



IRAQ

Judging Dujail

The First Trial before the Iraqi High Tribunal

HUMAN
RIGHTS
WATCH



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Glossary

Ba'th Party	The Ba'th Arab Socialist Party
CPA	Coalition Provisional Authority
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHT	Iraqi High Tribunal
IST	Iraqi Special Tribunal
NDBC	National De-Ba'thification Commission
RCLO	Regime Crimes Liaison Office (United States Embassy)
SCIRI	Supreme Council of the Islamic Revolution in Iraq (a Shi'a political party)
VWP	Victims and Witnesses Protection

I. Introduction and Overview

On October 19, 2005, much of daily life in Iraq paused to watch an unprecedented event: the opening of the trial of former President Saddam Hussein, three other senior former government officials, and four lower-level Ba'th Party members,¹ all charged with crimes against humanity. The trial concerned events centered on Dujail, a town in Iraq's central Salahaddin governorate, between 1982 and 1985.

On July 8, 1982, there was an assassination attempt against then-President Saddam Hussein during a visit to Dujail. The prosecution at the trial of Saddam Hussein and his co-defendants claimed that, soon after the assassination attempt and in retaliation for it, Dujail was the object of a "widespread and systematic attack" in which nearly 800 men, women, and children were detained, of whom an unspecified number were tortured. After a year of detention in Baghdad, approximately 400 detainees were transferred to internal exile in a remote part of southern Iraq. Another 148 male detainees were referred to trial before the Revolutionary Court, are recorded as having been convicted and sentenced to death in 1984 after a summary trial (the number who actually stood trial is disputed²), and most of them were executed in 1985.³ Large swathes of agricultural land and some homes in Dujail were confiscated by the government and bulldozed.

The Dujail trial was the first case brought before the Iraqi High Tribunal (IHT), the Iraqi court created to try persons responsible for grave human rights violations committed in Iraq between 1968 and 2003. Given the legacy of severe human rights

¹ The defendants in the Dujail case are: Saddam Hussein, former president of Iraq; Barzan al-Tikriti, head of the General Intelligence Directorate (*Mudiriyyat al-Mukhabarat al'Amma*) between 1979 and 1983; Taha Yassin Ramadan, former vice-president of Iraq; 'Awwad al-Bandar, chief judge of the Revolutionary Court between 1983 and 1990; 'Abdullah Kadhim Ruwayid Fandi al-Mashaikh, a farmer from Dujail and former Ba'th Party member; Mizher 'Abdullah Kadhim Ruwayid Fandi al-Mashaikh, a postal worker from Dujail and former Ba'th Party member (and son of 'Abdullah Kadhim); Muhammad 'Azzawi 'Ali al-Marsumi, a mechanic from Dujail and former Ba'th Party member; and 'Ali Dayeh 'Ali al-Zubaidi, a teacher and former Ba'th Party member from Dujail.

² See below, Section IV.6.b.

³ Documents produced in court suggested that two persons listed for execution were mistakenly transferred to detention in southern Iraq, while another 10 listed for execution were not executed until 1989.

violations of the previous government,⁴ the Dujail trial is likely to be one of several that eventually comes before the court. The scale of human rights violations in Iraq under the Ba’thist government was so serious that they reached the level of international crimes, such as genocide, crimes against humanity, and war crimes.

The significance of the trials before the IHT is difficult to overstate. For the first time since the post-Second World War Nuremberg trials, almost the entire senior leadership cadre of a long-lived repressive government faces trial for gross human rights violations committed during their tenure. At stake is not only justice for hundreds of thousands of victims, but, as at Nuremberg, the historical record itself. The trials represent the first opportunity to create a historical record concerning some of the worst cases of human rights violations, and to begin the process of a methodical accounting of the policies and decisions that gave rise to these events. Long shrouded in secrecy, the former government’s “bureaucracy of repression”⁵ could now potentially be examined in meticulous detail, evidence analyzed and tested, and individual criminal responsibility determined for human rights crimes.

In a political environment that has become even more intensely polarized since the Dujail trial commenced, the IHT must ensure that the legal and factual record it establishes through its proceedings and judgments is fair, credible, and withstands scrutiny. It should strive to make sure it is unimpeachable. Human Rights Watch believes that trials that meet international human rights standards of fairness will be more likely to ventilate and verify the historical facts at issue, contribute to the public recognition of the experiences of victims of different religious groups and ethnicities, and set a more stable foundation for democratic accountability after periods of conflict and/or repression.

The IHT as an institution has the heavy responsibility of being, up to now, the only mechanism for justice and accountability for these crimes in Iraq. But at the same

⁴ See, for example, Middle East Watch (now Human Rights Watch/Middle East), *Genocide in Iraq: The Anfal Campaign Against the Kurds* (New York: Human Rights Watch, 1993); Middle East Watch, *Endless Torment: The 1991 Uprising in Iraq and its Aftermath* (New York: Human Rights Watch, 1992); Human Rights Watch/Middle East, *Iraq’s Crime of Genocide: The Anfal Campaign Against the Kurds* (New Haven: Yale University Press, 1994); and Physicians for Human Rights, *Winds of Death: Iraq’s Use of Poison Gas against Its Kurdish Population* (Boston: Physicians for Human Rights, 1989).

⁵ Middle East Watch (now Human Rights Watch/Middle East), *Bureaucracy of Repression: The Iraqi Government in Its Own Words* (New York: Human Rights Watch, 1994).

time, the court is a newly created institution in a recently reconstituted legal system, in which lawyers and judges were previously isolated from developments in international criminal law and had no experience in investigating and trying complex international crimes. The United States-led Coalition Provisional Authority (CPA)⁶ insisted on an “Iraqi-led” process,⁷ and the US government strongly opposed an international tribunal or mixed Iraqi-international court under United Nations (UN) management, so significant international involvement in the creation of the court was largely foreclosed.⁸ There was also a strong demand among many Iraqis for “Iraqi control” of any court.⁹ The IHT Statute requires that the judges, prosecutors, and staff of the court, and the principal defense lawyer for the accused, be Iraqi nationals.¹⁰

Based on its long-standing commitment to ensuring justice and accountability for grave international crimes committed during the Ba’th Party’s three-decade rule in Iraq, Human Rights Watch has closely followed the development of the IHT since before and through its creation in 2003 under a CPA order.¹¹ Human Rights Watch strongly urged over many years the investigation and prosecution of leaders of the now-deposed Ba’thist regime.

⁶ The CPA was the occupying power in Iraq between April 2003 and June 30, 2004.

⁷ See comments of then-US Ambassador-at-Large for War Crimes Pierre Prosper in April 2003, quoted in Peter Landesman, “Who vs. Saddam?” *New York Times*, July 11, 2004.

⁸ See the background to the creation of the court, and the reasons for the lack of international participation, in Human Rights Watch, *The Former Iraqi Government on Trial: A Human Rights Watch Briefing Paper*, October 2005, <http://hrw.org/backgrounder/mena/iraq1005/iraq1005.pdf>, pp. 2–3.

⁹ See International Center for Transitional Justice and Human Rights Center, University of California at Berkeley, *Iraqi Voices: Iraqi Attitudes Towards Transitional Justice and Social Reconstruction*, May 2004, http://www.hrcberkeley.org/download/Iraqi_voices.pdf (accessed October 20, 2006).

¹⁰ Law of the Iraqi High Tribunal (IHT Statute), Official Gazette of the Republic of Iraq, No. 4006, October 18, 2005, English translation by the International Center for Transitional Justice, <http://www.ictj.org/static/MENA/Iraq/iraq.statute.engtrans.pdf>, art. 28 (judges, prosecutors, and staff), art. 19.4(B) (principal defense lawyer).

¹¹ See, for example, Human Rights Watch, *Justice for Iraq: A Human Rights Watch Policy Paper*, December 2002, <http://www.hrw.org/backgrounder/mena/iraq1217bg.htm>; *Iraq – The Mass Graves of Al-Mahawil: The Truth Uncovered*, vol. 15, no. 5(E), May 2003, <http://www.hrw.org/reports/2003/iraq0503/>; *Iraq: State of the Evidence*, vol. 16, no. 7(E), November 2004, <http://www.hrw.org/reports/2004/iraq1104/>; *Memorandum to the Iraqi Governing Council on ‘The Statute of the Iraqi Special Tribunal,’* December 2003, <http://www.hrw.org/backgrounder/mena/iraq121703.htm>; *Briefing Paper: The Iraqi Special Tribunal – Rules of Procedure and Evidence Missing Key Protections*, April 2005, <http://hrw.org/english/docs/2005/04/22/iraq10533.htm>; and *The Former Iraqi Government on Trial*, October 2005.

The evolution of the IHT over the past three years has given rise to serious concerns about its capacity to fairly and effectively try these massive crimes in a manner that is consistent with international criminal law and fair trial standards.¹² Underlying many of the concerns was the reality that, at the time the court was created, Iraq “lack[ed] the professional and technical investigative and judicial expertise to [prosecute crimes against humanity and war crimes] on its own.”¹³ At the same time, US advisors to the court insisted that sufficient training and advice could make up for this lack of capacity. The first trial would thus be a critical test of the functioning of the court, and an opportunity to carefully and objectively evaluate the proceedings—both from the point of view of their procedural fairness, and in terms of whether the court and its personnel had developed sufficient expertise to competently investigate and try complex international crimes.

From the beginning of the Dujail trial, Human Rights Watch engaged in intensive monitoring of the proceedings before the first trial chamber of the IHT. Human Rights Watch and the International Center for Transitional Justice (ICTJ) were the only international human rights organizations to consistently observe the trial and investigate the functioning of the court. Working collaboratively, the monitoring presences fielded by the two organizations achieved almost complete coverage of all trial sessions.¹⁴ In addition, Human Rights Watch conducted over three dozen interviews over the course of the trial with key actors in the tribunal, including prosecutors, judges, defense lawyers, and administrators. Human Rights Watch researchers also reviewed the dossier of evidence submitted by the investigative judge to the trial court, and examined the statements given by the defendants to the investigative judge. While much of the media and public attention on the trial concerned the behavior of key defendants such as Saddam Hussein, and the often-

¹² For further discussion of the development of the IHT, and Human Rights Watch’s concerns about its statute, see Human Rights Watch, *The Former Iraqi Government on Trial*.

¹³ US Department of State, *Quarterly Update to Congress: Section 2207 Report on Iraq Relief and Reconstruction* (January 2004), http://www.whitehouse.gov/omb/legislative/20040105-sec2207_main_report.pdf (accessed October 20, 2006), p. 43. The weaknesses of the post-conflict Iraqi legal system were also documented in the CPA’s “Report of the Iraq Judicial Assessment Team,” June 2003, and World Bank and United Nations Development Group, *Legal Needs Assessment Mission to Iraq*, August 2003.

¹⁴ For Human Rights Watch, trial monitoring was conducted principally by a Middle East-based researcher, who was joined for part of the trial by a researcher from the Human Rights Watch office in New York. Human Rights Watch and ICTJ shared all information obtained through their respective trial monitoring presences, and often jointly conducted interviews with tribunal personnel and defense lawyers.

tumultuous courtroom proceedings, Human Rights Watch’s focus was on the fairness of the proceedings and the capacity of the court to prosecute and adjudicate the crimes charged, in a manner consistent with international law.¹⁵

The picture that emerges from this research is of an institution struggling with all aspects of conducting these legally and factually complicated trials, and also beset by external problems: misunderstanding and hostility in public opinion and from political leaders; grave and increasing security threats to all participants; a bitterly divided legal profession; and a deepening reluctance by other international actors to assist the process. Cumulatively, these limitations have meant that, in the Dujail trial, the court has not met essential fair trial standards and that the credibility of the trial process is doubtful. Human Rights Watch has documented serious administrative, procedural, and substantive legal defects in the trial.

Taken together, these problems point strongly to the conclusion that the level of legal and practical expertise of the key Iraqi actors in the court—trial judges, administrators, prosecutors, and defense lawyers—is not sufficient to fairly and effectively try crimes of this magnitude. In addition, while non-Iraqi advisors provided by the US Embassy have been indispensable to the day-to-day functioning of the court, they have proved a poor substitute for the direct participation of international judges, counsel, and managers in the court. In the last instance, it appears that “advisors” can advise, but cannot actively participate to ensure that essential international standards are met.

In this report, Human Rights Watch sets out the principal concerns arising out of its observation of the Dujail trial and its research into the court. These concerns are divided into three categories: administrative difficulties that have significantly hampered the smooth functioning of the trial and also impacted on its fairness; procedural problems arising in the course of the trial; and substantive problems with the case presented by the prosecution and investigative judges, indicating a lack of

¹⁵ Crimes such as genocide and crimes against humanity achieved recognition as crimes through international law; the legitimacy of trying them is thus inextricably linked to whether the trial meets international fair trial standards and correctly applies substantive international criminal law.

sufficient understanding of the elements of proof required to establish individual criminal responsibility under international criminal law.

Because of severe security threats to all persons involved in the court process, and the desire of interviewees to be able to speak candidly about their concerns, persons quoted in this report are not referred to by name, but according to their role (for example “judge,” “Defense Office lawyer,” etc.).

* * *

On August 21, 2006, the second trial before the IHT commenced. The trial concerns a series of large-scale attacks mounted by the Iraqi army against the Kurdish populations of northern Iraq during 1988 and known as the “Anfal” campaign. The campaign involved the repeated use of chemical weapons, and resulted in the deaths of between 50,000 and 100,000 Kurdish civilians. Saddam Hussein is a defendant in that trial also (charged with genocide, war crimes, and crimes against humanity), along with six others.¹⁶ At this writing the trial is ongoing.

¹⁶ The other defendants in the Anfal trial are Ali Hassan al-Majid al-Tikriti (charged with genocide, war crimes, and crimes against humanity), Tahir Tawfiq al-'Ani (charged with crimes against humanity), Sabr Abdul-Aziz al-Douri (charged with war crimes and crimes against humanity), Farhan Mutlak al-Juburi (charged with war crimes and crimes against humanity), Sultan Hashem Ahmed al-Ta'i (charged with war crimes and crimes against humanity), and Hussein Rashid al-Tikriti (charged with war crimes and crimes against humanity).

II. Background¹⁷

Between December 2003 and October 2005 the Iraqi High Tribunal was known as the Iraqi Special Tribunal (IST). The IST Statute was promulgated as an Order of the CPA on December 10, 2003.¹⁸ In early August 2005 the IST Statute was revoked by Iraq's Transitional National Assembly, and replaced by an amended statute that renamed the Special Tribunal as the High Tribunal. The August enactment proved legally defective due to a failure to follow the proper legislative process,¹⁹ and was therefore re-debated and re-enacted in September 2005. The new law, Law No. 10 of 2005,²⁰ was promulgated in the Official Gazette on October 18, only one day before the commencement of the Dujail trial.²¹

The IHT has jurisdiction over Iraqis, and non-Iraqis residing in Iraq, accused of committing genocide, crimes against humanity, and war crimes between July 1968 and May 2003.²² The IHT Statute adopts the definitions of these crimes from the Rome Statute of the International Criminal Court. However, the IHT Statute also includes crimes from a 1958 Iraqi law that are of a breadth and vagueness that makes them susceptible to politicized interpretation and application, and therefore could be regarded as political offenses.²³ For example, the IHT Statute allows individuals to be

¹⁷ This section draws on Human Rights Watch's previous analysis of the IHT in *The Former Iraqi Government on Trial*.

¹⁸ *Coalition Provisional Authority Order Number 48: Delegation of Authority Regarding an Iraqi Tribunal*, CPA/ORD/9 Dec 2003/48 (2003) (IST Statute).

¹⁹ Draft legislation should normally be referred by the relevant ministry or the Council of Ministers to the State Consultative Council (*Majlis Shura al-Dawla*) for review before being debated in parliament. In this instance, the Council of Ministers sent the draft statute to the State Consultative Council and the Transitional National Assembly simultaneously. Consequently, in August 2005 parliament debated and adopted a draft law that had not been reviewed by the State Consultative Council. When the error was discovered, the adopted law was sent to the State Consultative Council for review, then re-debated and re-enacted with further amendments in September 2005.

²⁰ The Rules of Procedure and Evidence were also revised at this time, and were promulgated as an annex to Law No. 10 of 2005 on the same day. Rules of Procedure and Gathering of Evidence With Regard to the Iraqi High Tribunal (IHT Rules of Procedure and Evidence), Official Gazette of the Republic of Iraq, No. 4006, October 18, 2005, English translation by the International Center for Transitional Justice, <http://www.ictj.org/static/MENA/Iraq/IraqTribRules.eng.pdf>.

