysis of the evidence, despite the growing pains that are present.”

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