

Cover Story

Rough Justice

Behind the scenes with the American advisers to the Iraq v. Saddam Hussein court

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By [John Gibeaut](#)

For prosecutor Anne M. Tompkins, it was a dream assignment. The assistant U.S. attorney had prosecuted Medicare cheats and drug dealers--important cases in Charlotte, N.C., but hardly the stuff of international news.

Then in 2004, she volunteered to become one of the dozens of American lawyers and other experts who would help Iraqi officials build the case against former dictator Saddam Hussein.

The charge against Saddam would be crimes against humanity. But which crimes?

There was the notorious 1988 Anfal campaign against the Kurds of northern Iraq. As many as 100,000 died, some gunned down in mass executions and others in attacks using chemical weapons including sarin and mustard gas.

And there was Saddam's second attempt to exterminate the Kurds in 1991 after his army was evicted from Kuwait in the first Gulf War. That's not to mention his simultaneous operation against Shi'ites in southern Iraq. Estimates of the dead reached 100,000 for the Kurds and 130,000 for the Shi'ites.

To discuss which case should be brought first, Tompkins and her colleagues met in Baghdad in late summer 2004 with Ra'ed Juhi, the chief investigative judge for the Saddam court, which was later officially named the Iraqi High Tribunal. While criminal cases in the U.S. adversarial system begin in prosecutors' offices, civil law countries like Iraq use judges to investigate, bring charges and also hear cases.

Juhi wanted to know about Dujail--what about trying that case first? The Americans had never heard of it. But Juhi's story grabbed their attention.

After Saddam took over as Iraq's president in 1979, the small city of Dujail was one of the first places he demonstrated his boundless appetite for revenge. He took a relatively small event--a 1982 attempt on his life that involved about 10 people--and responded with overwhelming force against hundreds of residents.

First, the regime conducted summary trials and hanged 148 men and boys from Dujail--few if any of whom had something to do with the assassination attempt. Then, hundreds more languished without trial for years in a desert prison camp near Iraq's border with Saudi Arabia. Finally, on Saddam's orders, the government razed large sections of the town and the surrounding date orchards.

Though virtually unknown outside Iraq, the Dujail episode remained etched on the national psyche two decades later as the prototype for the regime's subsequent butchery. The case had a lot going for it from a prosecutor's perspective.

The crimes at Dujail were relatively simple to investigate, compared with the months of evidence gathering that would be needed in the cases involving Saddam's better known carnage. The regime had kept death records--including execution orders--so the case didn't require mass exhumations and forensic examinations of bodies. And because the case could be proved mostly by documents maintained by the regime, there was less need for live witnesses, whose memories could have faded over time.

And because the trial court was brand new, starting off with a comparatively small case would allow the judges to work out the kinks before tackling the operatic scale of Saddam's later massacres.

"We said, 'Hey, that makes perfect sense.' Judge Ra'ed liked it, too," recalls prosecutor Gregory Paw, who also worked on the investigation. Then an assistant U.S. attorney from Philadelphia, Paw is now criminal justice director

for the New Jersey attorney general's office in Trenton.

"That's why you start with a smaller case--in case you have to go back to the drawing board and redesign the tribunal," he says.

So Tompkins and Paw set out to find Dujail on a map. They looked for hours with no success.

It turned out that the city--population 80,000--was only 30 miles north of Baghdad. But it was a tough 30 miles, with the highway and surrounding countryside crawling with insurgents. A military escort was essential, as were helmets, body armor and sidearms. Getting to Dujail entailed more than ringing the Baghdad motor pool. "You just can't call up and say, 'Hi. I'm Anne. Take me to Dujail,'" Tompkins recalls. The military doesn't do anything simply because a prosecutor asks nicely. Getting from point A to point B requires orders.

Then the prosecutors caught two big breaks.

As Tompkins and Paw took chow one day in a Baghdad mess hall, an FBI agent working with them happened to walk by, and he took the opportunity to tell them he had obtained some documents from Dujail. Also by happenstance, an Army colonel was seated at the same table. The officer's ears perked up at the mention of the town's name. Dujail? The colonel had been to Dujail. He could help the prosecutors get there.

