

## **Iraqi judges and prosecutors and international human rights law – an Australian judge’s perspective**

In March 2005, I was invited to be part of a group of international lawyers making presentations to a group of Iraqi Judges, prosecutors and judicial investigators on international human rights law. This judicial training program was organised by the Human Rights Institute of the International Bar Association and the International Legal Assistance Consortium, an association of non-government organisations based in Sweden. These NGOs are spread throughout the world and specialise in providing assistance in post-conflict situations. The training took place in Dubai.

The other trainers were:

- Johann Kriegler, recently retired from his position as a judge of the Constitutional Court of South Africa, who also chaired the Independent Electoral Commission which ran the country’s first democratic elections in 1994, and who has held a number of election-related appointments for the United Nations Electoral Assistance Division, including in relation to the recent (2004) elections in Iraq.
- Candice Welsch, legal advisor to the UN Special Court in Sierra Leone.
- Melissa Waters, a professor at Washington and Lee University in Lexington, Virginia, where she lectures on international law.
- Safouen Ben Abdullah, a Tunisian-born Paris-based human rights lawyer in private practice.

The organisers were Nick Olley and Samir Jabal, on behalf of the IBA, whose organisation of the conference and all of the logistical arrangements that went with it were superb.

Attending were 17 Iraqi judges, 11 prosecutors, 10 judicial investigators and two administrative staff. They came from all over the country and represented different levels of experience. Amongst them were Kurdish and Arab Iraqis, Sunnis as well as Shiites. Everyone was, of course, aware of the unique context of the workshops and of the situation at the other end of the Persian Gulf: one of the judges who was to attend did not come as he had been shot.

There were four women, consisting of two prosecutors, one judicial investigator and one member of the administrative staff. None of the judges were women.

Before we went, the trainers were given a detailed overview of the Iraqi system current to 7 February 2005 (it is a civil system based on the Napoleonic Code), as well as a number of teaching materials including a manual on human rights for judges, prosecutors and lawyers entitled “Human Rights in the Administration of Justice” which was developed by the Office for the High Commission of the Human Rights at the United Nations in cooperation with the International Bar Association. This large volume was also provided to the Iraqis in Arabic. In addition, we were provided with a trainers’ guide to the manual and a number of materials on Iraqi laws such as the Iraqi Interim Constitution, information about Iraqi criminal law and criminal procedure, the penal code and the statute of the Iraqi Special Tribunal. We

were also provided with a number of the orders made by the Coalition Provisional Authority (“CPA”). In addition, we were provided with a copy of a number of international instruments such as the Universal Declaration on Human Rights, and other international instruments including some specific to the Arab world such as the Arab Charter on Human Rights and the Cairo Declaration of Human Rights.

Very few of the participants spoke English because its use had been discouraged prior to the fall of Saddam Hussein. We were aware from the material we received that prior to the Saddam Hussein era, the Iraqi legal system was considered to be one of the most modern legal systems in the Arab world and the judiciary had a proud history of independence.

The program consisted of presentations in plenary session, followed by questions and answers, comments and then small group work with about ten people in each group. There were simultaneous translations using headphones for all plenary sessions. In the group sessions a single interpreter provided consecutive interpreting. The interpreters were of an extremely high standard, making communication relatively trouble-free.

The program was conducted in Dubai because of security issues for the Iraqis and no doubt for the trainers. The leader of the group was a senior judge of Kurdish origin. He was not the most senior judge but had been chosen to lead the delegation by the Chief Justice of Iraq. (I am for obvious reasons avoiding using the names of, and geographically identifying information about, specific Iraqi participants.) The Kurdish judge’s nomination reflected a view, openly expressed by many, about the need to incorporate all ethnic and religious groups in the future of Iraq. It was expressed to me that they would prefer a federation, as more aptly reflecting their diversity, than a unitary state.

Some of the judges were very experienced: several were in their sixties, while the youngest judge was in his thirties. I was told in a later session that in Iraq judges must be at least 28 and married. I have subsequently been told that they must also be male.

In both the formal and informal sessions, it was clear that security continues to be a major concern in Iraq. As I have mentioned, just prior to the program commencing an Iraqi judge had been shot. The judges also fear for the safety of their families. Both the judges and the prosecutors, particularly the women, expressed to me individually the fear they held for their children, that when they left in the morning for school or university, they might not see them again that afternoon. They expressed grave concern about terrorism, but also about the military occupation. One incident which highlights a particular concern in regard to the security situation was told to me by a female chief prosecutor. She reported that, in the city in which she lives, an American army sergeant recently had released all the prisoners from custody. These were prisoners who were in jail for ordinary criminal offences. She said that when the Americans troops first arrived, they were welcome, and as she put it, posed for photos with children, but that the situation had changed dramatically and there is day to day antagonism between the American army and Iraqis.

