

ESTABLISHING RULE OF LAW IN POST-WAR IRAQ: REBUILDING THE JUSTICE SYSTEM

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At the end of April 2003, as major combat operations came to a close, the United States was faced with the daunting task of reinstating the rule of law in Iraq. The invasion of the country and the removal of Saddam Hussein from power had been undertaken with an understanding by the United States and its Coalition allies that they would shoulder much of the responsibility for this task. Furthermore, as the occupying power we had a legal obligation to reestablish governmental functions, including those associated with the justice system.¹ In my role as the Senior Advisor to the Ministry of Justice in those first months after the war, I had the opportunity to participate directly in this process and, to some extent, guide the direction of the emerging justice system.

I had previously served in a similar role as the Director of the Department of Justice in the United Nations-administered government in Kosovo. In that capacity—effectively the Minister of Justice—I supervised Kosovo's courts, prosecutors, and the prisons, as well as other organs of the justice system. In Kosovo, my authority and my mandate were very clear. Justice and police powers were reserved to the United Nations, and although the vast majority of jurists and staff were Kosovars, the management and control of the justice system were firmly in the hands of the international community.

In the immediate aftermath of the war in Iraq, control of the justice system also ended up in the hands of internationals by default. With the fall of

* The views expressed in this Comment are those of the author alone and do not necessarily reflect the position of the National Security Council or the Executive Office of the President.

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¹ See generally Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]; Convention (IV) Respecting the Laws and Customs of War on Land and its Annex, Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, [hereinafter Hague Regulations].

Saddam Hussein's regime, the ministers and the most senior officials in government agencies fled or went into hiding.² The resulting power vacuum could only be filled by the Coalition, and although the intention was for individuals such as myself to serve as advisors to the Iraqis, we found at least at the outset that there was no Iraqi management structure to advise. Thus, for the first few weeks, the senior advisors were effectively running the ministries and were the only ones in a position to ensure that they became functional again. So, with a mandate that was somewhat more ambiguous than I had had in Kosovo, the task was in many ways more challenging. This was due, in part, to the fact that the Coalition understandably wanted to be viewed as liberators, not occupiers. Our status under international law was very clear, however, and we had certain responsibilities and obligations as an occupying power, namely to maintain orderly government and to ensure public security.³ As we fulfilled those responsibilities, though, we were always mindful of not being too heavy-handed lest we erode our image as liberators. It was a difficult balance to maintain—instituting needed changes but doing so in a fashion that did not create resentment or hostility. This is true in all peace-keeping or post-conflict missions, but the nature of our intervention in Iraq was such that it made this task even more challenging and important that we succeed.

In the case of the Ministry of Justice, I was very fortunate. The mid-level Iraqi officials that remained were extremely cooperative and were willing to work with me from the outset. They recognized the need for changes and they eagerly embraced our efforts to bring them about. Perhaps more significantly, we found that the Ministry was not nearly as tainted as one would have imagined. In a country like Saddam's Iraq, one would expect that the Ministry of Justice and the courts would be important instruments of oppression. Undoubtedly, they played a role, but the regime primarily relied on a parallel court system to target its opponents rather than on the "legitimate" courts under the Ministry of Justice. Cases of real interest to the regime tended to be shunted to these parallel structures such as the Revolutionary Court, the Ministry of Interior Court, the Military Courts, and similar institutions. There were exceptions, but what remained in the normal courts were largely common

² See, e.g., Anthony Shadid, *Hussein's Baghdad Falls*, WASH. POST, Apr. 10, 2003, at A1, 2003 WL 17427430.

³ See Fourth Geneva Convention, *supra* note 1, pt. III, § III; see also S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg. at 2, U.N. Doc. S/RES/1483 (2003) ("recognizing the specific authorities, responsibilities, and obligations under applicable international law" of the occupying powers).

crime cases and civil cases in which the regime had no stake and in which the parties were of no concern to the government. Corruption was rife and there were other practices, such as use of confessions obtained through torture, which compromised the system, but the worst human rights abuses were taking place elsewhere. As a result, we at least had a base upon which we could rebuild. In saying this, I do not wish to downplay the challenges involved in fighting corruption or in educating jurists about concepts of due process—they are formidable. Nevertheless, it is easier to address these problems than to try to salvage a court system in which all of the jurists could be linked to officially sanctioned murders, torture, or other serious human rights abuses.