²¹ IHT Statute, Official Gazette of the Republic of Iraq, October 18, 2005.

²² IHT Statute, art. 1(2).

²³ *Ibid.*, art. 14. Two of the crimes listed in article 14 appear to have their origins in the military tribunal that was constituted to try leaders of the monarchical government after the 1958 revolution led by 'Abdel Karim Qassim. This tribunal, known as the Mahdawi Court, conducted overtly political trials more concerned with discrediting the monarchy than with establishing the

charged with “the wastage of natural resources and the squandering of public assets,” and “the abuse of position and the pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country.” These offenses are not defined, either in the IHT Statute or in the 1958 Law from which they are drawn.

Investigations and trials before the IHT are regulated primarily by the Iraqi Code of Criminal Procedure.²⁴ This is based on the civil law system of criminal procedure as used in countries such as France in the 1950s.²⁵ It concentrates powers of fact-finding and investigation in the hands of an investigative judge. The investigative judge plays the role of an inquisitor whose objective is to ascertain the truth,²⁶ and has broad powers to compel testimony, seek out experts, and collect and preserve evidence.²⁷ He or she must seek out both exculpatory and inculpatory evidence in order to assess whether there is sufficient evidence for trial. All evidence collected and testimony taken are compiled in a written dossier. During the investigative phase, the accused and the accused’s lawyer can seek to be present while the investigative judge collects evidence and questions witnesses,²⁸ and may only question a witness through the investigative judge and with the latter’s permission.²⁹ However, the investigative judge has an unfettered discretion to exclude the accused and his or her lawyer from investigative hearings.³⁰ The accused can submit comments on witnesses’ testimony, to be included in the dossier.³¹

guilt or innocence of the accused. It is troubling that these offenses have been included in the substantive jurisdiction of the IHT.

²⁴ IHT Statute, art. 16. The principal law is the Code of Criminal Procedure, No. 23 of 1971, as amended.

²⁵ In 1993 and 2000, French criminal procedure law was amended in order to expand the rights of defendants, which were considered insufficiently protected under the earlier laws. See Stewart Field and Andrew West, “Dialogue and the Inquisitorial Tradition: French Defense Lawyers in the Pre-Trial Criminal Process,” *Criminal Law Forum*, vol. 14, no. 3 (2003), pp. 261–316.

²⁶ Christoph J.M. Safferling, *Towards an International Criminal Procedure* (Oxford, UK: Oxford University Press, 2001), p. 217.

²⁷ Iraqi Code of Criminal Procedure, Law No. 23 of 1971, arts. 51-129.

²⁸ *Ibid.*, art. 57.

²⁹ *Ibid.*, art. 64.

³⁰ *Ibid.*, art. 57. Under the IHT Statute, the accused is guaranteed the right for counsel to be present when the accused himself or herself is being questioned as part of the investigative process.

³¹ Iraqi Code of Criminal Procedure, art. 63.

If the case is referred to trial, everything contained in the dossier constitutes evidence, and the trial court is entitled to treat all witness testimony in the investigative dossier as having been given at trial.³²

The Rules of Procedure and Evidence (IHT Rules) provide that the IHT will establish a Defense Office, headed by a director and supported by the Administration of the IHT, to ensure adequate facilities for counsel in the preparation of defense cases.³³

Each trial chamber of the IHT consists of five judges.³⁴ The conduct of a trial is controlled by the judges, who decide which witnesses shall be called and what questions are put to the witnesses and the defendant. Lawyers for the prosecution and the defense may address questions to witnesses only through the judges.³⁵ Proceedings at the trial stage can be expected generally to entail a review of the evidence contained in the dossier, followed by statements by the lawyers for the prosecution and defense. Where the judges are satisfied of the guilt of the defendant, they issue a verdict and sentence in a written opinion. Convictions may be appealed to the Appeals Chamber of the IHT, which is constituted by nine appeals judges including the president of the IHT.³⁶ A conviction and sentence may be reversed, revised, or set aside and the case sent back for re-trial.

The IHT applies the penalties that are available in Iraqi law.³⁷ Where the defendant is convicted of a crime that would also amount to murder or rape under domestic Iraqi law, the penalties for those offenses will apply.³⁸ The death penalty is widely prescribed in the Iraqi Penal Code, including for the murder of more than one

³² Defense counsel in the Dujail case were not invited to participate in the investigative judge's taking of witness statements, and thus could not question or submit comments on witness testimony during the investigative phase. See Human Rights Watch, *The Former Iraqi Government on Trial*, p. 11, and also below, Section IV.4.a.

³³ IHT Rules of Procedure and Evidence, rule 30(3)(c).

³⁴ IHT Statute, art. 3(4)(B).

³⁵ Iraqi Code of Criminal Procedure, art. 168(B). Article 16 of the IHT Statute makes the Code of Criminal Procedure the governing procedure for the trials, supplemented by the Rules of Procedure and Evidence.

³⁶ IHT Statute, art. 3.4(A).

³⁷ *Ibid.*, art. 24.

³⁸ *Ibid.*, art. 24(4).

person.³⁹ Consequently, most offenses over which the IHT has jurisdiction may incur the death penalty.

The IST Statute as originally promulgated permitted the appointment of non-Iraqi judges with expertise in international criminal proceedings to the trial chamber. The amended version that is the IHT Statute provides that non-Iraqi judges may be appointed only if a foreign state is a party to proceedings before the IHT.⁴⁰ To date, no non-Iraqi judges have been appointed to any chamber of the IHT. Non-Iraqi lawyers with experience in international criminal law may be appointed, at the discretion of the court's president, as "advisors" to judges and prosecutors in order to provide "assistance in the field of international law" (the exact role of advisors, to whom they are accountable, and how they exercise an "assistance" function are unspecified, however).⁴¹ Non-Iraqi defense lawyers are permitted to assist the principal lawyer, but non-Iraqis cannot register as representing the accused unless they present proof of accreditation with the legal professional association in their country, and are then approved by the Iraqi Ministry of Justice.⁴²

Almost the only source of non-Iraqi advisors and assistance has thus far been the US Embassy's Regime Crimes Liaison Office (RCLO), established in March 2004 by the US Department of Justice and funded by the US Congress.⁴³ Non-Iraqi defense lawyers were privately retained in the Dujail trial by Saddam Hussein, Barzan al-Tikriti, and Taha Yassin Ramadan (see also Section III.5, below).

³⁹ Iraqi Penal Code, Law No. 111 of 1969, art. 406 (1). The CPA suspended the application of the death penalty by means of Order No. 7 of June 10, 2003, section 3(1): *CPA Order Number 7: Penal Code*, CPA/ORD/9 June 2003/07, http://www.iraqcoalition.org/regulations/20030610_CPAORD_7_Penal_Code.pdf (accessed November 3, 2006). The Iraqi Interim Government reintroduced capital punishment for a range of offenses by means of Order No. 3 of August 8, 2004. The offenses for which the death penalty was reintroduced include premeditated murder. All the defendants in the Dujail case were charged with murder as a crime against humanity.

⁴⁰ IHT Statute, art. 3(5).

⁴¹ *Ibid.*, arts. 7(2), 8(9), 9(7).

⁴² *Ibid.*, art. 19(4)(D).

⁴³ See the discussion in Human Rights Watch, *The Former Iraqi Government on Trial*, pp. 17–18. Further discussion of the role of the RCLO is found below, in Section VI. According to the Foreign and Commonwealth Office website, the United Kingdom has provided 1.2 million UK pounds in training-related assistance to the IHT (this is less than 2 percent of the amount contributed to the IHT by the United States, which allocated US 128 million dollars to supporting the IHT between 2003 and 2006). See <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1024313967149> (accessed September 22, 2006). As discussed further below, two non-RCLO international advisors have been appointed, one to the first trial chamber shortly before the opening of the Dujail trial, and the second to the Defense Office in late April 2006, six months after the commencement of the Dujail trial.

III. Administrative Concerns

Competent administration is essential for any court to run effectively, but in the case of courts adjudicating multi-defendant trials concerning large-scale crimes, court administration is the fulcrum on which the trial pivots. For example, the administrative organ of the ad hoc international criminal tribunals for the former Yugoslavia and for Rwanda (ICTY, ICTR), usually known as the Registry, is independent of the judiciary and prosecution, and undertakes multifaceted tasks indispensable to both the efficiency and fairness of the trials. These tasks include servicing the judiciary's administrative and personnel needs, managing vast amounts of documentation, liaising between prosecution and defense, ensuring defense access to clients, supervising witness protection, supervising conditions of the accused's detention, and managing outreach and communications for the court.

Prior to its amendment in September 2005, the IHT (then-IST) Statute provided for an Administrative Department,⁴⁴ headed by an administrative director.⁴⁵ In its original form, the department was charged with addressing the administrative needs of judges and prosecutors, but not defense lawyers, and in addition was responsible for Victims and Witnesses Protection (VWP), detention conditions of the accused, communication with parties,⁴⁶ outreach and communications,⁴⁷ and the creation of the Defense Office.⁴⁸ In the 2005 revisions of the IHT Statute, the appointment of the administrative director and tribunal spokesperson was brought under the control of the president of the IHT, making the president ultimately responsible for the overall administration of the court.⁴⁹

The first administrative director was Salem Chalabi, who assumed a prominent role in the drafting of the IST Statute up to December 2003, and in nominating judges and

⁴⁴ IST Statute (revoked), art. 3(c).

⁴⁵ *Ibid.*, art. 9(a).

⁴⁶ IHT Rules of Procedure and Evidence, rules 13–15.

⁴⁷ IST Statute (revoked), art. 9(e).

⁴⁸ IHT Rules of Procedure and Evidence, rule 30.

⁴⁹ IHT Statute, art. 7(1).

other key personnel during the court's start-up phase in mid-2004. However, Chalabi was dismissed as administrative director in September 2004,⁵⁰ and his dismissal was followed by efforts to have "Chalabi loyalists" removed from the IST and replaced by personnel selected by officials in the government headed by then-interim Prime Minister Ayad Allawi. In the subsequent months the position of administrative director was filled by two other IST personnel on a temporary basis, during which time the administrative affairs of the court fell into disarray.⁵¹ In September 2005 an Iraqi-American was nominated as administrative director, but his nomination was not accepted by the IST president, and a judge of the Appeals Chamber assumed the role temporarily. The 2005 amendments to the court's statute, which took effect in October and concentrated administrative powers in the hands of the IHT's president,⁵² meant that the position of administrative director was effectively downgraded. As far as Human Rights Watch has been able to determine, the position has not been permanently filled since, and its functions were disaggregated and exercised by different officials within the court on an as-needed basis.

Although the IHT Rules continued to stipulate that the Administrative Department was responsible for VWP, detention conditions, communication with the parties,⁵³ and the creation of a Defense Office, in practice these essential functions have been taken over by other officials within the IHT. VWP is managed by the chief investigative judge,⁵⁴ who also functions as the court's spokesperson and media liaison. The defendants in all cases before the IHT are detained by the US military, and thus the US military is responsible for their detention conditions. At the court, it is unclear who is responsible for the court's supervision of the defendants' detention.

⁵⁰ Nancy Youssef, "Salem Chalabi Reportedly Removed from Post Overseeing Saddam Trial", *Knight Ridder News Service*, September 8, 2004. Charges were brought against Chalabi in an unrelated criminal case and referred to the Central Criminal Court of Iraq.

⁵¹ John Burns, "Hussein Tribunal Shaken by Chalabi's Bid to Replace Staff," *New York Times*, July 20, 2005; John Burns, "Ignoring U.S., Chalabi Pursues Attempt to Fire Hussein Judge," *New York Times*, July 27, 2005; Edward Wong, "Iraqi Leader Vows to Block Purges on Hussein Tribunal," *New York Times*, July 29, 2005; Kathleen Ridolfo, "Iraq: Debaathification Commission Backs Away from Tribunal Purge," *Agence France-Presse*, July 29, 2005.

⁵² IHT Statute, art. 7(1)(D).

⁵³ IHT Rules of Procedure and Evidence, rules 13–15.

⁵⁴ Human Rights Watch interview with chief investigative judge, Baghdad, February 2006; Human Rights Watch interview with non-Iraqi diplomatic official observing the court, Baghdad, November 2005.

The lack of administrative direction in the management of the IHT was a common theme among court personnel and lawyers interviewed by Human Rights Watch. Court administrative staff themselves complained that they received no training or instruction in administrative procedures relevant to trials of this kind,⁵⁵ while several judges asserted that the administration of the documentation and records of court proceedings was so poor that they could not easily determine what motions and documents had been received.⁵⁶ Judges also consistently stated that the then-president of the court was unresponsive to proposals to improve aspects of court administration.⁵⁷ As one judge commented,

It pains me to say this, but there is a lack of discipline in the administration of the court. The president is aged—he has my respect, I like him and he is a humane person, but ... [he] is a judge, not an administrator.⁵⁸

Overarching administrative problems have had a serious impact on the functionality of the court, and its capacity to perform tasks essential for a fair and effective trial, including witness protection, document management, security arrangements, the Defense Office, and outreach and communications.

1. Victims and Witnesses Protection

Witnesses (who may also be direct victims) in trials for genocide, war crimes, or crimes against humanity face serious risks. They may confront direct threats to the safety of their families and themselves—before or after testifying in court—and may also be in need of ongoing psychosocial support in the aftermath of testifying about deeply traumatic events. In circumstances where a conflict is ongoing, such as Iraq, the risks to all witnesses, whether for the prosecution or the defense, can be expected to be very grave, and a comprehensive program of protection and support is thus indispensable to ensuring both an effective prosecution and an effective

⁵⁵ Human Rights Watch interview with court administrative staff, Baghdad, March 2006.

⁵⁶ Human Rights Watch interviews with IHT judges, Baghdad, November 2005, February 2006 and March 2006.

⁵⁷ Human Rights Watch interviews with IHT judges, Baghdad, February and March 2006.

⁵⁸ Human Rights Watch interview with IHT judge, Baghdad, March 2006.

defense. At minimum, a witness protection program in such circumstances would be expected to include pre-trial and post-trial risk assessments for each witness; in-court protective measures (based on the risk assessment and duly authorized by the court on a witness-by-witness basis);⁵⁹ safe transportation to and from the court and safe accommodation during court attendance; post-trial follow up and threat monitoring; and relocation arrangements, including international relocation agreements, for the most at-risk witnesses.⁶⁰

The IHT Rules envisage the creation of a “Victims and Witnesses Unit.”⁶¹ However, concrete planning for the operationalization of such a unit does not appear to have commenced in earnest before July-August 2005, when a consultant expert in witness protection was funded by the United Kingdom (UK) Foreign and Commonwealth Office to develop a plan for the court. The consultant’s report was submitted to the court in September 2005, but in interviews with Human Rights Watch in November 2005, non-Iraqi diplomatic personnel familiar with the court’s workings stated that the Victims and Witnesses Unit existed only on paper.⁶² Another diplomat familiar with the issue stated that there were “100 witness protection staff on the books, but they don’t do anything.”⁶³ Instead of someone with direct experience in creating and managing a victims and witnesses protection program being appointed to lead the unit, the chief investigative judge assumed responsibility for the program, in addition to his judicial duties and his role as the court’s spokesperson.

In practice, the RCLO and the US military assumed complete responsibility for the safe transport of witnesses to and from the courtroom, and for accommodating them in Baghdad’s International Zone during their time at the court. Defense witnesses within Iraq but outside Baghdad who wanted to testify were transported by helicopter from the US Forward Operating Base (FOB) nearest their home town, and

⁵⁹ For concerns about the court’s approach to in-court protective measures see below, Section IV.4.b.

⁶⁰ See, for example, discussion in Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (Philadelphia: University of Pennsylvania Press, 2005), pp. 41–43. See also Human Rights Watch, *Justice in Motion: The Trial Phase of the Special Court for Sierra Leone*, vol. 17, no. 14(A), October 2005, <http://hrw.org/reports/2005/sierraleone1105/>, pp. 20-27.

⁶¹ IHT Rules of Procedure and Evidence, rule 15.

⁶² Human Rights Watch interview with non-Iraqi diplomatic personnel, Baghdad, November 2005.