The course itself covered the origin, meaning and scope of the international law of human rights, major international treaties, the independence and impartiality of the judiciary, prosecutors and the rest of the legal profession; international rules relating to individual liberty and rules relating to arrest and detention; equality before the law and the presumption of innocence; treatment during detention; right to a fair and public hearing; the prohibition on torture and cruel, inhuman and degrading treatment and punishment; and women's rights in the administration of justice.

The course started with a general introduction to international human rights law. After the introduction we broke into small groups where the participants introduced themselves to us and to each other and talked about what they wanted to get out of the week.

The first presentation I gave was in a plenary session and concerned international treaties including the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights. As well as describing the contents of those conventions, I used a PowerPoint presentation which my Associate, Andrew Fraser, developed with me and with the IT people at our court. The PowerPoint projections used Arabic versions of relevant clauses from the treaties, taken from the World Wide Web. In addition, the Anti-Discrimination Commission Queensland (ADCQ) gave me written material which they had in Arabic including a hard-copy version of material from their website about how to complain if a person believed they had been discriminated against; a pamphlet in Arabic which was developed by the ADCQ, the Health Rights Commission, the Crime and Misconduct Commission, the Ombudsman, and others, about how to make complaints if a person believed that various rights had been violated; and lastly small cards in Arabic about what action could be taken in response to racial or other vilification. These gave examples of how some of the rights protected by the international treaties can be given effect to in practical terms.

This was followed by a question and answer session. From the beginning the questions were forthright and searching, and came from many different members of the group. The first concerned the tension that may be thought to exist between international human rights norms and Islamic law and cultural traditions.

At the end of each day, the presenters met to discuss, in particular, the expectations which the Iraqis had of the course and which they had expressed in their various groups, so that we could take account of these in the program for the following day. They asked for presentations on sentencing procedure and what the purposes of sentencing were and how to give effect to those purposes, including, in particular, rehabilitation. This was dealt with through a forum in the last session. The participants were also particularly interested in whether an accused could avoid further punishment by making a payment to the victim; whether there was a discount on the sentence for a guilty plea; how parole or conditional release worked; in absentia sentencing; and what life imprisonment really meant. I was also asked about the value attributed to the evidence of a child.

The second day was Monday 14 March 2005. It commenced with a presentation from Judge Kriegler and Mr Ben Abdullah with regard to challenges to independence and impartiality of the legal professions, international legal aspects of the independence and impartiality of the judiciary, and international legal aspects of the independence of prosecutors and lawyers. As usual this was followed by a vigorous question and answer session.

After a break I addressed them on human rights and arrest and pre-trial detention. Again I used Arabic PowerPoint slides to illustrate the international covenants and treaties on which these rules were based. In particular, I addressed the topics of right to trial within a reasonable time or release pending trial; right to have lawfulness of detention decided by a court; right of access to a lawyer and right to compensation for unlawful detention. The group was particularly interested in the practices, procedures, and the legal criteria for the granting of bail.

This was followed by a question-and-answer session and then work in small groups seeking to answer the question: "How can you as judges and prosecutors seek to promote the rights identified either individually, through your respective professional associations or through civil society?" There was then a report back from the groups. My group appointed a female chief prosecutor as the rapporteur, and was particularly interested in the question of how to strengthen the independence of the judiciary, means of making the court independent of the prosecution, and how to give effect to the rights of the accused. The group thought it was necessary for people to be informed of their rights and responsibilities and particularly for the police to be educated about the rights of an accused person. There was a discussion about the method of choosing judges, particularly in a country under military occupation. Unsurprisingly, they thought that judges should be appointed by a judicial council rather than, as has happened in Iraq, by the occupying forces.

The third day of the conference was Tuesday 15 March 2005. It commenced with my presentation on the right to a fair trial. In particular I examined the questions of equality before the law; equal access to the courts; and the presumption of innocence. The PowerPoint slides were again in Arabic. Professor Waters then gave a presentation on the protection of, and limits on, the right to enjoy private life during criminal investigations; wire tapping; searches and correspondence. Then Ms Welsch and Judge Kriegler gave presentations on treatment during detention; information on charges in a language understood by the accused; right to effective legal assistance and contact with a lawyer; right to remain silent; recording of interrogations; and adequate time and facilities to prepare defence. Questions from participants were concerned with the lawful use of search and seizure powers and the use of confessions. I was asked a number of questions about the jury system: how juries worked in practice and my frank view of their role and utility.