Another positive finding was that the courts and the Ministry of Justice had a relatively low number of committed, senior Ba'ath Party members on their employment rolls. Under Saddam, membership in the Ba'ath Party was a prerequisite for advancement in the government. Nevertheless, it was possible to draw a distinction between those who participated in the party solely to ensure a livelihood and those who were zealous Ba'athists. The comparatively low number in the Ministry of Justice was due in part to the nature of the work and the onerous requirements for service as a jurist. In order to become a judge or prosecutor, an individual had to complete four years of university study in law and then a two-year course at the Judicial Training Institute.⁴ This was a significant commitment of time and effort for a job that offered only limited opportunities for advancement in the Ba'ath Party and the government. Also, it was apparent that the real power lay elsewhere—in the parallel courts or in other party or governmental organs. As a result, the Ministry was not necessarily the first choice for ambitious Ba'athists or “party hacks.” Instead, we found that the judges and prosecutors were generally well-educated and had a fairly sophisticated view of the law. Most felt that they had been marginalized under Saddam, and they were quite eager to prove that they could handle the responsibilities that shifted to them with the dissolution of the parallel court system.

Despite these positive factors, there were a number of significant problems that we confronted from the outset. In addition to corruption there was the shortage of judges and prosecutors. Due to the existence of the parallel courts, there were not enough jurists in the normal court system to handle the volume of cases that would end up there when everything was consolidated in these courts. Also, in many places, some of the worst judges and prosecutors had

⁴ INT'L LEGAL ASSISTANCE CONSORTIUM, REPORT FROM AN ILAC MISSION TO IRAQ 13 - 20 AUGUST 2003 7 (2003), available at <http://www.ilac.se/sajt/bilder/pdf/IraqReport.pdf>.

resigned in the face of pressure from their local populations immediately after the war. While this was a positive step, it nevertheless contributed to the shortage of jurists in the system.

Perhaps the most daunting problem was dealing with the destroyed infrastructure. This overwhelmed everything else and blocked progress on all fronts until it was rectified. During the war itself, and in the looting and civil unrest that followed, approximately seventy-five percent of the courts in Iraq were destroyed, including ninety percent in Baghdad alone. Most were left as burned-out shells, stripped of all furniture, wall and floor coverings, electrical lines, and water pipes. There had been few computers before the war, but those had disappeared. All of the court records and files also met the same fate. Likewise, the central Ministry of Justice building in Baghdad was an empty shell, as was almost every other building and facility associated with the Ministry. Damage to the infrastructure also extended to the communications network, which was nonexistent for the first few months after the war. Thus, all communications with Ministry officials had to take place in person; there were no functioning telephones. Conducting business this way in Baghdad was difficult, but it was virtually impossible beyond the Baghdad area. As the security situation started deteriorating in late May 2003, this problem was compounded even further as face-to-face meetings became harder to arrange.

My most pressing responsibility as Senior Advisor was to ensure that the Ministry of Justice became functional again as soon as possible. Confronted with the situation I have described above, my colleagues and I undertook a number of measures focused on the short-term objectives of reinstating basic justice functions and making the Ministry of Justice an operational entity. Many of these actions were not specifically law-related, but it is equally important that the practical problems associated with day-to-day operations be addressed along with the more substantive issues of revisions to legal codes and long-term reforms to the justice system. It is difficult to focus the attention of local officials on these meatier issues until you can first establish security, repair the buildings in which they will work, furnish them with essential supplies, and start paying them. What follows is an overview of the steps we took in the first months after the war, including our efforts to address the more practical concerns and to start the process of long-term reform.