⁶³ Human Rights Watch interview with non-Iraqi diplomatic personnel, Baghdad, November 2005.

were returned there after the completion of their testimony (it was incumbent upon the defense lawyer seeking to have the witness come forward to arrange for the witness to report to the FOB at an arranged time, in order to be transported to the International Zone). A number of witnesses for Saddam Hussein were first relocated out of Iraq, because the defense lawyers insisted that this was the only way to ensure the witnesses' safety.⁶⁴ When they were due to testify, the witnesses were flown back into Baghdad International Airport, and the RCLO provided secure transportation between the airport and the International Zone.

No systematic post-testimony mechanism of threat assessment or individual protection was available for either prosecution or defense witnesses. However, the town of Dujail did benefit during trial days from some additional deployments of Iraqi military personnel and increased vigilance by US military forces stationed nearby.

The RCLO also assumed responsibility for arrangements to relocate the most seriously at-risk witnesses. But no coherent and integrated program was operational by the beginning of the Dujail trial, and relocation arrangements appear to be largely ad hoc and dependent on the RCLO.

According to a Dujail-based witness ("Witness A") who testified before the court in the Dujail trial,⁶⁵ prosecution witnesses and complainants⁶⁶ were frightened to attend the first session of the trial on October 19, 2005, because no arrangements for their protection had been made, and threats had been received from the families of certain defendants. In early February 2006, lawyers for the victims complained in court that witnesses and complainants had received kidnap threats, and asked the court to "activate" its witness protection mechanisms.⁶⁷ According to Witness A, no risk

⁶⁴ Human Rights Watch interview with private defense lawyers, Amman, September 2006; Human Rights Watch interview with RCLO representatives, Baghdad, October 2006. The defense lawyers claimed that there was an agreement with the RCLO that the costs of transporting the witnesses for Saddam Hussein out of Iraq and accommodating them in a neighboring country would be reimbursed by the RCLO to the defense lawyers, and that the RCLO reneged on this agreement. The RCLO confirmed that they were willing to meet some costs, but that the defense lawyers concerned demanded a lump-sum of cash up front. This was unacceptable to the RCLO, particularly without guaranteed proper accounting of expenditures, and no reimbursement agreement was ultimately reached.

⁶⁵ Human Rights Watch interview with Witness A, March 2006.

⁶⁶ Under Iraqi law, a complainant is someone who alleges that they suffered injury as a result of the crime, and who has a right to file suit for compensation with the criminal court trying the case. Iraqi Code of Criminal Procedure, arts. 9, 25.

⁶⁷ Human Rights Watch–ICTJ trial observation notes, February 13, 2006.

assessments were undertaken for him or his family, and he arranged his own protection for his family (who remained in Dujail when he traveled to Baghdad to testify) through “local groups.” After completing his testimony, Witness A was offered the option of relocating to the Kurdistan region, but he chose to return to Dujail in the belief that the court’s witness protection program was now activated. However, sectarian conflict and threats intensified in Dujail, and Witness A returned to Baghdad on his own initiative to seek help. With the assistance of a Cabinet advisor, the witness was able to move into the International Zone and his family traveled to join him there. Witness A was subsequently contacted by an RCLO official, who offered to make arrangements for international relocation for Witness A and his family.

These arrangements were the result of the witness’s own initiatives and the intercession of an Iraqi government advisor. They were not the product of a coordinated response by the Victims and Witnesses Unit. Witness A stated,

The government is weak. The witnesses cannot leave Dujail. They protect themselves. They cannot go to Baghdad without being killed ... There is no counseling or support for female witnesses. I don’t think the court takes witness protection seriously. I am confused.⁶⁸

2. Court Documentation

Based both on in-court observation and on interviews with key actors in the trial process, it became evident that during the Dujail trial the court encountered significant difficulties in the management of trial-related documents. These difficulties were concentrated along two axes: private defense lawyers’ problems in receipt and transmission of documents, and problems with the internal management of documents received by the court, such as motions and powers of attorney.

In pre-trial interviews with privately retained defense lawyers (including lawyers representing accused who were not defendants in the Dujail trial), Human Rights Watch received consistent complaints that the court failed to process powers of attorney submitted by defense lawyers, and was unresponsive to written

⁶⁸ Human Rights Watch interview with Witness A, March 2006.

communications.⁶⁹ A court official denied this claim, and attributed problems in certifying powers of attorney to a lack of due diligence on the part of defense lawyers. However, it was apparent during trial proceedings that the court regularly could not find powers of attorney that defense lawyers claimed to have submitted, and the court lacked a system for verifying and tracking the receipt of documents.⁷⁰

The same problem arose in relation to motions claimed to have been submitted to the court,⁷¹ and more than one judge admitted that he was unable to determine exactly how many motions had been submitted.⁷² Court officials contradicted each other about whether a comprehensive list of submitted motions was maintained by the court, and despite repeated requests by Human Rights Watch to inspect such a list one was never made available. While Human Rights Watch was unable to substantiate each claim of document mishandling, it became clear in the course of observing proceedings that the only way for a lawyer to ensure that a legal document reached the trial judges was to submit it in person during a court session.

Private defense lawyers complained that part of the problem of submitting documents to the court, outside of court sessions, was that the court's administrative offices within the International Zone were difficult and very time-consuming to access.⁷³ These lawyers also expressed reservations about the security risk posed by regularly entering

⁶⁹ See Human Rights Watch, *The Former Iraqi Government on Trial*, p. 12. Human Rights Watch interview with private defense lawyer for a non-Dujail accused, October 2005.

⁷⁰ Human Rights Watch–ICTJ trial observation notes, October 19 and December 5, 2005; April 19 and July 11, 2006.

⁷¹ For example, on April 19, 2005, lawyers for the victims asked about a motion they had submitted to the court, and the court could find no record of it. Human Rights Watch–ICTJ trial observation notes, April 19, 2006.

⁷² Human Rights Watch interviews with IHT judges Baghdad, February and March 2006.

⁷³ Because the renovation of the building housing the courtroom is ongoing, the court's administrative offices (for prosecutors, investigative judges, trial judges, and appeal judges) have been provisionally located on one floor of a multi-storey building in the heart of the International Zone (this office building also accommodates numerous other Iraqi government agencies, such as the National De-Ba'athification Commission). Privately retained defense lawyers are not provided with badges that would allow them direct access to the building. Instead, they must place a phone call 24 to 48 hours ahead of the desired visit, and arrange to have their names listed at the entrance to the building. On the day they seek to visit, the lawyers must enter the International Zone on foot through the pedestrian checkpoint ("Checkpoint 3") and then traverse two other checkpoints over approximately 500 meters, before reaching the court administrative building. Once they arrive at the building, there is no guarantee that their names have in fact been communicated to the security desk at the entrance. If the name has not, the lawyer will be unable to enter; if the name is at the entrance, the lawyer may still have to wait for an hour or more before gaining access to the building. Once they enter the building, they are not permitted to go beyond the lobby area, and must wait for a court employee to meet them to either hand over documents or receive them. Private defense lawyers indicated that because the process is both time-consuming and fraught with uncertainty they rarely try to gain access to the administrative offices of the court.

and exiting the International Zone on foot.⁷⁴ The court did not provide badges that could have facilitated private defense lawyers' entry into the International Zone.

Among court officials there was confusion about how a private defense lawyer could effectively submit documents to the court if unable to reach the court offices. Some officials claimed that there was an arrangement with the Iraqi Bar Association, whereby lawyers could submit documents to the Bar Association and the court would send an employee to collect them;⁷⁵ private defense lawyers expressed support for this as an idea, but claimed that the procedure was not in fact in place, and documents were only collected from the Bar Association on an irregular basis.⁷⁶ By contrast, a trial judge firmly denied that any documents were received, or could be submitted, through the Bar Association.⁷⁷ Email submission of documents to the court was possible, and the court did receive motions from defense lawyers by email.⁷⁸ However, the court never instituted a practice of acknowledging the receipt of documents via email, leaving defense lawyers uncertain as to whether the documents had been received by the court.⁷⁹ As of March 2006 no standard protocol or procedure governing the modalities of submitting documents to the court had been established, and no court official had been appointed to liaise with private defense lawyers concerning the transmission of documents. Human Rights Watch has not been able to establish whether this situation has since changed.

The dossier of evidence in the Dujail case—containing witness statements and documentation collected by the investigative judge—was made available to defense counsel on August 10, 2005. On the first trial day, defense counsel complained that large portions of the dossier were illegible.⁸⁰ Human Rights Watch reviewed copies of

⁷⁴ Human Rights Watch's experience was that entry via Checkpoint 3 was possible if the entrant had two forms of legible photo identification. However, what amounted to acceptable identification could vary, and thus entrants can occasionally be refused. The pedestrian checkpoint has also been the subject of several suicide attacks in the past 12 months.

⁷⁵ Human Rights Watch interview with IHT judge, Baghdad, March 2006; and Human Rights Watch interview with prosecutor, Baghdad, February 2006.

⁷⁶ Human Rights Watch interview with private defense lawyers, Baghdad, March 2006.

⁷⁷ Human Rights Watch interview with IHT judge, Baghdad, March 2006.

⁷⁸ Human Rights Watch interview with IHT judge, Baghdad, February 2006.

⁷⁹ Human Rights Watch interview with private defense lawyer, New York, April 2006.

⁸⁰ Human Rights Watch–ICTJ trial observation notes, October 19, 2005.

the dossier disclosed on August 10, 2005, and found approximately 30 percent of its pages to be unreadable.⁸¹ The dossier was also poorly assembled and organized, with inconsistent pagination and some documents presented out of sequence or with missing pages. The dossier contained multiple copies of the same documents for no apparent reason, as well as documents that had no apparent connection with the Dujail case. Given that the dossier constitutes the principal basis for the conduct of the case, and for a defendant to understand the case against him, such haphazard collation of the material is problematic. As far as Human Rights Watch can determine, some defense counsel received more legible copies by late November 2005.

3. Security for Private Defense Counsel

Since the creation of the IHT (then-IST) in December 2003, the security situation in Iraq has declined steadily, with a dramatic deterioration from late 2004. In such an environment, and with trials concerning individuals and events that provoke very powerful emotions and polarized political views, all persons involved with the trials are at grave risk. At least five persons working for the court, including an investigative judge and the chief of security, were killed before the opening of the Dujail trial.⁸² Over the course of 2005, apartments inside the International Zone were renovated for use by prosecutors and judges, and as an interim measure some judges and prosecutors, and their families, were provided temporary hotel accommodation inside the International Zone. The RCLO played the primary role in devising security arrangements for court personnel, and for securing the court building in the start-up phase of the court.

However, a similar level of advanced planning for the security of defense counsel does not appear to have been undertaken. The ability of defense counsel to vigorously represent their clients without fear of reprisal or retaliation is essential for a fair trial. In Iraq's deteriorating security environment, the high level of risk to defense counsel for senior figures of the former regime such as Saddam Hussein, 'Awwad al-Bandar, Taha Yassin Ramadan, and Barzan al-Tikriti, was foreseeable.

⁸¹ The original dossier contained approximately 900 pages. It was supplemented by further material disclosed by the prosecutor in late January and early March 2006. For concerns about the practice of disclosure during the trial see below, Section IV.3.a–c.

⁸² Human Rights Watch interview with IHT judge, Baghdad, October 2005.

Whereas from among the prosecutors and the five-member bench only the faces of the chief prosecutor and the presiding judge were broadcast on the first day of the Dujail trial, the faces of all defense lawyers were visible. Defense lawyers stated that they gave their permission to be televised, but that they were consulted only a few minutes before the trial opened.⁸³ The following day (October 20, 2005), Sa'doun al-Janabi, lawyer for defendant 'Awwad al-Bandar, was kidnapped from his offices and murdered. Three weeks later, Adel al-Zubeidi and Thamer al-Khuza'i, defense counsel for defendants Taha Yassin Ramadan and Barzan al-Tikriti, were attacked by gunmen. Al-Zubeidi was killed, and al-Khuza'i was injured and fled Iraq. On June 21, 2006, Khamis al-Obeidi, defense counsel for Saddam Hussein, was abducted from his home in Baghdad and shot dead.

Up until the assassination of al-Janabi, neither the court administration nor the RCLO appears to have developed specific proposals to ensure the security of defense counsel. Defense Office lawyers, who are retained by the court, also complained that no security measures for them were planned or implemented before the beginning of the trial.⁸⁴ After al-Janabi's killing, a representative of the RCLO contacted private defense lawyers in the Dujail case and offered to relocate them and their families into the International Zone.⁸⁵ As an alternative, the Iraqi government offered security guards from the Ministry of Interior.

The private defense lawyers rejected security guards provided by the Interior Ministry, as they regarded it as hostile to them and their clients.⁸⁶ They also rejected the offer

⁸³ Human Rights Watch interview with private defense lawyer, Baghdad, October 2005.

⁸⁴ Human Rights Watch interview with Defense Office lawyers, Baghdad, November 2005. See Section III.5, below, for further discussion concerning the Defense Office.

⁸⁵ Human Rights Watch interviews with private defense lawyers, Baghdad, October–November 2005. According to representatives of the RCLO, the RCLO was able to secure one apartment in the International Zone in November 2005 that could have been made immediately available. Human Rights Watch interview with RCLO representatives Baghdad, July 2006. Under the security conditions prevailing in Iraq, the RCLO was unable to safeguard defense lawyers living outside the International Zone, and they made this clear to the defense lawyers when the latter made their choices.

⁸⁶ The killings of al-Janabi and al-Zubeidi came at a time when militia activity was intensifying in Baghdad, and there were persistent rumors that "death squads" and secret detention facilities were being operated by the Ministry of Interior. The Ministry of Interior was frequently alleged to be dominated by the paramilitary forces of the Shi'a political party the Supreme Council of Islamic Revolution in Iraq (SCIRI). Subsequently, the Ministry of Interior was indeed found to be operating secret detention facilities, and there were continued reports of death squads operating from among the police force and the ministry. See, for example, "Widespread abuse of Iraqi prisoners and detainees by Iraqi police and commandos," in "All Things Considered," National Public Radio, July 12, 2005, 8:00 PM EST; John F. Burns, "If It's Civil War, Do We Know It?" *New York Times*, July 24, 2005; Peter Beaumont, "Revealed: Grim world of new Iraqi torture camps," *Observer* (London), July 3, 2005; Edward Wong and John F. Burns, "Iraqi Rift Grows As Secret Prison Enrages Sunnis," *New York Times*, November 17, 2005;

to relocate into the International Zone on the grounds that living there—the heart of the US presence in Iraq and the seat of the new government—compromised their perceived independence and their ability to defend their clients. For those lawyers who maintained a legal practice in Baghdad’s ordinary courts, International Zone relocation also implied restrictions on their ability to continue their other legal work and an added risk of having to regularly enter and exit the International Zone. Defense lawyers further noted that, insofar as they feared violence from persons associated with the new government (such as Interior Ministry forces), living in the International Zone would not necessarily afford protection.⁸⁷

After the November 2005 killing of al-Zubeidi, defense lawyers negotiated an arrangement with the Iraqi government and US advisors to the court under which defense lawyers would be provided weapons licenses to carry a sidearm themselves, and the Iraqi government would pay the salaries for three armed guards for each defense lawyer. The armed guards would be nominated by each defense lawyer and approved by the Ministry of Interior. However, in interviews with Human Rights Watch over several months, defense lawyers consistently complained that the salaries for the three armed guards were never provided by the Iraqi government. Some lawyers also experienced difficulties obtaining the weapons licenses, with delays in the processing of the paperwork. Because the armed guards went unpaid, those defense lawyers who did not have their own resources to keep up payments were forced to let the guards go, and rely instead on relatives to volunteer their time as guards. This appears to have been the case with Khamis al-Obeidi, whose relatives were unable to guard him 24 hours a day.

Human Rights Watch raised these concerns with US advisors to the court in March 2006, but the situation did not improve. No single official among the court staff or in the Iraqi government was given responsibility for ensuring that the security arrangement negotiated in November 2005 was properly implemented. Defense lawyers who raised the concern with the court were told to speak to the RCLO, but

Solomon Moore, “The Conflict in Iraq; Killings by Shiite Militias Detailed,” *Los Angeles Times*, September 28, 2006; Ali Al-Fadhily and Dahr Jamail, “Government Death Squads Ravaging Baghdad,” IPS News, October 19, 2006. See also “Iraq: End Interior Ministry Death Squads, Police Must be Held Accountable for Killings,” Human Rights Watch news release, October 29, 2006, <http://www.hrw.org/english/docs/2006/10/29/iraq14473.htm>.