And he knew a reserve captain named Vincent G. Heintz, who back in the States was an assistant district attorney in New York City. Heintz had been investigating gunrunning and other insurgent activities in the Dujail area.

As he conducted his investigation, the locals told Heintz the story of Saddam's earlier revenge against the town, which involved some of the same insurgent ringleaders. Thinking like a prosecutor, Heintz had started to compile a separate file on the 1982 episode.

The colonel dispensed with the military formalities, and soon the prosecutors and Judge Juhi were on their way to Dujail. Capt. Heintz met them at a forward operating base outside town, where he already had assembled a handful of potential witnesses for the trio to interview. Paw and Tompkins' initial assessment of the evidence: "outstanding."

The case that eventually would slip the hangman's noose around Saddam's neck had begun to take shape.

Stumbling across the case of Dujail was the first of many surprises for the American advisers to the Iraqi High Tribunal. Unfortunately, it was their last pleasant one. The Americans badly miscalculated the level of support the trial would receive from Western governments and international human rights groups. They didn't count on a feisty panel of Iraqi judges who rejected U.S. advice about key aspects of trial procedure in favor of their own legal traditions. And they didn't expect a group of high profile defense counsel who were as intent on attacking the tribunal as attending to the law and facts of the case.

But perhaps the essential problem was that the difference in cultures was too great. The Iraqi judges harbored no small degree of suspicion for even friendly outsiders, the American legal experts included.

"They didn't know us," Tompkins says. "They didn't know how long we were going to be there.

"If it were an American system, things would have run a lot differently."

U.S. troops pulled a disheveled Saddam from his hiding place--a hole in the ground near his hometown of Tikrit--on Dec. 13, 2003. Just before Christmas, Attorney General John Ashcroft put in a call to former prosecutor Gregory W. Kehoe, who was about to hit the ski slopes while on vacation in Vail, Colo.

We need your help, Ashcroft said.

Kehoe had been a prosecutor at the International War Crimes Tribunal for the Former Yugoslavia. In 1999, he won the conviction of Bosnian Croat Gen. Tihomir Blaskic for the massacre of Muslim women and children. As an assistant U.S. attorney in Tampa in the early 1990s, Kehoe won money laundering convictions in the BCCI banking case and racketeering convictions against leaders of the Outlaws motorcycle gang. Complex cases populated with notorious characters were nothing new to him.

The assignment this time was to head the Regime Crimes Liaison Office, housed in the U.S. Embassy in Baghdad. Its staff of volunteer lawyers, investigators, security personnel, technicians and scientific experts would help the Iraqis construct a case against Saddam.

Nearly all the group's lawyers came from U.S. attorneys' offices, private practice or academia. Experience is what mattered, not politics. The staff included a supporter or two of 2004 Democratic presidential candidate John Kerry, as well as opponents of the death penalty.

Eric H. Blinderman got his call about the same time as Kehoe. He learned of it when he checked his office voice mail at Manhattan's Proskauer Rose while on his way to a law firm holiday party. It was a law school buddy who was working for the Coalition Provisional Authority, the occupation government established after the fall of Baghdad. "Eric, send me your resumé by 6 a.m.," the friend urged. "I can't tell you what it's about, but I promise it will be something you will be interested in." Out of Cornell Law School only four years, Blinderman was short on trial experience. But he had received a master's with distinction in international law from Oxford University in 2001. Three weeks after the call, he was getting briefed at the Pentagon.

"We've got this guy Saddam," Blinderman was told. "There will be war crimes trials. Are you interested?"

By March 2004, Blinderman was in Baghdad working as an associate general counsel for the CPA. When the Bush administration decided the Justice Department would take the lead in the Saddam case, Blinderman became chief legal counsel on Kehoe's staff. He was the American who worked most closely with the Iraqi judges in setting up the process and carrying through with the trial.

American preparations for the case had begun years earlier. Even before the Sept. 11, 2001, terrorist attacks, Pierre Richard Prosper, U.S. ambassador at large for war crimes issues, had begun studying a series of what if scenarios should Saddam fall from power.

The day before terrorists crashed jetliners into the World Trade Center and the Pentagon, two lawyers from the Army Judge Advocate General's Corps were assigned to Prosper's State Department office to collect evidence against Saddam. Prosper describes the effort as "just broad forward thinking."