During the period when major combat operations were coming to a close, and in their immediate aftermath, looting became a huge problem. I was in the second group of civilians to go into Baghdad, and by the time I arrived there the last week of April, most of the court buildings and other Ministry of Justice facilities had been looted or damaged through vandalism. Much of the looting

was perpetrated for the purpose of theft or economic gain; i.e., stealing furniture, light fixtures, wiring, pipes, et cetera. However, some of the looting was directed at undermining the justice system. Throughout the country, court records were stolen in order to conceal the criminal histories of interested parties. In one instance, looters went into the central property records archive and, moving room to room, set fire to the files without touching anything else. In many locations, Iraqis vented their anger at Saddam's regime by destroying whatever local government buildings they could, simply because they now could. No matter the underlying reason, however, this continuing destruction of the infrastructure served to further weaken the justice system with each passing day. Thus, from our first moment in Baghdad, our highest priority was stopping the destruction before we lost any more buildings. Since there were no Iraqi security organs, we were totally reliant on Coalition forces for this function. Stretched thin, and with a constantly changing list of priorities, the military was not in a position to secure every Ministry of Justice facility. By identifying a few very-high priority locations, we were able to arrange for military units to provide security. With the shortage of troops to perform all of the tasks required, this was a short-term solution. We thus began working to set up a security force, comprised of Iraqi guards. We got money to pay them, provided them with weapons, and put them to work. This had an almost immediate impact, but it took some time before these guards were capable of handling all of the security responsibilities on their own. With the support of Coalition troops, however, we were able to halt the looting and vandalism.

In order to determine the extent of damage to the infrastructure, we undertook an inventory of courthouses and other Ministry of Justice facilities throughout the country. Since communications and transport outside Baghdad were so difficult at the outset, we focused our initial efforts on the Baghdad area to determine which facilities were usable or could be repaired easily. We then channeled resources toward the rehabilitation of key facilities such as the main Ministry of Justice building and the Judicial Training Institute where we could temporarily consolidate functions that would normally be performed elsewhere. Additionally, we provided money to the chief judges of appellate court districts to use to repair and refurbish courthouses in their respective districts.

Amazingly, we found that there were two courthouses in Baghdad which were virtually undamaged. Fortunately, there was one on each side of the Tigris River, so in an effort to get courts functioning again we consolidated all of the district courts for Baghdad into these two facilities. We brought judges, prosecutors, investigators, and administrators from the various districts to hear

the cases that would normally be heard in their respective courthouses. When we opened these two facilities on May 8, 2003, it was largely a symbolic gesture. We were able to bring a few arrested subjects there for initial appearances, but at that point the mechanisms were still not working well enough to feed detainees through the court system on a regular basis. It was important for Iraqis to see that the courts were beginning to handle criminal cases again, but it took some time before we completely resolved the logistical and security problems which allowed for a steady flow of defendants into the Iraqi courts.

As we re-opened courts, a pressing question emerged as to the law that would be applied. The 1969 Penal Code was the law that governed criminal proceedings in Iraq and it was generally satisfactory. During Saddam's reign, however, he had introduced numerous amendments to the Code, many of which were unacceptable. Provisions which prescribed any criticism of Saddam and made the offense punishable by death, for example, were clearly egregious. Other provisions were not as outrageous, but were still problematic for one reason or another. It was clear that certain provisions of the Code would have to be suspended, but final decisions had not been made on which would be. The debate also got caught up on the issue of the death penalty; the Iraqis wanted to retain the death penalty, but some of our allies in the Coalition disagreed. In the end, the death penalty was suspended for the period of occupation. As a result of these ongoing discussions, however, no changes to the substantive law had been put into effect on the day we opened the first courts. Thus, the 1969 Penal Code, including all of Saddam's amendments, was still the controlling law at that point. We worked out an agreement, however, with judges, prosecutors, and senior police officials that they would not attempt to enforce laws that were obviously egregious. This was not an ideal solution, but it served the purpose until the revised Code could be put in place. Realizing the urgency of the situation, the Coalition Provisional Authority (CPA) General Counsel worked very hard to get the provisional code issued. Fortunately, in the intervening period there were no instances of jurists abusing the system and using problematic charges from the old Code.