⁸⁷ Human Rights Watch interview with private defense lawyers, October 2005.

the RCLO was in no position to ensure that the Iraqi government met its commitment to pay the guards. As a result, and in light of the other serious administrative difficulties faced by the court, no effective follow up seems to have occurred.

RCLO officials did expend considerable effort to be able to give the private defense lawyers an undertaking that the deaths of al-Janabi and al-Zubeidi would be independently investigated by US investigators. However, due to the continuing deterioration of security conditions the investigation did not progress, and the murders of all three lawyers remain unsolved.⁸⁸

After al-Zubeidi's killing, several Iraqi defense lawyers responded to the security risks by choosing to leave Iraq whenever the IHT was not in session. US advisors to the court facilitated this choice by providing secure transportation to and from Baghdad International Airport for those lawyers leaving Iraq between court sessions and returning for hearings. This transportation has so far been provided free of charge. Those defense lawyers who felt that they could not leave the country between court sessions—because they felt that they could not leave their homes unattended for fear of theft, or because they could not afford to take their families with them outside the country—were essentially left to make whatever security arrangements they could on their own.

On December 7, 2005, defense lawyers for all defendants submitted to the IHT trial chamber in open court a detailed, seven-page motion concerning security. The motion included a proposal for security arrangements that defense lawyers believed would adequately protect them and ensure their ability to fully participate in the trial. According to correspondence seen by Human Rights Watch, the presiding judge of the trial chamber referred the motion to the IHT president,⁸⁹ but no response was forthcoming. In failing to accept, reject, or rule on it in any way, the court effectively ignored this motion and the attached proposal.

A durable solution to the problem of security for private defense lawyers was not developed by the court over the course of the Dujail case. Insofar as the private defense

⁸⁸ Human Rights Watch interview with RCLO representatives, Baghdad, March 2006.

⁸⁹ Letter from Judge Rizgar Amin, dated December 7, 2005, viewed by Human Rights Watch on December 9, 2005.

lawyers for high-profile defendants in the Dujail case regarded relocation to the International Zone as unsafe and unacceptable, they were effectively left with one option: to relocate their families outside Iraq at their own cost, and return to Iraq for trial sessions. Such circumstances impose considerable practical constraints on the capacity of retained lawyers to conduct an effective defense, and are also an enormous disincentive for private Iraqi criminal lawyers to accept a high-profile defendant as a client. If the court fails to act decisively to develop security arrangements that regain the confidence of defense counsel in the court's capacity to protect them and all persons involved in the trial process, it is difficult to envisage how the court can ensure effective defense participation in current and future cases before the court.

Human Rights Watch has been informed that several lawyers who had accepted clients accused in the on-going Anfal trial withdrew from the case, on the grounds of personal security.

4. Outreach and Communications

Trials of a deposed political leadership for international crimes, applying international fair trial standards and international criminal law, are unprecedented in Iraqi history. All previous regime changes resulted in show trials for political crimes (such as the 1958-60 Mahdawi trials of leaders of the monarchical government), or summary executions and exile (1958, 1963, 1968). A countrywide qualitative interview study of Iraqi attitudes towards justice for the Ba'thist government revealed, on the one hand, some support for the idea of legal trials, and on the other, almost no knowledge about how trials under international criminal law, and applying international fair trial guarantees would work.⁹⁰ Understandably, among many sectors of the Iraqi population directly affected by human rights violations under the Ba'thist government, the desire for vengeance also ran high.⁹¹

Moreover, the ordinary legal system in Iraq deteriorated over three decades of authoritarian rule, when special or political courts were used to marginalize civilian courts. Fair trial guarantees found in the Iraqi Code of Criminal Procedure were

⁹⁰ See International Center for Transitional Justice and Human Rights Center, University of California at Berkeley, *Iraqi Voices*.

⁹¹ *Ibid*, pp. 26–27.

regularly violated in practice. Even after the end of the Ba’thist government, and despite investment in judicial training and capacity building, felony trials in ordinary criminal courts monitored by Human Rights Watch are essentially summary in nature.⁹²

In such an environment—and faced with defendants who are notorious and widely detested—public understanding of, and tolerance for, the need to uphold defendants’ fair trial guarantees is likely to be low. In addition, the IHT is an entirely new institution within Iraq, with a unique set of procedures that mix Iraqi and international law. Understanding of the IHT Statute and IHT Rules is minimal beyond those individuals directly involved with the court. Indeed, after the commencement of the Dujail trial, there was intense public criticism of the court and the trial judges for not being sufficiently harsh with the defendants. Steps aimed at ensuring basic fair trial guarantees—such as postponing a hearing to ensure that a defendant’s lawyer could be accredited—were vociferously condemned as excessive leniency in favor of defendants.⁹³ Even prior to the opening of the trial, a climate of hostile public opinion and a number of highly prejudicial comments made by political figures (see below, Section IV.1) threatened both the defendants’ right to be presumed innocent and the ability of the court to preserve its appearance of impartiality.

Under such conditions, an effective outreach and communications strategy for the court is imperative. Outreach and communications are also essential if the trials are to have a “demonstration effect” in terms of educating the broader public about the content of a fair trial, and in order to enhance public comprehension of why the court behaves in the way it does. This comprehension may in turn help ameliorate an understandable frustration and impatience with the legal process.

In other national or national-international courts trying international crimes, such as the Special Court for Sierra Leone (the Special Court),⁹⁴ specific Outreach Units have

⁹² As part of its research on torture in detention, Human Rights Watch conducted regular observation of felony trial proceedings at the Central Criminal Court of Iraq, Baghdad, during 2004–05.

⁹³ Human Rights Watch–ICTJ observer notes on Arabic-language press coverage in Baghdad, Iraq, December 2005 and February–March 2006. See below, Section IV.1., for further discussion of prejudicial comments made by public and political figures throughout the course of the Dujail trial.

⁹⁴ Human Rights Watch, *Bringing Justice: The Special Court for Sierra Leone – Accomplishments, Shortcomings, and Needed Support*, vol. 16, no. 8(A), September 2004, <http://hrw.org/reports/2004/sierraleone0904/>, p.33; *Justice in Motion*, p. 28.

been created at the inception of the court to help maximize public understanding and impact. These units have developed a variety of innovative and potentially far-reaching initiatives to enhance comprehension—and combat misperception—about their respective courts. For example, the Outreach Unit of the Special Court based outreach staff in Sierra Leone’s provinces, where they tapped into local social networks to disseminate information about the court through workshops, trainings, and screenings of specially prepared video materials. These materials covered such issues as the role of the judge, the prosecutor, and the defense lawyer in a fair trial, and simple explanations of complex legal issues such as jurisdiction and challenges to the court’s legal foundation.⁹⁵ The Special Court’s Outreach Unit also undertook workshops to educate the Sierra Leonean legal profession about the court and its rules, helping overcome misperceptions and confusion about the court in this important local constituency.

While some of these measures may not be feasible in Iraq due to the severe security risks facing court personnel, the IHT has failed to devise and implement any kind of outreach strategy, or create a specific outreach unit staffed with the relevant expertise. The IHT’s communications strategy has thus far consisted of only two basic activities: media briefings provided by the chief investigative judge as the court’s spokesperson, and the televising of court sessions on a “gavel-to-gavel” basis.⁹⁶ Neither of these activities can be considered adequate to ensure widespread knowledge and understanding of the court in Iraq. The mere provision of media briefings to Iraqi media is unlikely to be effective if the media personnel have not benefited from workshops or trainings to familiarize them with court procedures, relevant principles of international criminal law and fair trials, or other essential background knowledge. Indeed, a member of the Iraqi media pool covering the IHT stated to an international trial observer that most of the Iraqi media pool reporters could not easily follow the legal terminology used in the trial, and had a limited grasp of key principles such as the role of the defense.⁹⁷ Similarly, televising of proceedings without disseminating

⁹⁵ Human Rights Watch, *Justice in Motion*, p. 29.

⁹⁶ The court televises trial sessions with a 20-minute delay to allow for deletion of sensitive information, or to edit out remarks by defendants that the court deems inflammatory or prejudicial to national security. The exact criteria applied when redacting the televised sessions are not publicly available, and it is unclear whether they are consistently applied. Closed sessions are not televised.

⁹⁷ ICTJ trial observation consultant report, March 28, 2006, paras. 68–88.

simple, accessible, and neutral explanations of the workings of the court and its laws may spread confusion as much as comprehension. Over the course of 2005 the IHT website was only intermittently updated and for much of 2006 the website did not function at all.

Furthermore, under the Iraqi legal system key documents such as indictments and records of court proceedings are not publicly posted.⁹⁸

The role of the chief investigative judge as the court's spokesperson is also a matter of concern.⁹⁹ The IHT Statute requires that the spokesperson for the court be a judge or a prosecutor,¹⁰⁰ but casting either of these court personnel in such a role raises the risk that the perceived impartiality of the court will be diminished. A court spokesperson will be required not only to explain the actions of the court, but also at times to defend the court's decisions from criticism by defense lawyers, among others. Having a judge play this function is potentially in conflict with the need for judges to maintain the appearance of impartiality in their dealings with parties to a case. Similarly, appointing a prosecutor as spokesperson can create the impression that the judiciary and prosecution "speak with one voice." Several trial judges interviewed by Human Rights Watch stated their discomfort with the fact that a judge was acting as the court's spokesperson, on the grounds that judges should not make out-of-court statements to the media.¹⁰¹

The spokesperson's role was not consistently respected. Former presiding judge in the Dujail case Rizgar Amin gave an interview to the press while he was still a sitting judge in the case,¹⁰² and an IHT judge complained to Human Rights Watch that some judges had taken to speaking directly to the media because the court lacked

⁹⁸ The IHT does not maintain verbatim transcripts of any session. For further discussion, see below, Section IV.3.c.

⁹⁹ A court spokesperson, who was not the chief investigative judge, was in fact appointed initially, but his tenure was short-lived. Because of concerns about his security, the spokesperson could not reveal his name and this proved unacceptable to journalists. The chief investigative judge, whose identity was already publicly known, then stepped into the gap. After the amendment of the statute of the court in September 2005, it became a requirement that the spokesperson be a judge or prosecutor.

¹⁰⁰ IHT Statute, art. 7(1)(F).

¹⁰¹ Human Rights Watch interviews with IHT judges, Baghdad, November 2005 and February–March 2006.

¹⁰² Interview by the Arabic-language *Al-Hayat* newspaper (London) with Judge Rizgar Amin, December 21, 2005 (summary on file with Human Rights Watch).

sufficient communications expertise.¹⁰³ The chief prosecutor regularly spoke to the media concerning such matters as the scheduling of trial sessions.

In a meeting with the then-president of the IHT in March 2006,¹⁰⁴ Human Rights Watch raised its concerns about both the lack of any outreach strategy, and about the role of the chief investigative judge as court spokesperson. The president of the IHT stated his view that the IHT's efforts at communicating information about the court and the trial were more than sufficient, arguing that the Iraqi people were sufficiently knowledgeable about legal matters to comprehend the working of the court. He also saw no difficulties in respect of having the chief investigative judge as court spokesperson. According to a representative of the RCLO, the position of an outreach coordinator has been advertised but had not been filled as of October 2006.¹⁰⁵

5. IHT Defense Office

A fundamental component of a fair trial is “equality of arms.” Equality of arms refers to the principle that every party must be afforded a reasonable opportunity to present his or her case under conditions that do not place the party at a substantial disadvantage vis-a-vis the opponent.¹⁰⁶ This includes not only equality in presenting arguments, but also equality in being able to present evidence. In international or mixed national-international courts the prosecution typically has the benefit of considerable international assistance and expertise, including forensic analysts, military analysts, international legal experts, and experienced investigators and prosecutors. While such a level of prosecution resources is necessary if the prosecution is to meet its burden of proving guilt for massive crimes, it has been increasingly recognized that an effective defense of such cases also requires significant institutional, logistical, investigative, and legal support. One mechanism by which this support can be provided is through the creation of a Defense Office, which is an independent office within the court that endeavors to strengthen defense

¹⁰³ Human Rights Watch interview with IHT judge, Baghdad, March 2006.

¹⁰⁴ Human Rights Watch interview with IHT president, Baghdad, March 2006. The president of the court died in June 2006 while undergoing surgery, and has been replaced by another Appeals Chamber judge.

¹⁰⁵ Human Rights Watch interview with RCLO representative, Baghdad, October 2006.

¹⁰⁶ European Commission of Human Rights, *Kaufman v. Belgium* (App. 10938/84); (1986) 50 DR 98, p. 115; European Court of Human Rights, *Foucher v. France* (App. 22209/93), Judgment of 18 March 1997; (1998) 25 EHRR 234, para. 34.

capacity in various ways. For example, the Defense Office of the Special Court for Sierra Leone maintains a list of qualified counsel to represent accused who cannot afford legal assistance; advocates with the court administration and judges to ensure that defense lawyers (both privately retained and court-funded) have the necessary resources to prepare a defense; hires defense investigators to inquire into factual issues relevant to an accused's defense; and participates in regular discussions with court management concerning the needs of defense counsel.¹⁰⁷

Bosnia's War Crimes Chamber has a Criminal Defense Support Section (known by its Bosnian acronym OKO), headed by an experienced international defense lawyer, which forms part of the administrative and management structure of the War Crimes Chamber's Registry. As well as providing logistical and administrative support to all defense counsel, the OKO also engages in intensive training and capacity-building for Bosnian lawyers participating in trials before the War Crimes Chamber. The OKO manages the accreditation of lawyers seeking to appear before the War Crimes Chamber, in part to ensure that the lawyers have the necessary training and expertise. It also maintains five regionally-based teams that provide assistance to individual Bosnian lawyers defending persons indicted by the chamber. The assistance provided includes helping with the preparation and presentation of legal arguments, and the hiring of expert consultants if necessary.

There is a profound need for a Defense Office fulfilling these kinds of functions at the IHT. As previously noted, the Iraqi legal system has never before undertaken trials of this scope or complexity, and Iraqi lawyers have been isolated from the rapid development of international criminal law over the last 15 years. Yet contesting cases under the IHT's substantive jurisdiction requires a deep knowledge of international criminal law and international law more generally, as well as knowledge of modern investigative techniques and methods. The RCLO sought to build this capacity among IHT prosecutors and judges, including tens of millions of dollars worth of investigative assistance and substantial training programs. However, private Iraqi defense lawyers were not incorporated into these training programs, and no expert legal or investigative assistance was made available in the lead-up to the Dujail trial. Hence, the degree of inequality of arms between the prosecution and the defense—

¹⁰⁷ Human Rights Watch, *Bringing Justice*, pp. 21–28; *Justice in Motion*, pp. 15–17; *Looking for Justice*, pp. 22–23.

in terms of institutional support, expertise and training, and infrastructure—is potentially considerable.¹⁰⁸ A robust and well resourced Defense Office, with international advisors, would be one way to redress this imbalance.

The Rules of Procedure provide for the creation of a Defense Office that could potentially play a role similar to those at the Special Court and the War Crimes Chamber.¹⁰⁹ However, the poor implementation of these provisions has meant that, in fact, the IHT Defense Office has not realized this potential, and functions essentially as a “legal aid” office for indigent accused. The picture is one of disarray in terms of recruitment and training, and fraught relations between private counsel and Defense Office lawyers, with the latter reluctant to provide any assistance or support to non-Defense Office defense lawyers.

A director for the Defense Office was not appointed until early September 2005¹¹⁰—six weeks prior to the start of the Dujail trial—and the Defense Office came into existence around the same time. Two other Iraqi lawyers were appointed to it shortly after that. These three lawyers participated in two training sessions in international criminal law in September 2005. One of the Defense Office lawyers was appointed to represent defendant Muhammad ‘Azzawi in the Dujail proceedings, but did not meet with his client for at least a month after the opening of the trial.¹¹¹

When private defense lawyers for the Dujail defendants threatened to boycott the trial after the assassinations of Sa’doun al-Janabi and Adel al-Zubeidi, an additional

¹⁰⁸ As noted above (see Section II), Saddam Hussein, Barzan al-Tikriti, and Taha Yassin Ramadan privately retained non-Iraqi defense counsel. However, apparently only one of Saddam’s non-Iraqi lawyers, US attorney Ramsey Clark, has international criminal trial experience (he has defended individuals before the International Criminal Tribunal for Rwanda). The Dujail trial chamber did not provide legal-quality translation for non-Arabic-speaking lawyers such as Ramsey Clark, and was generally reluctant to allow him to speak in court. For example, on December 5, 2005, the court initially declined to hear Clark on the grounds that he did not speak Arabic, and then changed its mind. Overall, the poor quality of translation meant that his ability to follow proceedings was impeded. Under these conditions, non-Arabic-speaking, non-Iraqi lawyers with direct experience in defending international criminal cases are effectively precluded from directly participating in defending the accused. In the first days of the Anfal case, the court has ruled orally that non-Iraqi lawyers cannot have a speaking role in court.