As war grew imminent in early 2003, discussions began in earnest between Bush administration officials and Iraqi expatriates about what a trial of Saddam would look like.

Agreement quickly emerged that Saddam would stand trial in an Iraqi court. The International Criminal Court in The Hague, created to hear cases like the one against Saddam, came into being only in 2002. Most of Saddam's crimes predated that court's jurisdiction.

There was also the question of punishment. Saddam and his top lieutenants who orchestrated atrocities for more than two decades wouldn't receive the death penalty in international courts, where capital punishment is not an available sanction. But lesser officials who committed the crimes on their orders, who would be tried in Iraqi courts where the death penalty was used, would risk execution. Trying everyone in Iraqi courts avoided that disparity.

Though they didn't want to cart Saddam off to The Hague, Bush administration officials wanted international participation all the same. They also knew the prospect of a death sentence would pose an obstacle, especially when it came to dealing with opponents led by then United Nations Secretary General Kofi Annan.

So, in one of his first official acts, CPA administrator L. Paul Bremer suspended Iraq's death penalty in June 2003. Bremer cited Saddam's abuses of capital punishment as his reason, but lawyers close to Bremer viewed the suspension more as an attempt to placate death penalty opponents in order to enlist international assistance.

When it came to selecting judges to hear the case and drafting a statute to empower the Saddam court, the CPA deferred extensively to the Governing Council, a 25 member panel of prominent Iraqis hand picked by the CPA as the nation's first temporary government.

The CPA did, however, persuade the council to include international judges on the panel deciding Saddam's fate; this was regarded as another crucial condition for meaningful help from other nations. To reduce the potential for interference from other parts of the government, the council also divorced the Iraqi High Tribunal from the Ministry

of Justice, which had a reputation under Saddam for politically interfering with judges. The Governing Council finished its work Dec. 10, 2003, producing a statute modeled after U.N. tribunals for Yugoslavia, Rwanda and Sierra Leone, and blending pre Saddam Iraqi criminal law with international provisions on war crimes and humanitarian offenses. Three days later, U.S. troops captured Saddam.

But once a second Iraqi government replaced the council in June 2004, the Iraqis effectively killed any hope of broad international support by reinstating capital punishment and eliminating the international judges.

Prosper found his job impossible as he went nation to nation looking for the international aid the United States hoped would give the trial legitimacy. Except for some limited offers of help with exhumations from the Dutch and the Danes, Prosper couldn't even persuade governments to contribute in "death penalty neutral" ways, such as assisting with court administration or witness protection.

"I said, 'There's lots of areas where you can assist and make this a fair process,'" recalls Prosper, who in 2006 mounted an abortive campaign for California attorney general. "The justice system in Iraq got caught up in the larger political questions involved in the war."

Dujail investigator Tompkins got the same treatment from private humanitarian organizations. Groups like Human Rights Watch had long documented Saddam's abuses. So in the Americans' minds, getting it and similar groups on board should have been a cinch.

"We got a cold reception from them," says Tompkins, who is now back in Charlotte and a partner in Alston & Bird.

"Their main problem was that the death penalty was going to be a possible punishment. That was a deal breaker."

The Iraqis and their American backers would largely go it alone.

No matter what the policymakers expected, Kehoe was not shocked when the Iraqis reinstated the death penalty. After all, this was the Middle East, not Western Europe. Governments throughout the region extensively use capital punishment and make no apologies for it.

"It was just a given that the Iraqis were going to implement their law, and their law included the death penalty," says Kehoe, who is now a partner in the Tampa office of Greenberg Traurig. Besides, he had more pressing concerns with training the judges who would handle the case.

Iraqi law and its legal profession are among the oldest on Earth, dating back more than 3,500 years to ancient Mesopotamia and the Code of Hammurabi. Even Saddam, after nearly 25 years in power, was unable to subdue completely Iraq's fiercely independent judiciary. He simply avoided the legal establishment by creating "revolutionary courts" to do his political bidding.

But Saddam did stifle the judiciary's professional growth by isolating judges from legal developments in the outside world. Those who ultimately would judge Saddam knew little or nothing of the growing practice of using international law to try national leaders for committing humanitarian atrocities against their own citizens.