Within days of my arrival in Baghdad in late April we arranged a meeting with the senior and mid-level managers who had remained, after Saddam's fall, in the Ministry of Justice. We met at the main Ministry building which at that time was an empty shell, stripped bare during the looting. As we met, a firefight was going on between U.S. troops and remnants of the Iraqi army a couple of blocks away, so our first discussions took place in a tense and still-dangerous environment. However, the danger did not dampen the enthusiasm

of the Iraqi participants; they were eager to discuss what we could do to rebuild the Ministry and to get them and their staffs back to work. Most of those I met with that day were directors general of the Ministry, individuals who headed up the various directorates (roughly equivalent to divisions in the U.S. Department of Justice). As a first step, I asked each of them to compile a list of everything they needed to get their respective directorates functional again—at least at a basic level—and also to identify a group of core personnel who would go to work first and would ensure that the most vital tasks were being performed. This input from those who knew the Ministry best was invaluable as we made our initial decisions on how to apply resources. The exercise allowed them to focus their thinking on immediate needs and to prioritize tasks. It also made them recognize that they had a vital role to play in reconstituting the Ministry; it was not going to be done solely by internationals.

To oversee Ministry operations for the near-term, we established a management committee which I chaired and which was comprised of the directors general. We met at least once a week for the entire time that I was in Baghdad, although meetings often occurred more frequently. Over time, responsibility for day-to-day operations shifted more to the members of this committee, allowing me and my colleagues in the CPA to spend more time on long-term reform issues.

A very practical concern became apparent in the first meetings: the dire state of Ministry finances. This had a direct impact on our ability to operate and it had a very real effect on the Ministry employees who had not been paid in two months. As a result, we had to devote a considerable amount of time to preparing a provisional budget, recovering financial records, creating mechanisms for funding, and reinstating salary payments. The resumption of salary payments was particularly difficult because the pay system utilized during Saddam's regime was no longer tenable. It had provided extremely low base salaries for almost everyone, but supplemented this pay with bonus payments that were given out for acts of loyalty to the regime. It was necessary, then, to establish an equitable system in which employees received pay based on their job category and the work they were doing rather than on political loyalty. A government-wide plan was instituted by the Ministry of Finance which accomplished this, and while this was certainly a positive move, it nevertheless required tremendous effort to go through and classify the 12,000 employees of the Ministry into appropriate job categories and to ensure that they were all paid.

In mid-May, the U.S. Department of Justice dispatched a group of approximately fifteen judges, prosecutors, and court administrators to Iraq to conduct an assessment of the justice system. They were divided into four teams which traveled around the country recording what was happening in various regions and what the state of the infrastructure was in those areas. This was our first attempt to get a comprehensive overview of the situation throughout the country. While the reports did provide us with a valuable first look at places outside Baghdad, the quality of reporting varied from team to team and from area to area. Also, in the rapidly evolving dynamic that was post-war Iraq, the information quickly became dated. Since the assessment team deployment was a one-time phenomenon, we had to establish some sort of regular reporting mechanism. It was clear that our only reliable means of collecting information would have to be through military channels. We were receiving sporadic reports from various units, but these were mostly anecdotal in nature. In order to get a more comprehensive view, with standardized information, we worked with the military command to issue an order to all units throughout Iraq to report on justice and security sector activities in their respective areas of responsibility (AORs). We were trying to get an accurate picture of which courts were operating; if judges and prosecutors were working, and if so, how many; if prisons were functional; how many police were working; and similar information. The order directed units to provide regular reports on these questions and to keep us informed of the actions they were taking. As these reports began coming in, it provided us with a much better perspective on the situation throughout Iraq.

It was important to accurately ascertain what was happening around the country because it directly impacted our efforts to implement a consistent approach to the justice system nationwide. Until we knew what was occurring from place to place, it would have been difficult to issue guidance that would be beneficial. Outside of Baghdad, military commanders were largely responsible for reestablishing governmental organs in their respective AORs. From place to place, the approach varied. In some locations, the commanders were extremely successful and in other areas, less so. In some instances, they were following the exact same approach but the underlying dynamics on the ground varied, so the results varied as well. It was important to determine what was working and what was not before we instituted policies that might not be productive. Based on the information we received from the Justice Assessment Team and then from military reporting channels, combined with what we had found to work in Baghdad, we drafted a directive that was issued to all military component commanders and CPA regional offices. This

directive provided detailed guidance on what should be done to reinstitute justice functions throughout the country, including instructions on the processes for temporarily suspending judges, for appointing provisional replacement judges, and the substantive and procedural laws to be applied. It was an important first step in establishing an integrated, national justice system.