¹⁰⁹ IHT Rules of Procedure and Evidence, rule 30. This provides that the director of administration shall establish a Defense Office and appoint a director for the office from among the lawyers working for the office. The director of the Defense Office serves at the pleasure of the director of administration, who may remove the Defense Office director “at any time.” The Defense Office is mandated to provide legal counsel to accused persons who cannot afford counsel, to appoint a lawyer on a temporary basis to persons in detention who have not yet appointed a lawyer, and to provide “the required facilities to enable the lawyer in preparing his defense.”

¹¹⁰ Human Rights Watch interview with Defense Office lawyer, Baghdad, November 2005.

¹¹¹ Human Rights Watch interview with Defense Office lawyer, Baghdad, November 2005.

five Iraqi defense lawyers were recruited by the Defense Office in October and November 2005. These lawyers were recruited to act as “stand-by counsel” in the event that the private defense lawyers failed to appear in court, and were given copies of the dossier of evidence. However, because they were recruited only a few weeks before the trial was to resume, they were not provided with any training in international criminal law. The threatened defense boycott of the court session of November 28, 2005, did not materialize, but in December six of the Defense Office lawyers resigned en bloc because their names had been inadvertently revealed to the media by a court official.¹¹² To replace them new lawyers were recruited, but these also did not have the opportunity to undergo training in international criminal law before a January 2006 boycott by the private defense lawyers led the trial court to appoint the new Defense Office lawyers as counsel for the defendants until their own counsel returned to court.¹¹³ When Human Rights Watch interviewed the Defense Office lawyers again in March 2006, they stated that they had not yet received further training, and that they did not have access to international criminal law judgments in Arabic.¹¹⁴

Human Rights Watch’s concerns about the in-court performance of Defense Office lawyers are detailed below (see Section IV.7), but it is clear that the Iraqi lawyers staffing the office have not had adequate training in substantive international criminal law, or in the relevant aspects of the fair trial procedure that should underpin any international criminal law prosecution. It appears that the Defense Office was eventually given a compact disc containing Arabic translations of key international criminal law judgments in May or June 2006. However, by their own admission, the Defense Office lawyers did not read these judgments. Indeed, it would be unrealistic to expect the lawyers to become conversant with judgments that are often hundreds of pages long, and which concern criminal laws not

¹¹² Human Rights Watch interview with Defense Office lawyers, Baghdad, February 2006.

¹¹³ Human Rights Watch interview with Defense Office lawyers, Baghdad, February 2006. The Defense Office lawyers were imposed on the defendants against their will. For our concerns about the imposition of lawyers against the will of the accused, see Human Rights Watch, *The Iraqi High Tribunal and Representation of the Accused*, February 2006, <http://hrw.org/backgrounder/mena/iraq0206/>.

¹¹⁴ Human Rights Watch interview with Defense Office lawyers, Baghdad, March 2006. The RCLC undertook the translation of over 12,000 pages of international criminal law judgments from English to Arabic. These were provided to judges of the court in December 2005.

previously contained in Iraqi law, in the absence of formal instruction and some guidance.

It is noteworthy that the closing statements for the defendants read by Defense Office lawyers in July 2006 (after another boycott by private defense lawyers) did contain extensive reference to and discussion of the relevant international criminal law principles. However, Human Rights Watch has determined that these statements were written not by the Defense Office lawyers but by international advisors to the IHT. The statements were drafted in English, translated into Arabic, and provided to the Defense Office lawyers to read aloud in court—indicating the underlying lack of capacity among the Defense Office lawyers themselves.¹¹⁵

The Defense Office has not hired any investigators to work on behalf of defendants in the Dujail trial or any other trial before the IHT.¹¹⁶ The Defense Office also does not provide logistical, administrative, or other support to privately retained defense lawyers.¹¹⁷ In interviews over several months, the director of the Defense Office reiterated his view that the Defense Office did not, and would not, have a role in supporting or assisting the private defense lawyers in the Dujail case.¹¹⁸ Other Defense Office lawyers emphatically seconded this view, arguing that the role of the Defense Office is to assist court-appointed lawyers only. They also stated that they preferred to keep their distance from the private defense lawyers out of concern for their own security.¹¹⁹

¹¹⁵ The advisor told Human Rights Watch that he had provided international criminal law references to the Defense Office lawyers as part of his assistance with the closing statements. However, Defense Office lawyers confirmed Human Rights Watch's conclusion that the advisor had written the text of the closing statements. Human Rights Watch interviews with Defense Office lawyers, Baghdad, July and September 2006.

¹¹⁶ While the investigative judge is under an obligation to seek out exculpatory evidence, this does not necessarily mitigate the need for defense investigators in lengthy and complex criminal cases. For example, in the Dutch trial of two former Afghan military officers for torture committed in Afghanistan in the 1980s, the court authorized an investigator to travel to Afghanistan on behalf of the defense to collect evidence to present to the investigative judge. See Human Rights Watch, *Universal Jurisdiction in Europe: The State of the Art*, vol. 18, no. 5(D), June 2006, <http://hrw.org/reports/2006/ijo606/>, pp. 17–18. It is noteworthy that the Bosnian War Crimes Chamber's Criminal Defense Support Section, which functions in a civil law system, also facilitates the hiring of defense investigators.

¹¹⁷ One exception to this was the attempt by an international advisor to the Defense Office to provide legal assistance to privately retained lawyers.

¹¹⁸ Human Rights Watch interviews with Defense Office director, Baghdad, November 2005 and February–March 2006.

¹¹⁹ Human Rights Watch interviews with Defense Office lawyers, Baghdad, November 2005 and March 2006.

Relations between Defense Office lawyers and private defense lawyers deteriorated further after January 2006 when the Defense Office lawyers were brought into court to replace the boycotting private lawyers. The private defense lawyers filed a complaint with the Iraqi Bar Association, arguing that the payment arrangements between Defense Office lawyers and the IHT amounted to a “salary,” and this violated the Iraqi Law of the Legal Profession.¹²⁰ The Iraqi Bar Association demanded that the IHT disclose to it the identity of the Defense Office lawyers, but the court declined to do so.¹²¹ These divisive developments have resulted in little or no professional interaction between the Defense Office lawyers and the privately retained lawyers.

The Defense Office premises are located in the same building as the IHT’s administrative offices, and thus Defense Office lawyers do not have the difficulties in gaining access to the court administration encountered by private lawyers. However, when Human Rights Watch visited the premises of the Defense Office in November 2005, it found the accommodations to be very basic: one office with three desks and two computers with no internet connection, shared among seven lawyers. Defense Office lawyers complained consistently that the IHT had not allocated resources to improve the facilities available to them, and that they had no administrative or secretarial support. On subsequent visits to the Defense Office premises in July 2006 Human Rights Watch found no improvement in the conditions and indeed observed that the office no longer had computers.

No security arrangements were in place for Defense Office lawyers at the opening of the Dujail trial in October 2005. When Human Rights Watch interviewed the Defense Office lawyers in November 2005 and February and March 2006, they stated that they had been offered relocation into the International Zone after the killing of Sa’doun al-Janabi, but living accommodation had still not been made available. The Defense Office lawyers noted that while the court was in session they stayed in the International Zone, but when the court adjourned for a recess the lawyers left the International Zone without secure transportation.¹²² Their homes also remained

¹²⁰ Human Rights Watch interview with Defense Office lawyers, Baghdad, March 2006.

¹²¹ The Iraqi Bar Association itself was reportedly plagued with governance problems, and its governing officers were alleged by many lawyers to be corrupt and strongly supportive of the former Ba’thist government.

¹²² Human Rights Watch interviews with Defense Office lawyers, Baghdad, February–March 2006.

unprotected. Like the private defense lawyers, Defense Office lawyers were also given the option of being licensed to carry a handgun, and handguns were issued to them in mid-February 2006.¹²³ Also, like the private defense lawyers, the Defense Office lawyers were given the option of nominating three guards, to be approved by the Ministry of Interior and paid for by the Iraqi government. According to the Defense Office lawyers, some of them had one or two nominated guards approved by the Ministry of Interior, but none of the approved guards' salaries had been paid.¹²⁴

The Defense Office lawyers complained that, despite repeated requests to the court's administration to improve their security arrangements, the court was not responsive and the Defense Office lawyers asked the RCLO to intercede.¹²⁵ The RCLO responded by taking up the issue directly with the Prime Minister's Office, which has responsibility for allocating secure apartments within the International Zone. Representatives of the RCLO noted that the waiting list for accommodation within the International Zone runs to 1,500 families but they continued to press the issue with the Prime Minister's Office.¹²⁶ When Human Rights Watch again interviewed Defense Office lawyers in July 2006 they stated that apartment accommodation had recently become available in the International Zone and that some had been able to relocate to these apartments with their families.¹²⁷

Rule 30(6)(a) and (b) of the IHT's Rules of Procedure and Evidence permit the director of administration to appoint an international advisor to the Defense Office. The advisor is required to have experience and expertise in "international war crimes trials."¹²⁸ An international advisor was not appointed to the Defense Office until mid-April 2006. The advisor appointed had considerable experience as an investigator with international criminal tribunals, but was not a lawyer. He appears to have made a good faith effort to offer assistance to the private defense lawyers during the Dujail trial, but over some time private defense lawyers became reluctant to accept his

¹²³ Human Rights Watch interviews with Defense Office lawyers, Baghdad, February 2006.

¹²⁴ Human Rights Watch interviews with Defense Office lawyers, Baghdad, July 2006.

¹²⁵ Human Rights Watch interviews with Defense Office lawyers, Baghdad, March 2006.

¹²⁶ Human Rights Watch interview with RCLO representatives, Baghdad, July 2006.

¹²⁷ Human Rights Watch interview with Defense Office lawyers, Baghdad, July 2006.

¹²⁸ IHT Rules of Procedure and Evidence, rule 30(6)(b).

assistance on the grounds that the international advisor was regarded as serving the interests of the RCLO (which played a role in his recruitment).¹²⁹ Private defense lawyers accused the advisor of talking to defense witnesses *ex parte* and without the permission of the defense lawyers.

¹²⁹ Human Rights Watch interview with private defense lawyers, Baghdad, September 2006.

IV. Procedural Concerns in the Conduct of the Trial

Based on its extensive monitoring of trial sessions, and its interviews with key actors in the trial process, Human Rights Watch has identified a number of serious procedural concerns that, cumulatively, significantly diminished the fairness of the Dujail trial.

The Republic of Iraq ratified the International Covenant on Civil and Political Rights (ICCPR) in 1976, and all successor governments remain bound by it. Article 14 of the ICCPR provides that any person charged with a criminal offense is entitled to “a fair and public hearing by a competent, independent and impartial tribunal established by law.”¹³⁰ A “fair trial” under the ICCPR means that a person being tried for a criminal offense must be guaranteed, at a minimum, the following rights:¹³¹

- To be presumed innocent until proved guilty according to law;¹³²
- To be informed of the charges against her/him in detail and promptly, in a language she/he understands;
- To have adequate time and facilities for the preparation of a defense and communication with counsel of her/his own choosing;
- To be tried without undue delay; to be tried in her/his own presence, and to defend her/himself in person or through legal counsel of her/his own choosing;
- To examine witnesses against her/him and be able to obtain the attendance and examination of witnesses on her/his behalf, under the same conditions as the prosecution;
- Not to be compelled to confess guilt or incriminate her/himself;
- To be able to appeal to a higher tribunal against conviction and sentence.¹³³

¹³⁰ International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, art. 14(1).

¹³¹ *Ibid.*, art. 14(3)(a)-(g).

¹³² *Ibid.*, art. 14(2).

¹³³ *Ibid.*, art. 14(5).

These basic fair trial guarantees apply irrespective of whether the legal system of the country conforms to an adversarial model (such as in the United States or the United Kingdom) or an inquisitorial model (such as in Iraq). They are the minimum requirements for a trial to be considered “fair” in international law.

The procedural flaws identified by Human Rights Watch over the course of the Dujail trial undermine several of these fair trial guarantees, including: the right to an independent and impartial tribunal; the right to be presumed innocent; the right to be promptly informed of charges against the accused; the right to adequate time and facilities to prepare a defense; and the right to examine witnesses against the accused.

1. Concerns Affecting the Independence and Impartiality of the IHT and the Presumption of Innocence

A basic element of a fair trial is that the court conducting the proceedings be independent from interference by litigants, the political branches of government, or any other source. Critical determinants of the independence of a court are the laws and procedures governing the appointment of judges, the conditions governing the transfer and cessation of their functions, and the “actual independence of the judiciary from the executive branch and the legislative.”¹³⁴ The UN Basic Principles on Independence of the Judiciary require that procedures for the suspension, removal or disciplining of a judge be determined in accordance with established standards of judicial conduct and be subject to independent review.¹³⁵

The IHT Statute declares the “complete independence”¹³⁶ of the court, and the statute and rules contain judicial procedures governing the disciplining of a judge for misconduct,¹³⁷ and concerning the recusal of a judge where there is an allegation of

¹³⁴ UN Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 (1994), para. 3. The Human Rights Committee monitors the implementation of the ICCPR.

¹³⁵ Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985).

¹³⁶ IHT Statute, art. 1(1).

¹³⁷ IHT Statute, arts. 4–6.

bias.¹³⁸ The Iraqi constitution also guarantees the independence of judges in the exercise of their functions.¹³⁹

However, the IHT Statute contains two provisions—articles 4(4) and 33—that are open to abuse, and have in fact been abused to seriously undermine the independence of the court by the transfer or suspension of judges in the midst of ongoing trials.

Despite specific provisions governing the suspension and dismissal of judges for misconduct,¹⁴⁰ article 4(4) of the IHT Statute allows the Council of Ministers (the Prime Minister and Cabinet) to transfer a judge from the IHT to the Higher Judicial Council “for any reason.” While a judge so transferred does not lose his status as a judge, he is removed from any role in adjudicating cases before the IHT and may also lose certain privileges associated with being an IHT judge, such as secure accommodation in the International Zone.

Article 33 of the IHT prohibits any person who belonged to the Ba’th Party from holding any position within the court. However, it does not specify any procedures for investigating whether a court employee was a member of the Ba’th Party, or which governmental institution is responsible for enforcing this provision. A de facto “pause” in the applicability of article 33 meant that former Ba’th members were in fact appointed to the IHT, although they remain vulnerable to dismissal should the article be enforced. Membership of the Ba’th Party was a prerequisite for admission to judicial training under the former government, and does not necessarily imply that the member was a supporter of the Ba’th Party or the government of Saddam Hussein, so former membership of the Ba’th Party, without regard to rank or extent of participation, is unlikely of itself to be sufficient to render a person unfit for office with the IHT.

The susceptibility of judicial personnel to dismissal at any time is a threat to the independence of the IHT. It creates the possibility that judges who belonged to the Ba’th Party may be selectively dismissed or threatened with dismissal. Any

¹³⁸ IHT Rules of Procedure and Evidence , rules 7–8.

¹³⁹ Constitution of Iraq (as adopted by referendum on October 15, 2005), art. 88.