So along with Blinderman, Kehoe had to get the Iraqi judges up to snuff on trends and best practices as quickly as possible. His Regime Crimes Liaison Office conducted training courses in Italy and the United Kingdom, far from the volatile environment at home. "The best thing you could do was get these guys out of Iraq," Blinderman says.

The logistics alone were hairy. The tribunal judges, appointed by three successive temporary and permanent Iraqi governments, were culled from other courts around the country. The Americans had to arrange military escorts to gather as many as 20 judges at a time and take them to the Baghdad airport--where they were met by a kennel of bomb-sniffing dogs.

"I would not get off the ground until I had the bomb dogs go through all the luggage, the entire plane and everyone on it," Kehoe says.

To staff the first two week training course, scheduled for Oct. 4, 2004, in London, Kehoe dialed up some old contacts at the U.N. sponsored Yugoslav tribunal. But four days before the sessions were to begin, Kehoe's office

received a letter from the United Nations announcing that it was prohibiting court personnel from participating in the program. Anyone who helped train the judges would be fired.

U.N. officials gave no reason for the ban, either in the letter or later on the telephone, Kehoe says. He assumes the death penalty was to blame. Meanwhile, a plane had been chartered; hotel reservations had been made. Kehoe had students--"the pick of the litter"--but no teachers. "At this point I was scrambling."

An unlikely ally was coaxed to step forward. Michael P. Scharf, director of the Frederick K. Cox International Law Center at Case Western University School of Law, was a death penalty opponent who questioned the legality of the invasion in the first place. He had wanted nothing to do with the Saddam trial.

"I originally thought the United States was the puppet master," he says. He changed his mind and agreed to participate in the sessions after he read the Iraqi tribunal's enabling statute and concluded it was designed every bit as fairly as other international tribunals--including the Yugoslav forum, which he helped to create as a lawyer in the State Department. That experience stood out as Blinderman searched for instructors from a list of international law experts supplied by one of his law school professors. Both Blinderman and Kehoe went to work on Scharf.

"They said, 'Scharf, do you want to sit on the sidelines and hurl criticisms through your op eds and law review articles, or do you want to get your hands dirty and try to make this trial as fair as possible?'"

Once in London, away from the bombs and shrapnel, the Iraqis could relax. Organizers kept the training low key, and the judges arrived at their hotel with no fanfare. Most had never been outside Iraq. The relative safety and freedom of London made for an environment conducive to learning.

Their anonymity in London allowed the judges to use their free time for shopping or dining out--both good ways to wind up dead in Baghdad. Some judges even packed spare shopping bags inside their luggage. Uninterrupted running water and electricity were nice perks, too.

In classroom and mock trial settings, the judges were catching up on a quarter century of growth in international law. The learning curve was downright vertiginous.

"Most of them were very apologetic that Saddam and the regime had prevented them from traveling and learning from the outside," says law professor Michael A. Newton of Vanderbilt University. Newton had helped draft the tribunal's governing statute and later worked as an adviser to the lightning-fast appeals court that affirmed Saddam's conviction and death sentence.

Scharf assumed the judges simply would soak up what the Americans told them without asking too many questions. But it was in London that the Americans first began to realize this was not the group of judges they had expected.

"They were surprising," Scharf says. "They were very boisterous and aggressive debaters--very animated. I had thought they would be a beaten people who would just defer to the Americans."

Instead, Scharf and his colleagues witnessed colossal debates among the judges on every conceivable subject, right down to the legality of their own tribunal. Scharf quickly concluded that the Iraqis weren't interested in putting Saddam through a show trial, then stringing him up. "They were not executioners."

The judges constantly pressed their instructors to predict how history would assess the proceedings. They wanted to know what would happen if they treated some defendants more leniently, perhaps even issuing an acquittal or two. After all, three Nazi officials walked away from Nuremberg with acquittals.

[Of eight defendants in the Dujail case, the tribunal issued death sentences against three: Saddam; his half brother and head of intelligence Barzan Ibrahim al Tikriti; and Awad Hamed al Bander, the former chief justice of Saddam's Revolutionary Court. An appeals court later changed the life sentence of Taha Yassin Ramadan, a longtime Saddam confidant and vice president, to death. Three minor defendants received 15 years each, while the tribunal acquitted a fourth.]