The measures that I have discussed above were all focused on immediate problems and doing what was necessary to get the system functional again—if even at just a basic level. To ensure that we were creating something that would be sustainable over the long-term, and which would provide Iraqis with a fair justice system, it was vital that we also focused on more substantial reform initiatives.

Perhaps the most important factor in instituting successful reform was the assurance that we had a professional, credible judiciary. Despite the fact that a parallel court system existed and that many of the worst abuses occurred there, it was clear that a significant number of judges and prosecutors in the Ministry of Justice system were also tainted by their past conduct. In some instances, they had a history of corruption. In others, the jurists had been involved in human rights abuses. In either case, it was important that we identified the worst offenders since their continuing involvement in the criminal justice system would undermine the credibility of the entire system. To do this we set up the Judicial Review Committee (JRC),⁵ a variation on a process we had employed in Kosovo.⁶ The JRC was comprised of a mix of Iraqi and Coalition representatives. The senior Iraqi was a former appellate judge who had been imprisoned by Saddam for failing to endorse a dictate of the Revolutionary Command Council. He was universally well-regarded in the Iraqi legal community and his participation in the process enhanced the standing of the JRC significantly. The JRC was given a mandate to examine the record of every judge and prosecutor in Iraq, to interview them, and to hear from any relevant witnesses who emerged in the course of the inquiry.⁷ The JRC was then to make a decision if the individual should be removed from their function or should be allowed to continue.⁸

⁵ *Establishment of the Judicial Review Committee*, Ord. No. 15, Coalition Provisional Authority, CPA/ORD/23 June 2003/15 (2003) [hereinafter Order 15].

⁶ *See On the Establishment of the Kosovo Judicial and Prosecutorial Council*, Reg. No. 2001/8, U.N. Interim Administration Mission in Kosovo, UNMIK/REG/2001/8 (2001), available at <http://www.unmikonline.org/regulations/2001/reg08-01.html>.

⁷ Order 15, *supra* note 5, § 3.

⁸ *See id.* § 4.

The JRC was also tasked with screening any new judges or prosecutors⁹ (many of whom had been appointed on an interim basis by military commanders in the field) to determine if they were suitable. The JRC started work in June 2003 and completed its reviews in mid-2004. By that time, over 800 judges and prosecutors had been investigated and approximately 170 were removed¹⁰ for corruption, linkages to human rights abuses, or other serious breaches of conduct. The process was objective and transparent, it provided an individualized examination of each person, and it afforded anyone who was affected a hearing and an opportunity to present evidence in their defense. Although it took months to complete this process, it was recognized by Ministry employees as a fair means of screening and removing unsuitable officials. As a result, this vetting process was embraced almost universally within the Ministry of Justice—something which was not always the case in other government departments where individuals were vetted out in a fashion that was perceived to be less judicious.

After major combat operations had ended, there had been a downturn in violence. Unfortunately, this was short-lived. After approximately one month, violence was again on the upswing. As the insurgency intensified, security concerns became paramount. This affected me and my colleagues directly as it became harder to move about and attend meetings with our Iraqi counterparts. Beyond this practical impact, the violence also placed a burden on the Ministry of Justice to respond and address the criminality in a more effective fashion. In late May 2003, the courts were still in a nascent stage and were not capable of dealing with the cases that were beginning to emerge from the insurgency—at least in a consistently professional manner. Also, as we had just started the JRC process at that point, we were not entirely confident that all of the judges and prosecutors in the justice system could be relied upon to act responsibly. As an immediate solution, we proposed to the Coalition Administrator, Ambassador Paul Bremer, that we try to quickly identify some of the better judges and prosecutors and that we assign them to a dedicated court to deal with the most serious cases—those that threatened national security. With his endorsement, we fashioned a proposal that to some extent mirrored the international judge and prosecutor arrangement that is utilized in Kosovo. We then worked with the CPA General Counsel to complete the