¹⁴⁰ IHT Statute, arts. 5–6.

procedure for the dismissal of judges must preserve the independence of judicial personnel, for example by considering their performance on an individual basis, and with avenues for review against a dismissal decision. Article 33 is also at variance with the general rules for de-Ba’thification applied by the National De-Ba’thification Commission (NDBC), which render persons holding any of the top four levels of Party membership potentially ineligible for government employment.¹⁴¹

In July 2005 the NDBC relied on article 33 to seek the dismissal of over 20 personnel from Iraqi courts, including judges. On that occasion the dismissals were avoided only due to the direct intervention of Iraqi President Jalal Talabani and then-Prime Minister Ibrahim al-Ja’fari. But in January 2006 the NDBC intervened again, this time in relation to a judge sitting on the Dujail case. After the resignation of the first presiding judge in the Dujail case (discussed below), the next most senior judge on the trial chamber, Judge Saeed al-Hammashi, was to take over as presiding judge. However, before Judge al-Hammashi could continue hearing the case in January, the NDBC demanded his removal on the grounds that he was previously a Ba’th Party member. Judge al-Hammashi denied the charge, and in November 2006 the NDBC notified Judge al-Hammashi that the case against him had been dropped. Nevertheless, due to the NDBC’s invocation of article 33, Judge al-Hammashi was removed from the Dujail trial. The NDBC’s intervention forced the IHT to negotiate with the Prime Minister’s Office in order to forestall Judge al-Hammashi’s dismissal from the IHT altogether; he remains a judge of the IHT but has not been reassigned to any case.

Article 33 has thus become a “sword at the necks”¹⁴² of sitting IHT judges, and has been used by the NDBC to exercise considerable power in terms of having sitting judges suspended from their duties. In October 2006, a further four trial judges—including one judge sitting on the ongoing Anfal trial—received letters stating that they were being transferred from the IHT to the Higher Judicial Council. According to one of the judges, those transferred were made to understand that if they protested the transfer they would become subject to investigation by the NDBC.¹⁴³

¹⁴¹ Coalition Provisional Authority, Order Number 1, De-Ba’thification of Iraqi Society, CPA/ORD/16 May 2003/01, paras. 2–3.

¹⁴² Human Rights Watch interview with IHT judges, Baghdad, October 2006.

¹⁴³ Human Rights Watch interview with IHT judges, Baghdad, October 2006.

Article 4(4) of the IHT Statute was used by the Council of Ministers to remove the presiding judge in the Anfal trial, ‘Abdullah al-Amiri, on September 19, 2006. Five days earlier, Judge al-Amiri had had an exchange with defendant Saddam Hussein in which the judge stated, “I will answer you: you are not a dictator. Not a dictator. You were not a dictator. The people or those who are around the official make him a dictator, and it is not just you. This is the case all over the world.”¹⁴⁴ These comments were interpreted as showing leniency or bias towards Saddam Hussein, and were the subject of intense public criticism. Members of parliament demanded the removal of Judge al-Amiri,¹⁴⁵ and a representative of the prime minister was also dispatched to the president of the IHT to demand the judge’s transfer off the case.¹⁴⁶ The IHT president then wrote to the Council of Ministers, requesting the transfer of Judge al-Amiri from the IHT to the Higher Judicial Council under article 4(4) of the IHT Statute, and the Council of Ministers authorized the transfer. A spokesperson for the prime minister confirmed that the Cabinet acted to remove Judge al-Amiri because of its view that he was biased in favor of Saddam Hussein, and because of popular anger over al-Amiri’s comments.¹⁴⁷ The executive’s intervention to transfer Judge al-Amiri—despite the existence of judicial procedures to resolve allegations of bias¹⁴⁸—seriously undermined the IHT’s independence and reflected a disturbing readiness to intervene in a judicial matter in response to public opinion. When challenged about the propriety of transferring a judge for such reasons, a Cabinet advisor responded that Iraqi law gives the government the right to “hire, fire and transfer judges. We are responsible and the Iraqi government does pay the salaries of these judges. The only thing is, we have no influence over the verdict and what goes on in court because it’s an independent system.”¹⁴⁹ This statement suggests a failure to grasp fully the principle of independence of the judiciary.

¹⁴⁴ Paul von Zielbauer, “Judge Tells Hussein, ‘You are Not a Dictator,’” *New York Times*, September 15, 2006.

¹⁴⁵ Richard Opiel, “After Remark, Judge in Trial of Hussein Loses His Post,” *New York Times*, September 20, 2006.

¹⁴⁶ Brian Bennett, “Behind the Saddam Judge’s Ouster,” *Time Magazine*, September 20, 2006. This was confirmed by Human Rights Watch interviews with IHT judges, including a judge in the Anfal trial, Baghdad, October 2006.

¹⁴⁷ See comments by spokesman for Nouri al-Maliki, Ali Dabbagh, reported in “Saddam Hussein ejected from Trial,” CNN, September 20, 2006, <http://edition.cnn.com/2006/WORLD/meast/09/20/iraq.saddam/index.html> (accessed November 3, 2006). See also Liz Sly, “Hussein Trial Judge Removed,” *Chicago Tribune*, September 20, 2006.

¹⁴⁸ IHT Rules of Procedure and Evidence, rules 7 and 8.

¹⁴⁹ Bassam Ridha, quoted in Sly, “Hussein Trial Judge Removed,” *Chicago Tribune*.

The IHT's independence and its appearance of impartiality have also been undermined by fierce public criticism of the court and its judges by senior government officials. This has occurred regularly since the beginning of the Dujail trial. The uncertain and faltering start to the trial, and the difficulties in controlling the behavior of the defendants encountered by former presiding judge Rizgar Amin, gave rise to vituperative attacks from members of parliament and the then-minister of justice. Members of parliament denounced the court and Judge Amin as "weak" and excessively lenient with the defendants, and demanded his resignation.¹⁵⁰ During one trial session at which Human Rights Watch was in attendance, a prominent parliamentarian in the public gallery was heard to declare that "this Kurdish judge must go."¹⁵¹ The then-minister of justice also denounced Judge Amin as weak and demanded his resignation on more than one occasion in the press.¹⁵² Then-Prime Minister Ibrahim al-Ja'fari during a press conference also criticized the conduct of the trial by the presiding judge.¹⁵³ The Iraqi government did nothing to defend the court from these attacks, and did not warn ministers or other public officials against making such statements. In January 2006 Judge Amin resigned. Judges interviewed by Human Rights Watch stated that the resignation was principally caused by the severity and intensity of official criticism of his conduct of the trial.¹⁵⁴ Judges observed that the attacks by government figures created an enormous sense of pressure upon them, and that there was in fact little understanding within the government about the IHT and its procedures.¹⁵⁵ One judge explained,

The attitude of the cabinet towards the court and the trial is one of a consumer who pays money for a product: they give money, and they demand results. The government treats the court like a factory.¹⁵⁶

¹⁵⁰ Iraqi press summaries, December 2005–March 2006, on file with Human Rights Watch.

¹⁵¹ Human Rights Watch-ICTJ trial observation notes, November 28, 2005. In a similar vein, Shi'a parliamentarian and Da'wa Party member Ali al-Adeeb stated to the press, "The chief judge should be changed and replaced by someone who is strict and courageous." See Hamza Hendawi, "Saddam Lashes out at US as Trial Resumes," Associated Press, November 28, 2005.

¹⁵² Iraqi press summaries, December 2005–March 2006, on file with Human Rights Watch.

¹⁵³ Iraqi press summaries, December 2005–March 2006, on file with Human Rights Watch.

¹⁵⁴ Human Rights Watch interviews with IHT judges, February, March and October 2006.

¹⁵⁵ Human Rights Watch interviews with IHT judges, November 2005 and March 2006.

¹⁵⁶ Human Rights Watch interview with IHT judge, March 2006.

The pressure was compounded by impatience and a lack of understanding in the wider Iraqi public, and the failure of the IHT to develop an effective outreach and communications strategy (discussed in Section III.4, above). This public impatience was intensified by statements from government officials demanding a rapid trial and speedy execution of Saddam Hussein.¹⁵⁷

Through comments prejudging the guilt of the defendants, senior government officials and political figures have also run the risk of appearing to or actually seeking to influence the outcome of the trial. State officials and political figures must not prejudice the accused's fair trial rights or undermine the perceived impartiality of the tribunal by prejudging the assessment of the facts by the competent judicial authority.¹⁵⁸ From well before the beginning of the Dujail trial, senior Iraqi government officials and political figures made statements declaring Saddam Hussein guilty and deserving of execution.¹⁵⁹ These statements continued throughout the Dujail trial: On November 28, 2005, Abdul Aziz al-Hakim, leader of the powerful Shi'a political party the Supreme Council of the Islamic Revolution in Iraq (SCIRI), stated that "the government wants to see Saddam dead, it wants him to face the death penalty because that is the will of the people."¹⁶⁰ Another prominent SCIRI

¹⁵⁷ Iraqi press summaries, December 2005–March 2006, on file with Human Rights Watch. See also statement by a leader of SCIRI, Adel Abdul Mahdi, that Saddam Hussein should have been "put to death without trial" quoted in Ali Rifat, "Saddam trial is bad for us, says top Iraqi," *Sunday Times* (London), January 8, 2006. See also Ellen Knickmeyer, "Iraq's Premier Urges a Speedy Trial for Hussein," *Washington Post*, October 18, 2005; and "Maliki: Saddam's Execution is Imminent," United Press International, July 5, 2006.

¹⁵⁸ UN Human Rights Committee (HRC), General Comment 13, para. 7; HRC, Decision: Gridin v. Russian Federation, CCPR/C/69/D/770/1997, July 18, 2000, para. 8.3; European Court of Human Rights (ECtHR), *Alenet de Ribemont v. France*, Judgment of 10 February 1995; (1995) 20 EHRR 557, para.35; African Commission on Human and Peoples' Rights (ACHPR), *International Pen and Others (on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organization) v. Nigeria*, Communication Nos. 137/94, 139/94, 154/96, and 161/97, decision adopted on October 31, 1998, paras. 94-96.

¹⁵⁹ On May 9, 2005, Iraqi President Jalal Talabani stated that Saddam Hussein "will not escape punishment for his terrible crimes" (as quoted in "Iraqi president on national unity, government, terrorism, foreign presence" (in Arabic), *Al-Ra'y* (Amman), May 9, 2005, p. 6, reproduced in English translation by BBC Monitoring Middle East – Political), and on May 31 Talabani stated that "Saddam Hussein is a war criminal" (as quoted in "Talabani: Saddam Likely to Face Trial Soon," Associated Press, May 31, 2005). In an interview with Iraq's state-funded broadcaster Al-Iraqiya on September 6, 2005, President Talabani stated, "I received the investigating magistrate who is in charge of questioning Saddam [Hussein]. I encouraged him to continue his interrogation. He told me good news, saying that he was able to extract important confessions from Saddam Hussein." Talabani added that "Saddam signed these confessions," and that "Saddam Hussein is a war criminal and he deserves to be executed 20 times a day for his crimes against humanity." See "Iraq's Talabani says Saddam 'confessed' and deserves to die" (in Arabic), Al-Iraqiya TV (Baghdad), September 6, 2005, 17:35 GMT, reproduced in English translation by BBC Worldwide Monitoring, September 7, 2005. On June 24, 2005, SCIRI head Abdul Aziz Hakim stated in an interview with Reuters that "there is no doubt that Saddam deserves more than just execution... I am among those who are going to file a complaint for killing 64 members of my family. For these crimes alone he deserves 64 executions." See Mariam Karouny, "Iraqi Shiite Leader Wants Insurgents Wiped Out," Reuters, June 24, 2005.

¹⁶⁰ Muhammad Shakeel, "Trial of Saddam Set to Resume, Former PM warns against Rising Abuse in Iraq," *World Markets Analysis*, November 28, 2005.

figure (and currently one of Iraq's two vice-presidents), Adel Abdul Mahdi, stated in January 2006 that Saddam "deserves to be put to death without trial" and that "the continuing [trial process] is unnecessary and will only hurt the Iraqi people."¹⁶¹ On February 20, 2006, Shi'a cleric Muqtada al-Sadr stated that Saddam deserved the death penalty because he was responsible, directly or indirectly, for all those killed in Iraq while he was president.¹⁶² In an interview published on July 12, 2006, Muqtada al-Sadr—whose faction now formed part of the Iraqi government—asserted that "Saddam needs no trial and he must be treated as he treated the Iraqi people ... I demand his execution immediately."¹⁶³ On July 5, Prime Minister Nouri al-Maliki stated of Saddam Hussein, "his execution for the crimes he committed will come soon, just after the court ruling."¹⁶⁴

The statements of officials indicate that the Iraqi government has not only failed to promote a climate of public opinion conducive to a fair trial, but has actively encouraged the prejudgment of the outcome of the case. While the trial of someone as notorious as Saddam Hussein will inevitably be accompanied by strong opinions and public discussion as to his guilt or otherwise, public authorities and in particular leading political figures are not relieved of their obligation to refrain from prejudging the outcome of the trial. In creating an environment in which judges feel intense pressure to be seen as dealing severely with the accused, such behavior undermines the guarantee of presumption of innocence at trial.

¹⁶¹ Rifat, "Saddam trial is bad for us, says top Iraqi," *Sunday Times*.

¹⁶² Iraqi press summaries, December 2005–March 2006, on file with Human Rights Watch.

¹⁶³ "Iraqi Shi'i cleric Al-Sadr denies Al-Mahdi Army's involvement in recent killings" (in Arabic), Al-Iraqiya TV (Baghdad), July 12, 2006, 1710 GMT, reproduced in English translation by BBC Monitoring International Reports, July 14, 2006.

¹⁶⁴ "Maliki: Saddam's Execution is Imminent," United Press International. While in Baghdad in December 2005, Human Rights Watch also observed that, during the breaks in the telecast of the trial on the government-funded Al-Iraqiya television channel, material was broadcast that strongly suggested the guilt of the defendant Saddam Hussein. This is also described by journalist Jonathon Steele in "This faltering trial has put Saddam back in charge," *Guardian* (London), December 9, 2005: "Whenever the courtroom had a break, the screen was filled with a propaganda commercial showing Saddam's face. Blood slowly pours across it. Pictures of the former President bringing his hand down firmly to make a point are intercut with archive footage of a prisoner lying on the ground while a man uses a baseball bat to smash his wrists. In the style of Shi'a religious mourning, a voice wails a poem that taunts Saddam with God's judgment: 'Where will you hide from all your crimes?'"

2. The Defendants' Right to be Informed of the Charges

Article 14(3)(a) of the ICCPR provides that the defendant has the right to be informed “promptly and in detail ... of the nature and cause of the charge against him.”¹⁶⁵ A basic prerequisite for the fairness of a trial is that a defendant has sufficient information about what is alleged against him or her, so that he or she can adequately defend him or herself against the charge.¹⁶⁶ At minimum, a defendant must be provided with information that identifies the material facts alleged against him or her that are at the basis of the accusation, and the legal characterization of these material facts.¹⁶⁷ The level of detail that is necessary will depend on the nature of the case, and needs to be considered in terms of what would amount to sufficient information to prepare an adequate defense to the charges.¹⁶⁸

In international criminal law cases, the crimes alleged will likely have been committed by numerous individuals, playing distinct roles over an extended period of time. International criminal law contains several different theories of individual criminal liability that could be used to connect the defendant in court to the large-scale crime that occurred. Individuals brought before a court may bear different kinds of responsibility, from a commander to a participant to an aider-and-abettor. Each of these forms of liability will require specific kinds of criminal intention (*mens rea*) and criminal act (*actus reus*) to be proved in order to convict the individual defendant. Thus, in cases involving accusations of international crimes (such as crimes against humanity), international tribunals have consistently held that sufficient detail about the nature and cause of the charge must be provided to the defendant, so that a defendant can properly understand *in what capacity* he or she is alleged to be responsible for the crime. International courts have held that, at minimum, the *particular nature* of the defendant’s responsibility (for example, as a planner, commander, instigator, or aider of the crime) must be clearly identified, *and*

¹⁶⁵ This guarantee appears in almost identical form in article 6(3)(a) of the European Convention on Human Rights. The holdings of the European Court of Human Rights are therefore relevant to the interpretation of this fair trial guarantee, particularly because the European Court frequently interprets fair trial guarantees in the context of inquisitorial or civil law systems.

¹⁶⁶ European Court of Human Rights, *Mattoccia v. Italy* (App. 23969/94), Judgment of 25 July 2000, para. 59.

¹⁶⁷ *Ibid.*

¹⁶⁸ European Court of Human Rights, *Sadak and Others v. Turkey* (App. 29900/96, 29901/96, 29902/96 and 29903/96), Judgment of 17 July 2001, para. 50.

the defendant must be given *a concise statement of the material facts* that will be used to establish the defendant's specific mode of responsibility.¹⁶⁹ The kinds of facts that may be material for someone alleged to have planned or directed a crime will be quite distinct from those facts that are material for someone accused of aiding a crime.