For Scharf, the classes foreshadowed the tumultuous televised images of the trial. He recalls an American instructor in London, perhaps a little too in love with the adversarial system, admonishing the Iraqis to conduct themselves like

pit bulls in the courtroom. The remark didn't immediately register with the Iraqis, partly because of the time it took the translator to convey the meaning.

But once they got it, the judges became indignant and walked out of the room. You just don't compare an Iraqi to a dog. Yet the judges calmed down and returned to their seats a few minutes later. Class resumed as if nothing had happened.

Scharf was starting to catch on to the Iraqi way of justice. "When you see a lot of yelling in an Iraqi courtroom, it's pretty much normal."

The Americans say they wanted to create not just a fair tribunal, but one that appeared to be fair. Back in Iraq, the job of ensuring fairness largely fell to Blinderman, who hammered out procedural and evidentiary rules with Judge Juhi.

Pre-Saddam Iraqi law was steeped in protections for the accused, such as the right to counsel and protection from self incrimination. At the suggestion of the Americans, the tribunal's rules built on that foundation with bans on evidence obtained through torture and prohibitions on judges drawing negative inferences from a defendant's refusal to testify. So far, so good.

But the Iraqi civil law system, in which judges present the bulk of the evidence for both prosecution and defense, appeared inherently biased to some Western critics whose experience was with adversarial systems that use juries as fact-finders.

To combat those perceptions, the Americans encouraged the Iraqis to release written rulings over the course of the trial as they decided motions, which included serious challenges to the tribunal's jurisdiction and arguments that Saddam enjoyed immunity as a head of state.

But the court rejected that approach, publishing a 300 page judgment weighing arguments for guilt and innocence and explaining its reasoning on key motions nearly a month after it issued the verdicts in the case. Sure enough, that judgment came down two days after Human Rights Watch issued a 93 page post mortem concluding that the tribunal's conduct "reflects a basic lack of understanding of fundamental fair trial principles."

Blinderman also failed to persuade the judges to use reasonable doubt as their standard of proof. The absence of that hallmark of American criminal justice prompted complaints from one human rights organization after another.

The Iraqi rules require only evidence that "satisfies" judges of a defendant's guilt, which Judge Juhi insisted to Blinderman is at least the functional equivalent of guilt beyond a reasonable doubt, if not an even higher standard of "moral certainty." Blinderman had a hard time swallowing Juhi's argument, but on this point the Iraqis wouldn't budge.

So, after all the wrangling, it was a surprise to Blinderman and the other Americans that the words reasonable doubt appear 29 times in the trial panel's written judgment. "They wanted to disabuse critics who don't know anything about the civil law system," surmised one adviser.

The professional conduct of a platoon of private foreign lawyers hired by the major defendants--including Saddam defense counsel and former U.S. Attorney General Ramsey Clark was particularly vexing to the American advisers. Taking their cue from the trials of U.S. radicals in the late 1960s and early '70s, those lawyers focused more on political arguments and theatrics than the facts of the case, the American advisers contend.

None of the private lawyers showed up in court more than a handful of times, leaving most of the heavy lifting to public defenders appointed by the court as standby counsel. Besides staging boycotts of the proceedings, some private counsel also disrupted the trial by intimidating lawyers for other defendants, the American advisers say. One of the private lawyers' favorite tactics was the threat of "serious repercussions" for counsel who didn't stand to acknowledge Saddam as president when he entered the courtroom, Blinderman remembers.

The court put a stop to that by having the defendants enter the courtroom first and take their seats before the lawyers came in.

The bullying from Saddam's lawyers became so serious, Blinderman says, that lawyers for the remaining defendants turned down offers to live in the relative safety of Baghdad's heavily fortified International Zone, where the judges, prosecutors and American advisers lived and worked. Not even the slayings of two defense lawyers in other neighborhoods could prompt their colleagues to move.

Blinderman blames much of the reluctance on a motion signed by Clark that ridiculed a security plan for lawyers considering bringing their families into the protected area. Clark counters that, with its concentration of Shi'ites and other enemies of the former regime, the International Zone was the most dangerous place in Iraq for any lawyer bold enough to take on Saddam's defense.

