

Reinstating the Rule of Law

This past May, Notre Dame Professor of Law Jimmy Gurulé was a member of a group of international jurists and legal scholars invited to The Hague to provide advice and guidance to members of the Iraqi Special Tribunal, the governing body charged with bringing Saddam Hussein to justice.

To say that the eyes of the world have been turned to Iraq recently would be something of an understatement. The international media, world leaders, and citizens from every country have watched the United States' military engagement in Iraq.

No one aspect of this battle has received more attention than the capture of Saddam Hussein, Iraq's erstwhile self-declared dictator. After his capture, Hussein was held by the Coalition Provisional Authority. When the United States turned over sovereignty to a newly formed Iraqi governing council on June 28, 2004, it also turned over legal authority of Hussein to the newly formed Central Criminal Court of Iraq. Once again, the international community was watching.

The judicial proceedings surrounding the prosecution of Hussein and other leaders of his former government will be closely scrutinized by lawyers, judges, academics, and the international media. Ironically, members of the very judicial body from which Hussein withdrew independence more



Notre Dame Law Professor Jimmy Gurulé

than 35 years ago will form the Iraqi Special Tribunal. These men and women, whose judicial autonomy had been severely restricted by Hussein, must be guided by the highest of standards to assure the world that justice, not revenge, is being sought.

That this trial will be held in Iraq, perceived by some to be a lawless country, is not such an apparent paradox, as Iraq's rule of law may be traced to the ancient Middle East. Called the Code of Hammurabi, it is believed to have been written around 2500 B.C. by Hammurabi, the sixth king of the Amorite Dynasty of Old Babylon. According to Charles Horne, a noted Hammurabi scholar, Hammurabi's most remarkable achievement was his "code of laws, the earliest-known example of rules proclaiming publicly to his people an entire body of laws."

Yet Iraqi judges, having suffered 35 years of isolation from any legal tradition, much less contact with the world's legal community, needed guidance before entering the international spotlight. To help them prepare for the legal proceedings that would first charge Hussein and his codefendants and then try them, the Coalition Provisional Authority developed a "Rule of Law Training Program," the inaugural workshop of which was held at The Hague on May 5-7, 2004.



The Hague Conference on Rule of Law in Iraq focused on three substantive areas: judicial independence, which focused on the need for the judiciary to act independently from governmental interference; due process, which considered fundamental rights afforded to any defendant;

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and prosecutorial responsibility, which explored the role the prosecutor plays in both assuring that laws are upheld and that the judicial proceedings are fair.

Invited presenters at the conference included international jurists, such as President of the International Criminal Tribunal for the Former Yugoslavia Judge Theodor Meron, Lord Chief Justice of England and Wales Henry Kenneth Woolf, and United States Supreme Court Justices Sandra Day O'Connor and Anthony M. Kennedy, as well as legal scholars. Included among this prestigious group was Notre Dame Law School Professor Jimmy Gurulé.

Professor Gurulé is uniquely suited to present a lecture on terrorism to conference participants. A member of the Law School faculty since 1989, he took a leave of absence from the faculty to serve in a variety of high-profile public law enforcement positions, including serving as Under Secretary

for Enforcement in the U.S. Department of the Treasury, from 2001-2003. There, he had oversight responsibilities for the U.S. Secret Service; the U.S. Customs Service; the Bureau of Alcohol, Tobacco, and Firearms; the Financial Crimes Enforcement Network; the Office of Foreign Assets Control; and the Federal Law Enforcement Training Center. While with the U.S. Treasury Department, Professor Gurulé developed and implemented a departmental global strategy to combat terrorist financing.

That the world will be watching the upcoming trial is not lost on Gurulé, who believes that many in the international legal community may be skeptical of the Iraqi Special Tribunal's efficacy. He explains, "Some members of the international legal community may expect to see revenge justice." Such an expectation makes it even more important that the basic tenet of any judicial system is upheld: Hussein must receive a fair trial. But, Gurulé cautions, this trial must exceed the bounds of fairness: If convicted, the defendants' convictions must be beyond a shadow of a doubt. If there is a conviction, it must be a "slam dunk."

In addition to the worldwide expectation that the tribunal will not mete out justice, the tribunal members face other challenges, according to Gurulé. Despite having endured 35 years of a dysfunctional judiciary under Hussein's rule, the council members will not have the benefit of a long period of time in which to prepare themselves for the rigorous trial proceedings. "I participated in the training session in the beginning of May, the Coalition Provisional Authority turned ruling power over to the Iraqi Governing Council on June 28, and Hussein was arraigned on criminal charges the beginning of July. That's a terribly fast track for a judiciary that is, arguably, taking on the 'trial of the century'."

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Another challenge facing the court is the need to ensure that the trial does not become a circus, as has become the case in the war crimes trial of Slobodan Milosevic. Gurulé believes that Hussein could use the proceedings to enflame the sentiments of his followers, conveying indirect messages to them through his statements. However, there is a delicate balance that must be maintained, one that carefully reconciles due process and the rule of law with Hussein's ability to spout political diatribes during cross-examination.

And, Gurulé warns, those accustomed to a Western style of trial proceedings may be surprised by the differences between American courtrooms and those under the direction of international law. To illustrate his point, Gurulé gives the example of a jury trial in Moscow he observed shortly after a new constitution there created provisions for such judicial proceedings.

When he entered the Moscow courtroom, Gurulé was surprised to see the defendant sitting in a jail cell that was in the middle of the courtroom. Armed guards surrounded the celled defendant. During the trial, when the defense counsel conferred with the defendant, the conference took place between the bars of the cell, in full view of the jury.

To someone accustomed to American courtroom proceedings, such a spectacle would appear highly inflammatory and prejudicial. But to those who had been without access to justice for more than 80 years, the trial embodied the miracle of democracy.

A final challenge is more personal, less theoretical: the members of the Tribunal will have their lives held in jeopardy during the trial. These committed judges, who face what Gurulé calls a "monumental task," will function with full knowledge that Iraqi insurgents would like nothing more than to halt the proceedings; killing or kidnapping a judge

would certainly accomplish that. Indeed, the July 9, 2004, edition of *The Wall Street Journal* featured an article about the dangers facing the judges. Describing the danger one judge faces, the article said, "He now has four Iraqi bodyguards and deliberately keeps irregular office hours."

Other challenges to the proceedings include a legal system that is so antiquated that fingerprinting technology does not exist, much less the ability to conduct DNA testing. There is speculation that Hussein's family is mounting an international team of at least 20 defense attorneys, a foreign "dream team" as it were. Funds for this defense will come from the \$6 billion to \$10 billion that Hussein is suspected of skimming from Iraq during his reign.

Still, Gurulé has full confidence in the tribunal judges, who never lost belief in the country's centuries-old rule of law, even for the 35 years in which it was abolished by Hussein. For Gurulé, Hussein's appearance in a courtroom represents a "victory for the rule of law."