Thus, in order to effectively prepare a defense, the defendant must be able to determine the "theory of liability" to be applied against him or her, and what facts will be proved in order to sustain that theory. For example, the international courts have held that if a defendant is accused of having "command responsibility" for the crime, he or she must be given notice of the following material facts that will be proved against him or her:¹⁷⁰

- (a) what command position he or she is alleged to have held;
- (b) the identities of the subordinates over whom he or she exercised effective control and for whose acts he or she is alleged to be responsible;
- (c) the conduct of the defendant that shows that he or she knew that a crime was being committed, or was about to be committed, by those identified subordinates and;
- (d) the conduct of the defendant that shows that he or she failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.

If someone is alleged to have personally participated in the crime, material facts such as the identity of the victim, the time and place of the event, and the means by which the criminal acts were committed have to be notified to the defendant.¹⁷¹ The facts that will be proved to show the defendant's mental state, and his or her criminal intent, also should be stipulated.¹⁷²

¹⁶⁹ *Prosecutor v. Kupreskic et al.*, ICTY, Case No. IT-95-16, Judgment (Appeals Chamber), October 23, 2001, para. 95; *Prosecutor v. Mejjakic et al.*, ICTY, Case No. IT-02-65, Decision on Dusan Fustar's Preliminary Motion on the Form of the Indictment, April 4, 2003; *Prosecutor v. Sesay*, Special Court for Sierra Leone (SCSL), Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, October 13, 2003, para. 12.

¹⁷⁰ *Prosecutor v. Blaskic*, ICTY, Case No. IT-95-14, Judgment (Appeals Chamber), July 29, 2004, para. 218.

¹⁷¹ *Kupreskic*, Judgment (Appeals Chamber), para. 90.

¹⁷² *Blaskic*, Judgment (Appeals Chamber), para. 219.

Without this kind of specification of the defendant’s alleged role in a large-scale, multiple-perpetrator crime, and identification of what facts will be established to prove that role, the defendant is essentially left to guess at the “nature and cause” of the case against him or her.

The charge sheet in the Dujail case was in the form of a “referral decision” from the IHT’s chief investigative judge, and was provided to defendants along with the dossier of evidence on August 10, 2005. The referral decision and dossier were identical for all eight defendants, even though the defendants ranged from the former President of the Republic through to minor Ba’th Party officials from Dujail. The referral decision was the only notice of charges provided to the defendants before the trial commenced. The referral decision contained no information whatsoever about each defendant’s alleged role in the crime, or what theory of liability was to be used against each defendant. No material facts to be proved against each defendant were described. Indeed, no material facts were stipulated at all; the referral decision simply stated that each defendant was charged with “[c]rimes against humanity against a number of citizens in the town of Dujail in Salahuddin Governorate on July 8, 1982. This is in accordance with Clauses A, D, E and F of Paragraph ‘First’ of article 12 of the court law. It consists of:

- A. Premeditated murder.
- D. Removal of population or forcible removal of population.
- E. Imprisonment or arbitrary deprivation of physical freedom contrary to the basic rules of international law.
- F. Torture.”

The referral decision does not constitute adequate notice of the cause and nature of the charge. The disclosure of the dossier of evidence does not amount to adequate notice, because the dossier was not tailored to each defendant, and thus does not inform a defendant of the material facts related to his role that will be proved at trial.¹⁷³

Under Iraqi law, no “indictment” or similar document is produced before the beginning of the prosecution case. However, a more detailed “charging document” is

¹⁷³ *Prosecutor v. Naletilic and Martinovic*, ICTY, Case No. IT-98-34, Judgment (Appeals Chamber), May 3, 2006, para. 27; *Prosecutor v. Jean Mpambara*, ICTR, Case No. ICTR-01-65-T, Judgment (Trial Chamber), September 11, 2006, para. 30.

drafted after the close of the prosecution case and before the commencement of the defense case.¹⁷⁴ In the Dujail case, this more detailed charging document was read out in court on May 15, 2006, eight months after the beginning of the trial. The charging document did contain more details concerning the specific role that each defendant was alleged to have played in the events at Dujail. However, because it was formulated only after the close of the prosecution case, the defendants cannot be considered to have had adequate notice of the charges against them during the presentation of prosecution witnesses and documentary evidence. The defendants' ability to prepare challenges to this evidence was thus circumscribed.

In addition, the May 15 charging documents added two new charges against seven out of the eight defendants: in addition to murder, forcible displacement, arbitrary detention, and torture, the charges of enforced disappearance and "other inhumane acts" were added against Saddam Hussein, Taha Yassin Ramadan, Barzan al-Tikriti, 'Abdullah Kadhim Ruwayid, Mizher 'Abdullah Kadhim Ruwayid, 'Ali Dayeh 'Ali al-Zubaidi, and Muhammad 'Azzawi 'Ali al-Marsumi. The defendants had no notice during the prosecution case that these charges would be added, and thus could not effectively address prosecution evidence that may have been relevant to proving disappearance or "other inhumane acts." The court required the defendants to open their defense case on the same day that the charging document was read out in court, effectively denying them any opportunity to revise or amend their defense in accordance with the more detailed notice and in light of the new charges.

It is also questionable whether even the May 15 charging document constituted adequate notice of the charges against each defendant. The charging document does include more specific allegations concerning the acts of each defendant, but

¹⁷⁴ Iraqi Code of Criminal Procedure, art. 181(C), (D). This provides:

"C – If it appears to the court, after the aforementioned steps have been taken, that the evidence indicates that the defendant has committed the offense being considered, then he is charged as appropriate, the charge is read to him and clarified and he is asked to enter a plea.

"D – If the defendant confesses to the charge against him and the court is satisfied of the truth of the confession and that he understands its implications, then it listens to his defense and issues a judgment in the case without any requirement for further evidence. If he denies the charge or does not offer a defense, if he requests a trial or if the court considers that his confession is confused, or that he does not understand the consequences or if the offense is punishable by death then the case goes to trial, defense witnesses are heard and the remaining evidence in his defense is heard, unless the court finds it to be an unjustified attempt to impede the investigation or mislead the court. When this has been completed the commentary of the other parties, the public prosecutor and the defense of the defendant are heard. The end of the trial is then announced and the court issues its verdict in the same session or in another session held soon afterwards."

does not stipulate material facts such as the facts showing the effective authority of defendants charged in a “command responsibility” role, the facts proving the mental state of the defendants, or the facts showing that a defendant knew that crimes were being committed by a subordinate. Moreover, the charging document does not clarify which theory of liability is being applied to each defendant—participation, instigation or joint criminal enterprise—or whether any high-level defendant is also accused of a “failure to prevent or punish” subordinates.

3. Equality of Arms and the Defendants’ Right to Adequate Time and Facilities to Prepare a Defense

As noted above (see Section III.5), a fundamental element of a fair trial is that every party must be afforded a reasonable opportunity to present his or her case under conditions that do not place the party at a substantial disadvantage vis-a-vis the opponent.¹⁷⁵ Implicit in the notion of equality of arms,¹⁷⁶ and explicit in article 14(3)(b) of the ICCPR, is that a defendant has a right to adequate time to prepare his or her case. The meaning of “adequate” will depend on the size and complexity of the case against the defendant.¹⁷⁷

Human Rights Watch has concluded that a number of aspects of the conduct of proceedings in the Dujail trial violated the principle of equality of arms, and deprived the defendants of adequate time and facilities to prepare their defense. In addition, Human Rights Watch observed a troubling indifference on the part of the court when these procedural concerns were raised by the defense. The court never engaged in a public or reasoned process of evaluating these concerns in light of fair trial principles, despite the seriousness of some of the concerns, as outlined below.

¹⁷⁵ European Commission of Human Rights, *Kaufman v. Belgium* (App. 10938/84); (1986) 50 DR 98, p. 115; European Court of Human Rights, *Foucher v. France* (App. 22209/93), Judgment of 18 March 1997; (1998) 25 EHRR 234, para. 34; UN Human Rights Committee, Decision: *Moraël v. France*, Comm. No. 207/1986, UN Doc. Supp. No. 40 (A/44/40) at 210 (1989), para. 9.3 (“... the concept of a fair hearing in the context of article 14(1) should be interpreted as requiring a number of conditions, such as equality of arms ...”).

¹⁷⁶ *Prosecutor v. Kordic and Cerkez*, ICTY, Case No. IT-95-14/2, Judgment (Appeals Chamber), December 17, 2004, para. 175.

¹⁷⁷ UN Human Rights Committee, General Comment 13, para. 9.

a. *Continuous late or same-day disclosure of incriminating evidence and non-disclosure of some witness statements*

Timely disclosure of prosecution evidence is essential for defendants to adequately prepare their defense. The IHT Rules provide that prosecution evidence must be disclosed 45 days before the start of the trial.¹⁷⁸ Approximately 900 pages of the trial dossier were disclosed in accordance with this rule, on August 10, 2005, seven weeks before the opening of the Dujail trial. The bulk of the 900 pages consisted of photocopies of official documents. On January 22, 2006—three months after the commencement of the trial—a further several hundred pages of documentation were provided to the defense, but with no explanation (and no explanation was requested by the court) as to why the material had not been made available in accordance with the Rules.¹⁷⁹

Of more serious concern was a tendency by the prosecution to engage in “trial by ambush,”¹⁸⁰ in which incriminating documents were not disclosed to the defense until the day that the document was used in court by the prosecution. Human Rights Watch documented a number of instances in which critical, incriminating documents were disclosed to the defense only on the day that they were used in court, and in some cases well after the close of the prosecution case.

On February 13, 2006, the court read the statements of 23 prosecution witnesses into the court record, without making these witnesses available for questioning by the defense.¹⁸¹ Of those 23 witness statements, 13 were not in the dossier and were not subsequently disclosed to the defendants during the trial. During the prosecution’s presentation of its documentary evidence on March 1, 2006, over 40 previously undisclosed documents were presented to the court, including the most important incriminating evidence against three of the “low-level” defendants: three letters addressed to former Minister of Interior Sa’doun Shaker naming suspected

¹⁷⁸ IHT Rules of Procedure and Evidence, rule 40.

¹⁷⁹ Human Rights Watch examined the documents disclosed on January 22, 2006, and found that some were copies of documents previously disclosed but the majority were new documents, not previously disclosed.

¹⁸⁰ This term is used by Judge Richard May and Marieke Wierda in *International Criminal Evidence* (Ardley, New York: Transnational Publishers, Inc.), p. 70.

¹⁸¹ See below, Section IV.4 (on the right to confront and examine witnesses) for discussion of other concerns raised by this aspect of proceedings.

Da'wa Party members in Dujail in the aftermath of the 1982 assassination attempt, and allegedly written by 'Ali Dayeh 'Ali, 'Abdullah Kadhim Ruwayid and Mizher 'Abdullah Kadhim Ruwayid. Also presented on that day, but previously undisclosed to the defense, was a compact disc containing a recording of a conversation allegedly between Saddam Hussein and former Ba'th Party Regional Command member Abdel Ghani al-Ghafour, in which the latter refers approvingly to the destruction of orchards in Dujail. The date of the recording was not disclosed, nor its source or means of interception.

The prosecution case effectively closed on March 1, 2006. On March 15, during the taking of statements from the defendants, the prosecutor confronted defendant Taha Yassin Ramadan with a previously undisclosed document concerning the detention of individuals from Dujail, which Ramadan allegedly had signed. As far as Human Rights Watch can ascertain, this document was never actually disclosed in full to Ramadan's defense lawyers, even after it was displayed in court. Further new documents were introduced on April 6 concerning the age of some of those convicted by the Revolutionary Court in connection with the Dujail incident.

On April 24, 2006, the prosecution introduced another compact disc recording, this time purporting to be a conversation between Saddam Hussein and Taha Yassin Ramadan concerning the fate of properties in Dujail. On June 13, 2006—the last day of the *defense* case—the prosecution produced in court a further three undisclosed documents allegedly signed by Taha Yassin Ramadan concerning land seizures in Dujail, and another compact disc recording of a conversation alleged to be between Taha Yassin Ramadan and Saddam Hussein.¹⁸²

The court always retains discretion to permit evidence that has not been disclosed in a timely manner to the defense, where the evidence is clearly probative. However, the exercise of this discretion requires a reasoned process of weighing the value of the evidence against the potential prejudice to the defendant due to late disclosure, and consideration of steps that might mitigate that prejudice (such as granting an

¹⁸² The conversation appeared to refer to a town by a code name, although identification of this town as Dujail was never established by evidence.

adjournment or a delay to permit review of the new evidence).¹⁸³ Moreover, international tribunals have emphasized that the prosecution bears the burden of explaining why the evidence was not disclosed earlier or could not reasonably have been made available in time¹⁸⁴—in part to ensure that the prosecution does not reap the benefit of failing to comply with court rules.

However, as best Human Rights Watch could determine, the IHT trial chamber did not consider these issues and permitted the prosecution to introduce new evidence as and when it wished. It also did not seek an explanation from the prosecution as to why disclosure was not made earlier, and never undertook a reasoned examination of whether permitting the evidence would be prejudicial to the defendants or how ensuing prejudice could have been remedied. The court appears to have been essentially indifferent to the potential threat to the defendants' fair trial rights flowing from consistent late disclosure or non-disclosure. The court also appears to have applied a different standard to defense late disclosure than to the prosecution: on May 30, 2006, the defense sought to have shown in court a compact disc of television footage suggesting that a complainant was not speaking truthfully during some of his in-court statements.¹⁸⁵ Whereas the presiding judge always permitted the prosecution to play its newly introduced recordings in court without consulting the defense, on this occasion he refused to allow the footage to be played until the defense obtained the permission of the prosecution. The judge insisted that all such material must be given in advance to the prosecution before it could be used in court. The prosecution examined the compact disc overnight and gave its consent the next

¹⁸³ See, for example, *Prosecutor v. Bagosora*, Case No. ICTR-96-7-T, Decision on the Motion by the Defense Counsel for Disclosure, November 27, 1997; *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-PT, Decision on Application for Leave to File an Interlocutory Appeal Against Decision on Motions for Exclusion of Prosecution Witness Statements and Stay on Filing of Prosecution Statements, February 4, 2005.

¹⁸⁴ *Prosecutor v. Delalic et al.*, ICTY, Case No. IT-96-21, Judgment (Appeals Chamber), February 20, 2001, para. 279.

¹⁸⁵ The complainant, Ali al-Haydari, had stated in court that the incident at Dujail on July 8, 1982, was “not an assassination attempt” against Saddam Hussein. The footage, shown on Al-Arabiya television channel on May 30, 2005, shows al-Haydari addressing a commemoration ceremony in Dujail in August 2004. Al-Haydari states, “Heroes from the sons of the *mujahid* and heroic city of al-Dujail turned the day of the tyrant Saddam’s visit to that city into a historic day in the life of that city, when they tried to kill the most vicious tyrant of modern history, and even the most vicious tyrant known by mankind.” See “Al-Arabiya airs video of Saddam prosecution witness contradicting his testimony,” BBC Monitoring Middle East – Political, May 30, 2006, 0705 GMT.

day, and the footage was shown on May 31. Treating the two parties unequally in this manner raises concerns that the principle of equality of arms has been violated.¹⁸⁶

b. Non-disclosure of exculpatory evidence

Rule 42 of the IHT Rules requires the prosecution to disclose, on a continuing basis, any evidence that mitigates the guilt of the accused. The obligation to disclose exculpatory evidence that is within the prosecutor's custody and control is considered as "important as the obligation to prosecute."¹⁸⁷ International tribunals have held that the equivalent obligation in their own rules is "fundamental to the fairness of proceedings before the Tribunal."¹⁸⁸

The prosecution does not appear to have exercised due diligence in complying with its obligation under the IHT Rules to disclose exculpatory evidence. On May 29, 2006, while questioning a defense witness, the prosecution showed in court documents apparently issued by a "compensation committee" formed to compensate Dujail residents whose lands had been seized by the government. One of the contentions of the defense case for Saddam Hussein and Taha Yassin Ramadan was that the razing of orchards in Dujail was unrelated to the assassination attempt against Saddam Hussein, but was undertaken pursuant to an agricultural redevelopment program in which compensation was paid to expropriated landowners. Documents suggesting the existence of a "compensation committee" for Dujail clearly tend towards supporting this aspect of the defense case, but were never disclosed to the defendants.