⁹ *See id.*

¹⁰ Press Release, Coalition Provisional Authority, An Historic Review of CPA Accomplishments 22 (June 28, 2004), http://www.iraqcoalition.org/pressreleases/0040628_historic_review_cpa.doc.

proposal and to put it into the form of an order that was eventually signed by Ambassador Bremer, creating the Central Criminal Court of Iraq (CCCI).¹¹ This then provided a forum for the most serious cases to be handled expeditiously and with a degree of professionalism that still was not a certainty in the regular criminal courts at that point. A small number criticized the CCCI as a special court set up in the manner that Saddam created the parallel courts, but this was not a view shared by the vast majority of judges and prosecutors who embraced the concept. This was due to the fact that the CCCI was staffed by qualified judges and prosecutors from the legitimate courts and, most importantly, its actions were subject to review by the regular Iraqi appellate courts. Thus, it was firmly placed in the Iraqi court structure. Since its establishment, the CCCI has had over 215 cases referred to it and, as of August 2004, fifty-six trials have been completed. Even since the transfer of sovereignty to the Iraqis in June 2004, the Iraqi Interim Government has maintained the court as a valuable component in the criminal justice system—the only one currently capable of handling the most serious and sensitive cases on a day-to-day basis.

In the CPA orders that established the CCCI, and those that modified the Criminal Code and the Code of Criminal Procedure, we provided certain protections for defendants that had been absent in the Iraqi criminal justice system. Foremost among these was the right to defense counsel from the outset of judicial proceedings.¹² Previously, suspects were only entitled to representation at trial, but the investigative phase in civil law jurisdictions is perhaps as crucial to the ultimate outcome, so it was important to extend this protection during this stage as well. Defendants were also provided for the first time with the right to appointed counsel in minor cases,¹³ some of which had potential penalties of five years imprisonment. Arrested subjects were given the right to remain silent in the face of questioning¹⁴ and a requirement was instituted that they be advised of their rights when facing criminal charges.¹⁵ Finally, confessions obtained through torture were proscribed, even

¹¹ *The Central Criminal Court of Iraq*, Ord. No. 13, Coalition Provisional Authority, CPA/ORD/18 June 2003/13 (2003) [hereinafter Order No. 13].

¹² Order 13, *supra* note 11, § 22. *Criminal Procedures*, Mem. No. 3, Coalition Provisional Authority, CPA/MEM/18 June 2003/03 § 7 (2003) [hereinafter Memorandum 3].

¹³ Memorandum 3, *supra* note 12, § 7. *Public Defender Fees*, Ord. No. 53, Coalition Provisional Authority, CPA/ORD/16 January 2004/53 (2004).

¹⁴ Memorandum 3, *supra* note 12, §§ 3-4.

¹⁵ *Id.*

in situations where the confessions were corroborated by other evidence.¹⁶ While it was important to establish these protections, the quality of defense counsel in Iraq made practical application less than perfect. This shortfall should be rectified through training programs that have been established, but it will take some time before the quality of representation is as good as it needs to be.

In Iraq, as in many civil law countries, the courts were integrated into the Ministry of Justice as opposed to being a completely independent branch of government. This arrangement works well in many established democracies, such as most of the countries in continental Europe. Judges in those systems have substantive independence from the ministries of justice, but they are much more closely linked administratively. In any event, it is not an arrangement that should be dismissed out of hand or that should be seen as necessarily inferior to the common law system where an absolute separation of powers exists. In Iraq, however, the courts had been an independent branch of government during the period of the monarchy and it was only under Saddam that they lost all independence and became completely subjugated to the Ministry of Justice, not just for administrative matters, but also in substantive terms as well. To imbue the courts with the authority and the stature they required to maintain rule of law, it was important to recreate the independence the courts had prior to Saddam's rule. To accomplish this, we reconstituted the Judicial Council (now the Higher Juridical Council) as an organ independent of the Ministry of Justice and vested it with the authority to appoint judges and to oversee administration of the courts.¹⁷ This step effectively reestablished the courts as another branch of government.