Clark says he and Saddam's other lawyers presented the only defense they could. The court hamstrung the defendants by failing to give them exculpatory evidence and by refusing to hear oral arguments and promptly issue detailed rulings on motions, he says. And unlike the American advisers and Iraqi judges, Clark says, the defendants received no military protection so they could do their own investigation in Dujail.

"We had no real way of defending the case," Clark says.

At times, the proceedings resembled pure farce. Blinderman describes one day in late May 2006, near the end of the trial, when defense counsel called three witnesses who said that prosecutor Jaafar Mousawi had offered to pay them for their testimony against Saddam. Then counsel played a video that purported to show Mousawi egging on a crowd against Saddam at a memorial service for the Dujail victims.

That turned out to be a bad idea when Mousawi called a witness--who looked like the prosecutor--who testified it was him, not Mousawi, on the video.

But still the jig wasn't up. The next day, the defendants brought in a fourth witness who, like the three before him, swore that Mousawi attended the service. And he went on to claim that 23 of the people believed to have been executed actually were still alive. He started to read their names from a handwritten list.

But the witness faltered when the court took the list and asked him to recite the names from memory. He offered only a few names, none of which matched those on the prepared list. What's more, the witness's handwriting differed from that on the confiscated list.

When pressed, the witness would say only that he received the names from an unknown source. That was enough for presiding Judge Ra'ouf Abdel Rahman. He threw all four witnesses in jail and began a perjury investigation.

Under questioning at a hearing that began late on a Friday afternoon and lasted into the early morning hours, all the witnesses admitted they had not attended the service. At least three never even had been to Dujail.

Then they turned on the private defense lawyers, telling the court that some of the attorneys had coached them in their testimony and provided them with the list in exchange for housing and jobs in Damascus, Syria. One even swore that defense lawyers had his son kidnapped and threatened to kill the boy if he did not testify for Saddam. Rahman took signed statements from the witnesses, then read them in open court when the trial resumed. Stunned defense lawyers claimed that Iraqi guards and U.S. marshals tortured the witnesses while they were locked up.

The witnesses, however, had given video statements upon their release after the Friday hearing--statements in which they said they were treated fairly. They were well fed, too. Prosecutor Mousawi had ordered spaghetti dinners for the witnesses when it appeared the questioning would last well into the night.

Scenes like that were viewed by huge audiences in Iraq and the wider Middle East, thanks to 34 video cameras mounted throughout the courtroom. Arab news networks broadcast gavel-to-gavel coverage.

"I'd go back to the office, and everybody would be telling me they couldn't get any work done because the Iraqis were all gathered around the television sets," says Christopher Reid, a former New Hampshire state legislator who became head of the regime crimes office in August 2005 after Kehoe's tour ended.

But in the West, where the public's appetite for the trial was limited, news reports focused on the theatrics, such as Saddam's frequent harangues and threats against the court and witnesses.

"You never saw on TV what happened immediately afterward," says Vanderbilt professor Newton. "The judge would say, 'I'm the judge and you're the defendant. Now sit down.' And what would Saddam do? He would sit down. And so would [co defendant] Barzan. They implicitly respected the authority of the court."

In part to counter the image of the trial as a circus, American officials conducted regular press briefings on the proceedings. The American advisers also urged the tribunal's judges to hire a press officer to help the court fend for itself.

"They would just say, 'Yes, of course we'll do it,' " Reid remembers. "Then it just wouldn't happen."

The tribunal finally created its own Web site in late winter 2005 and designated investigative Judge Juhi as the body's spokesman--largely because he was the only jurist who spoke English well enough to communicate with Western reporters. But a dearth of details about the case and a rough Arabic to English translation hardly make the site a font of information. Neither Juhi nor the American advisers still working in Iraq responded to requests to comment for this story.

The Iraqi High Tribunal announced its verdicts and sentences on Nov. 5, 2006. After a quick review and approval by the appellate court, Saddam was delivered to the Iraqi hangman by his American captors on Dec. 30.

As an illicit cell phone video would later reveal, minutes after the handover, Iraqi officials hurled invective at the former dictator in the final, chaotic moments of his life. The end was as turbulent as the trial that preceded it.

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