The group work which followed concentrated on how the rights that had been dealt with in that day's presentations could be promoted in Iraq. The group with which I worked appointed the same prosecutor as rapporteur and I invited her to chair the group discussion. Debate in our group ensued about the right to silence with one participant expressing a view that not only should an adverse inference be drawn against an accused who refused to answer questions, but also that an accused person should be made to speak. None of the others shared his view about the accused being

required to incriminate himself or herself and there was an interesting and enlightened debate about the issue. They were strongly against coercion, particularly as they perceived it to be the route to torture.

Each group then reported back to the group in plenary and the day ended with presentations on the right to a fair and public hearing; the right to defend oneself in person or through a lawyer of one's own choice; the right to call witnesses; limits on punishment; right to compensation in case of miscarriage of justice; right to a fair trial before special tribunals and in emergency situations; the prohibition on torture, cruel, inhuman and degrading treatment and punishment, including States' duty to prevent, investigate, punish and remedy; legal requirements as to places of detention and registration of detainees and prisoners; conditions of detention and imprisonment; contacts with the outside world; and inspection of places of detention and complaints procedures. Questions were asked about the right to compensation for victims of torture. It was reported that a first instance judge who had made such an order for compensation had been removed from office by the CPA.

The following day, Wednesday 16 March 2005, was taken up by a visit to the prosecutions' office in Dubai and to the courts. The Dubai courts are very technologically advanced but the Dubai judges told the Iraqi judges that the legal system in Iraq was the equal of their own. The Dubai courts said they would be happy to provide the Iraqis with assistance with technological issues. The courts in the Middle East are concerned, as are our own, with efficient case management as well as fair outcomes.

The final day was Thursday 17 March 2005. The topic for that day was women's rights in the administration of justice. The first presentations were by myself and then by Ms Welsch. I spoke about the relevant international legal instruments as well as women's rights to legal personality as well as their right to equality before the law and equal protection of the law. I traced the development, since the commencement of the United Nations, of women's rights as human rights which had led to the absolute rule, which must be guaranteed in all circumstances and at all times, that women have a right to legal personality on an equal basis with men. I introduced the topic of women's right to respect for their life as well as their physical and mental integrity. This topic was taken further by Ms Welsch, whose practical experience, as legal advisor to the UN Special Court in Sierra Leone, of violence against women in a conflict situation poignantly demonstrated the necessity for protecting women's rights and how vulnerable those rights are to abuse particularly in times of civil conflict. I then spoke on women's right to equality as to marriage; equal right to legal capacity in civil matters; and women's right to an effective remedy, including the right of access to the courts in due process of law.

Judge Kriegler spoke on women's right to equal participation in public affairs, including elections. His knowledge of electoral processes in many countries, including that of Iraq, made this presentation particularly compelling. In addition, Mr Ben Abdullah, himself a Muslim, gave a presentation which demonstrated that equal rights for women was not inconsistent with Islamic thinking. This view was shared by many, although not all, of the participants. In the question and answer session, a discussion was initiated by the Iraqis about the need for reform of particular criminal laws in Iraq that discriminated against women. Some suggested that it was important

for a woman to enjoy financial independence and that it was traditional for women to keep their own names. One of the Iraqi judges said that Islam required that women be treated with dignity and respect and that this was not inconsistent with the right to education and work.

The women present wore clothing that covered them completely, together with closely fitting head scarves. Afterwards, one of the women told me that she chose the clothes and head covering she wore because they were in accord with her religious beliefs but also because there were signs daubed on the walls in her city which said that women who didn't dress in that way would be shot. The women there were only four in number but impressively articulate and intelligent with clear leadership capacity.

The organisers thought the week's workshop a success, and noted that the final day's seminars on women's rights had been more successful than they apparently had been in some previous training sessions. I suspect that, if this was true, there were a number of factors involved:

- That there were significant numbers of both sexes present from both the presenter and Iraqi groups of participants;
- That Johann Kriegler and I, as a former and a practising judge respectively, were granted considerable authority and respect by the Iraqi participants. In addition, Judge Kriegler was able to speak with great authority about living through a period in which his own society had moved painfully towards a system of law which granted greater respect to all peoples, including women;
- The fact that the issue of women's rights was only addressed centrally on the final day, by which time a level of mutual trust and goodwill had been established and our expertise demonstrated;
- That Mr Safouen Ben Abdullah was able to bring a sophisticated understanding of the issue from a Muslim point of view, amply demonstrating that these are not western values, but universal human values.

The Iraqis, as they told me, have had to endure a lot of suffering with the Iran-Iraq war, the first Gulf war, dictatorship and international sanctions and now military occupation. They appeared to really enjoy and appreciate the week and were extremely engaged in each session. All of us learnt much during the week, international presenters and Iraqi judges and prosecutors alike.

**Justice R G Atkinson  
Supreme Court of Queensland**