At the same time, we moved to strengthen the Court of Cassation which is the Iraqi equivalent of the U.S. Supreme Court. As a high priority, we sought to bring the court up to its full complement of thirty-five judges (split between various chambers for criminal, civil, domestic relations, and financial affairs).

¹⁶ *Id.* § 3(d)(viii) (deleting language from the Criminal Procedure Code that had permitted used of confessions where "there [was] no causal link between the coercion and the confession or if the confession [was] corroborated by other evidence"). Iraqi Penal Code of 1969 para. 281 (English translation), <http://www.jagcnet.army.mil/JAGCNETInternet/Homespages/AC/CLAMO-Publics.nsf> (last visited Oct. 21, 2004).

¹⁷ *Re-establishment of the Council of Judges*, Ord. No. 35, Coalition Provisional Authority §§ 1, 3, 5 & 6, CPA/ORD/13 Sep 2003/35 (2003). *Administration of Independent Judiciary*, Mem. No. 12, Coalition Provisional Authority, CPA/MEM/8 May 2004/12 (2004) (implementing Order 25).

In the last years of Saddam's rule, the court had been completely marginalized and the number of judges had declined to about half of the intended number.

Under Saddam, jails and prisons were operated by various government agencies, including the ministries of Defense and Interior and the intelligence services, but primary responsibility for prisons rested with the Ministry of Labor and Social Affairs. This chillingly Orwellian arrangement was meant to convey to the outside world that prisons had a primarily rehabilitative role, and as such were some sort of social welfare organ. The true nature of the prisons, however, was anything but that. Torture and extra-judicial executions were commonplace and the conditions under which prisoners were held were abysmal. In order to ensure that prisons were operated more humanely and that one legitimate prison system was established, we proposed that prison operations be consolidated into the Ministry of Justice—an approach consistent with that followed in the rest of the Middle East, in Europe, and in the United States. Ambassador Bremer approved this move and a subsequently executed CPA Order authorized the creation of a prisons directorate in the Ministry of Justice, one responsible for operation of all civilian prison facilities.¹⁸ Although Coalition forces continued to operate facilities for the detention of security detainees throughout the period of occupation, we began setting up civilian prisons, staffed by Iraqi correctional officers, which would house the prisoners being processed through Iraqi courts. In light of the prison practices employed under Saddam, we were unable to rely on any of the former guards until they went through extensive retraining. This process is ongoing and significant progress has been made. As with the courts, prison infrastructure was also extensively damaged. Rebuilding a network of correctional facilities is crucial if the criminal justice system is to succeed. It is as vital a component as the police or the courts.

In late June 2003, after instituting the above measures, we appointed the first Iraqi Interim Minister of Justice, Judge Medhat Mahmud, who had formerly headed the Judicial Council, and who had been a member of the Iraqi Court of Cassation. He was universally respected by the other Ministry officials and by the judges and prosecutors. He did an outstanding job overseeing the Ministry until the separation of the courts became official and

¹⁸ *Management of Detention and Prison Facilities*, Ord. No. 10, Coalition Provisional Authority, CPA/ORD/8 June 2003/10 (2003) (vesting full authority and control in the Ministry of Justice over all detention and prison facilities). *Management of Detention and Prison Facilities*, Mem. No. 2, Coalition Provisional Authority, CPA/MEM/2 Jun 2003/2 (2003) (prescribing “standards to be applied in the Iraqi prison system”).

he moved over to once again become Chief Judge of the Court of Cassation and Head of the Judicial Council.

As in any peacekeeping or post-conflict mission, there were a number of incredible successes in Iraq, but there were also some unfortunate shortfalls. I would like to think that the transformation of the Ministry of Justice and the courts has been one of the successes. To the extent that this is true, it can be attributed primarily to the factors that I cited at the beginning of this Comment. Another factor which I believe contributed to the outcome, however, was the experience that I, and some of my close colleagues in Iraq, brought to the Ministry of Justice from prior peacekeeping missions. Having done this type of work in a similar environment, we were perhaps better prepared than some in the CPA for what we would be facing. We had worked in post-conflict missions in the past and we had been through this process before. This was an invaluable advantage since our learning curve was limited to the factors unique to Iraq and not to the whole experience of working in a post-conflict environment.

One of the dangers of working in such an environment is the tendency to become overwhelmed with the crises of any given day and to lose sight of accomplishing the long-term objectives. It is very easy in a chaotic post-conflict setting to get entangled in the crisis of the moment and one can easily spend one-hundred percent of one's time responding to such events. If the objective, however, is to build a structure that is sustainable over the long-term, it is crucial to have a vision of what that structure should look like and to devote time and resources to creating it. This may sound like a simple and obvious statement, but it can be incredibly difficult to execute when one has to contend with any number of pressing concerns, many of which have life-threatening consequences. Fortunately, we were able for a variety of reasons to keep the daily crises under control and to put in place the measures necessary for long-term substantial reform.

As we examine what happened in Iraq, there are many lessons that can be learned. We should not, however, see Iraq as the template for all future post-conflict missions. It is much more likely that the United States will engage in multilateral interventions with more frequency than in unilateral ones just as we have in the past, but we should be better prepared for either contingency. And whether it is Iraq, Afghanistan, Kosovo, East Timor, Bosnia, or Haiti we must keep in mind that an integrated approach is required. We must be able to provide the whole range of government services when indigenous institutions collapse. This is most crucial in the justice and security sector, because

establishment of a secure environment is a prerequisite for every other function.

If we are to accomplish this, we must address all of the justice and security functions simultaneously. It is not enough just to set up a civilian police capability, as was done in several past UN peacekeeping missions. For if the police are to be successful there must be a court system and a corrections capability. These various components are inextricably linked and they must be developed in tandem. If the police arrest fifty people on a given day, there must be a prison or jail capable of holding those fifty, and there must be a court system capable of processing them. If any of the three components cannot keep pace with the others, the system will falter.

We must recognize that no matter where stabilization missions take place it is going to be difficult. Putting a shattered country back together again is never easy. Whether it is the United States doing it, a specially-created coalition, or the UN, the actor will face formidable challenges. There will be successes and there will be failures. One enduring lesson from every post-conflict mission, however, is that the forces for instability must be dealt with as the highest priority. Many of the ingredients of instability that exist before an armed conflict and which lead to outside intervention in the first place will remain there after the conflict ends. They will continue to undermine efforts to establish a secure environment in which rebuilding and reform can take place. Thus, the justice and security component of any mission is crucial, since the development of local capacities to deal with these threats is the only true guarantor for success.

Our experience in Iraq crystallized the thinking of many in Washington that the United States Government needs to establish a dependable post-conflict civilian response capability. The lack of such a capability has been apparent for the last ten years as we have pieced together, in an ad-hoc fashion, the resources that we sent to Haiti, Bosnia, Kosovo, East Timor, and Iraq. Even before the events in Iraq transpired, many who had worked in post-conflict stabilization missions had recognized this need and efforts were launched in various quarters to address the problem. I began working on this issue at the National Security Council shortly after I commenced work there in January 2003 and, after returning from Iraq in July 2003, I again became engaged in this project. As a result of Iraq, many more people were willing to focus on the issue of how to respond to post-conflict contingencies. Eventually, we presented a proposal to senior administration officials in April 2004 and we secured their approval for the establishment of a standing post-conflict/crisis

response office in the Department of State.¹⁹ This is an important first step which should, over time, allow the United States to be more effective and efficient when it is forced to respond, either as part of a multilateral effort or unilaterally, to crises around the world.

¹⁹ See Press Release, Senator Richard G. Lugar, State Department to Establish Stabilization and Reconstruction Office (July 6, 2004), *available at* <http://lugar.senate.gov/pressapp/record.cfm?id=223639>. As of September 27, 2004, the U.S. Department of State had established the Office of the Coordinator for Reconstitution and Stabilization (S/CRS), <http://careers.state.gov/student/particip.html#srs> (last visited Oct. 24, 2004).