The defendant 'Awwad al-Bandar, the former chief judge of the Revolutionary Court who presided over the 1984 trial and sentencing of men and boys from Dujail, repeatedly claimed that the soundness of the legal procedures he employed could be verified by having regard to the full file of the Revolutionary Court proceedings. Documents in the Dujail trial dossier clearly indicated that the Revolutionary Court file

¹⁸⁶ See, for example, *Frank Robinson v. Jamaica*, Comm. No. 223/1987, U.N. Doc. CCPR/C/35/D/223/1987 (1989), para. 10.4, in which the Human Rights Committee commented, "The refusal of the trial judge to order an adjournment to allow the author to have legal representation, when several adjournments had already been ordered when the prosecution's witnesses were unavailable or unready, raises issues of fairness and equality before the courts. The Committee is of the view that there has been a violation of article 14, paragraph 1, due to inequality of arms between the parties."

¹⁸⁷ *Blaskic*, Judgment (Appeals Chamber), para. 264.

¹⁸⁸ *Prosecutor v. Krstic*, ICTY, Case No. IT-98-33, Judgment (Appeals Chamber), April 19, 2004, para. 180.

consisted of 361 pages, but only four of these pages were extracted in the Dujail trial dossier. Lawyers for al-Bandar repeatedly demanded that the court or the prosecution produce the entire Revolutionary Court file, but the court declined to order the prosecution to do so. Indeed, at one point the court suggested that the defendant al-Bandar should have kept a copy for himself when he left the Revolutionary Court in 1989, and that any failure to find the file was al-Bandar's responsibility.¹⁸⁹

It appears that the prosecution also took no steps to review documents in its custody and control in order to determine whether the Revolutionary Court file was in its possession. The investigative judge responsible for compiling the Dujail trial dossier, who has an express legal obligation to search out exculpatory evidence,¹⁹⁰ also does not appear to have sought to locate the file among the millions of pages of documents to which the court has access.¹⁹¹ The file was, in fact, among those documents within the control of the court, as it was located by a representative of the RCLO shortly before the end of the trial.¹⁹² The file was never produced in open court, and no explanation was proffered by the prosecution—or sought by the court—as to why it could not have been located earlier.

c. Non-disclosure of trial session notes and late disclosure of defendants' statements made to the investigative judge

The Dujail trial was conducted without a verbatim written transcript being taken.¹⁹³ Although the trial was relatively short compared to other major international criminal trials, it nevertheless ran for 40 trial days, with approximately 70 witnesses and over 1,000 pages of documentation. The absence of a transcript makes it exceptionally difficult to determine exactly what a witness or defendant said, and also makes the task of preparing and adjudicating an appeal both imprecise and cumbersome. The court did maintain a video recording of all sessions, but using video footage to

¹⁸⁹ Human Rights Watch-ICTJ trial observation notes, April 6, 2006. The judge made a similar statement on June 5, 2006.

¹⁹⁰ IHT Rules of Procedure and Evidence, rule 23.

¹⁹¹ The court maintains a "Secure Evidence Unit" overseen by the RCLO, which is responsible for reviewing and cataloging documents seized by investigators. The documents include some of those seized by the US military after the fall of the former government, which were initially transported to Qatar for review as part of the search for weapons of mass destruction.

¹⁹² Human Rights Watch interview with RCLO representative, Baghdad, October 2006.

¹⁹³ Ordinary Iraqi criminal courts do not as a matter of practice maintain a verbatim transcript for court proceedings. Rather, the presiding judge dictates the court record to the clerk.

pinpoint witness testimony or trial events is significantly more time-consuming than using a verbatim transcript.

In place of a verbatim written transcript, the court maintained a “court record” of trial session notes, written in longhand by court clerks. The trial session notes are essentially a summary of what was said in court (although Human Rights Watch observers frequently noted that the court clerks were writing little or nothing at all as testimony was given). These trial session notes were not made available to private defense counsel, despite repeated in-court requests. When Human Rights Watch raised the issue with an IHT prosecutor, he stated that “Iraqi law” did not require the sharing of trial session notes with defense lawyers.¹⁹⁴ The court itself never made such a ruling, but it failed to respond to requests by the private defense lawyers that copies of the notes be made available to them. In the absence of either a transcript or the trial session notes, the ability of private defense counsel to review evidence and other statements given in court is severely circumscribed, and constrains their opportunity to prepare an adequate defense.

The court did not make available to the defendants copies of their statements given before the investigative judge, until the morning of the trial session at which defendants were to be questioned by the trial chamber concerning those statements.¹⁹⁵ The dossier of evidence handed over in August 2005 did not include these statements,¹⁹⁶ and the statements were also not included in additional documents disclosed by the prosecution in January and early March 2006. When Human Rights Watch raised this with two IHT prosecutors, they both stated (in separate interviews) that “Iraqi law” does not require that copies of defendants’ statements be provided to defendants or their counsel.¹⁹⁷ The court did not rule on in-court demands by private defense counsel that copies of the statements be provided. Only shortly before the opening of the trial session of March 12, 2006 (in

¹⁹⁴ Human Rights Watch interview with IHT prosecutor, Baghdad, July 2006.

¹⁹⁵ Human Rights Watch–ICTJ trial observation notes, March 12, 2006.

¹⁹⁶ Human Rights Watch reviewed a copy of the dossier.

¹⁹⁷ Human Rights Watch interview with IHT prosecutor, Baghdad, March 2006; Human Rights Watch interview with IHT prosecutor, Baghdad, July 2006. Human Rights Watch’s review of the Iraqi Code of Criminal Procedure has not identified any express provisions stating that providing copies of the defendants’ statements is not obligatory, so this assertion appears to be based instead on common practice in the Iraqi legal system.

which defendants would be questioned by the trial chamber concerning their statements), were copies given to private defense counsel. The late provision of these documents made it effectively impossible for private defense counsel to prepare with their clients for questioning by the trial chamber. It also made it impossible for defense counsel to know exactly what their clients were alleged to have said to the investigative judge. This information must be disclosed prior to trial because it is highly material to the preparation of a defense and in particular if counsel wishes to challenge whether any of what is recorded in the statement was in fact uttered by their client.

The charging documents read in court on May 15, 2006, were also not provided in a timely manner to the defendants. The court did not provide a written copy to private defense counsel on May 15, stating that printed copies were still being prepared. This was despite the fact that the court required the defense to commence their case on May 15, just subsequent to the reading of the charges. Private defense counsel repeated their requests for written copies every day for the next three trial sessions, to no avail, and a copy was only provided after one privately retained lawyer, who was considered more cooperative by the court, intervened informally with the trial chamber and repeated the request. As best Human Rights Watch can determine, a written copy of the charging document for each defendant was not provided to private defense counsel and the defendants until one week after the charging documents were read in court.

d. Refusal to require information concerning chain of custody of documentation and refusal to permit defense to nominate own expert for document examination

The most significant evidence in the Dujail trial came from documents compiled in the trial dossier by the investigative judge and presented by the prosecution at trial. The dossier contains no indication that the investigative judge took any steps to verify any of the documents, or sought out information that would be relevant to determining the authenticity of the documents. The investigative judge also did not indicate how the documents were obtained, from which files or series of files they were extracted, and whether the documents constituted partial or complete extracts from a larger file.

Information concerning the source and chain of custody of a document is essential to assess how much weight should be placed on the document.¹⁹⁸ Similarly, it is important to know whether the document constitutes an extract from a larger file (which may well contain documents that cast doubt on the information in the document tendered), in order to assess its weight and in order to enable the other party to demand to inspect the complete file.¹⁹⁹ In the Nuremberg trials, the prosecution provided detailed information concerning how the tendered documents were captured, analyzed, registered, translated, and safeguarded.²⁰⁰ In the *Hostages Case*, the Nuremberg tribunal went so far as to state that failure to produce the remainder of a document on the part of the prosecution would cause the court to infer that the evidence contained therein was unfavorable to the prosecution.²⁰¹

No information concerning the source and chain of custody of any document in the dossier was ever introduced during the Dujail trial, and the court was indifferent to defense requests that the prosecution produce information concerning the provenance of the documents. Indeed, when on April 5, 2006, private defense counsel demanded information about how the prosecution had obtained the documents in the dossier, the prosecution refused to answer.²⁰² The court did not react to the prosecution's refusal. When, on April 4, private defense lawyers alleged that the documents were obtained through the Association of Free Prisoners,²⁰³ the presiding judge denied the claim but offered no further information on the source of the documents.²⁰⁴ In fact, numerous photocopied documents in the dossier bear the stamp of the Association of Free Prisoners. As discussed above, requests by the

¹⁹⁸ *Prosecutor v. Halilovic*, ICTY, Case No. IT-01-48, Judgment (Trial Chamber), November 16, 2005, para. 21; *Prosecutor v. Delalic*, ICTY, Case No. IT-96-21, Decision on the Motion of the Prosecution for the Admissibility of Evidence, January 19, 1998, para. 20.

¹⁹⁹ May and Wierda, *International Criminal Evidence*, p. 244.

²⁰⁰ *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1946-1949)* (Washington, DC: U.S. Govt Printing Office, 1949-53), vol. 15, pp. 632-72 ("Contemporaneous and Captured Documents").

²⁰¹ *Ibid.*, vol. 15, pp. 94-96.

²⁰² Human Rights Watch-ICTJ trial observation notes, April 5, 2006.

²⁰³ The Association of Free Prisoners comprises a group of former political detainees, Shi'as in the main, who announced their establishment as a nongovernmental organization on April 11, 2003, the day after Baghdad fell to coalition forces. According to its founders, the decision for establishing the Association of Free Prisoners and laying down their plan of action, including for the seizure of Iraqi state documents, was taken soon after the war against Iraq became imminent. Human Rights Watch interview with Ibrahim Ra'uf al-Idrisi, head of the Association of Free Prisoners, Baghdad, July 2003.

²⁰⁴ Human Rights Watch-ICTJ trial observation notes, April 4, 2006.

defense to produce the full Revolutionary Court file, from which four pages were extracted, were also denied. Overall, the court failed to avail itself of the opportunity to obtain evidence that would be vital to assessing the weight to be given to the documents. It also seemed unaware of the relevant international principles that might guide its approach to this issue.

The only step taken to attempt to verify any of the documents submitted in the court was the retention of “handwriting experts” from the Ministry of Interior to inspect approximately 11 of the several hundred documents in the dossier. The mandate of the handwriting experts—whose identities and qualifications were never disclosed, and who were never made available for questioning—was to evaluate whether signatures on certain documents corresponded with signature samples taken from the defendants Saddam Hussein,²⁰⁵ Barzan al-Tikriti,²⁰⁶ ‘Abdullah Kadhim Ruwayid,²⁰⁷ Mizher ‘Abdullah Kadhim Ruwayid,²⁰⁸ and ‘Ali Dayeh ‘Ali.²⁰⁹ In addition, a report said to have been authored by Saddam’s late son-in-law Hussein Kamel, and dated July 1987, was sent for verification. Two panels (one composed of three experts and the other composed of five experts) examined these documents in March–April 2006. According to the summary of the reports read in court on April 19 and April 24, the panels were able to verify the signatures and handwriting on seven out of the 11 documents, but could not authenticate the documents because they were unable to assess the documents’ age.²¹⁰ In the summary report read in court, it was stated that

²⁰⁵ The documents submitted for signature verification in relation to Saddam Hussein were: Presidential Decree No. 778 of June 16, 1984 (authorizing the carrying out of the death sentences imposed by the Revolutionary Court); Revolutionary Command Council Resolution 1283 of October 14, 1982 (authorizing the expropriation of lands in Dujail for an “agricultural development” project); and Revolutionary Command Council Resolution 982 of July 31, 1982 (awarding promotions to several General Intelligence Directorate Officers for their role in responding to the incident at Dujail).

²⁰⁶ The documents submitted for signature verification in relation to Barzan al-Tikriti were: General Intelligence Directorate letter addressed to the Revolutionary Command Council regarding honors/awards of General Intelligence Directorate Officers, No. 220 of 21 July 1982; General Intelligence Directorate document No. 5782 of 23 September 1982 regarding Dujail farms; General Intelligence Directorate document No. 6282 of 25 October 1982 regarding Dujail farms, with a list of farm owners attached; and Memo addressed to the Revolutionary Command Council from the head of the General Intelligence Directorate, 13 July 1982, No. 9, concerning progress in the investigation into events at Dujail.

²⁰⁷ The document submitted for signature verification in relation to ‘Abdullah Kadhim Ruwayid was the Ba’th Party report allegedly written by him to then-Minister of Interior Sa’doun Shaker, naming Da’wa Party supporters in Dujail, undated.

²⁰⁸ The document submitted for signature verification in relation to Mizher ‘Abdullah Kadhim Ruwayid was the Ba’th Party report allegedly written by him to then-Minister of Interior Sa’doun Shaker, naming Da’wa Party supporters in Dujail, undated.

²⁰⁹ The document submitted for signature verification in relation to ‘Ali Dayeh ‘Ali was the Ba’th Party report allegedly written by him to then-Minister of Interior Sa’doun Shaker, naming Da’wa Party supporters in Dujail, dated July 8, 1982.

²¹⁰ Human Rights Watch–ICTJ trial observation notes, April 19 and 24, 2006.

both panels reached their conclusions by consensus. The defendants were denied the opportunity to retain their own expert to inspect the documents and submit a view concerning their authenticity. The defense objected to the use of experts from the Ministry of Interior, arguing that the institution was implicated in the activities of Shi'a "death squads" and was dominated by groups hostile to some of the senior defendants. Their objections were rejected out of hand, as was their request for an international document expert to be appointed by the court.

Because the credentials and identities of the experts were never disclosed, and none of them was made available for questioning by the defense, the defense was unable to effectively confront this evidence. Moreover, by denying the defendants the opportunity to call their own expert to offer an opinion, the court does not appear to have considered the requirements of equality of arms, insofar as one party should not be placed at a disadvantage in terms of its opportunity to present evidence.²¹¹ Human Rights Watch has also learned that the second panel of experts did not, in fact, reach their conclusions by consensus, but the differences in opinion between the experts do not appear to have been disclosed to the defendants. This exculpatory evidence should have been disclosed to the defense under rule 42 of the IHT Rules, as noted above, but the court appears to have ignored the rule.

e. Ex parte scheduling of trial sessions and closing of the defense case

The devising of a trial schedule, known in advance to both sides and created on the basis of an objective evaluation of the preparation needs of both sides, is a basic logistical prerequisite for ensuring that adequate time and facilities have been accorded in long trials.²¹² The IHT trial chamber engaged in no process of pre-trial hearings, had no clear timetable for its sessions, and no procedural mechanisms (such as "status conferences") by which it might create one: it simply issued the

²¹¹ See, for example, European Court of Human Rights, *Mantovanelli v. France* (App. 21497/93), Judgment of 18 March 1997; (1997) 24 EHRR 370, in which the ECtHR held that, where an expert report is commissioned by the court, the litigants must have an opportunity to be "associated with the process of producing the report, as it consisted in interviewing witnesses and examining documents." Making submissions on the content of the report after it was produced, and in the absence of contributing to it, was not a real opportunity to comment effectively on it (paras. 35–36).

²¹² For example, rule 73 *bis* and rule 73 *ter* of the ICTY's Rules of Evidence and Procedure require the trial chamber to hold status conferences before the beginning of the trial, and after the end of the prosecution case, and issue written decisions determining how many witnesses may be called by the prosecution and defense, and how many trial days are to be allocated for each part. The scheduling order may be amended on the application of either party, in the interests of justice.

dossier and assumed that the defense would be ready within 45 days. Even once the trial had commenced, the court rarely consulted the defense in advance when scheduling sessions and would schedule on a session-by-session basis, creating great uncertainty as to when and for how long it would adjourn. The practice of the IHT trial chamber was to schedule sessions in informal consultation with the prosecution only. This poor trial management helps explain the “stop-start” nature of the proceedings.

The absence of a deliberative and reasoned process in which the court assesses the readiness of each side, and also sets deadlines for various intermediate procedural steps, diminishes the transparency of the trial, while increasing the risk that the court will appear indifferent to the right of the defendants to adequately prepare their defense. While the court did often adjourn for long periods of time, these adjournments were unscheduled and not necessarily related to any requests by the defense, or any reasoned evaluation by the court of the defense’s requests for more time to prepare.

The presiding judge moved to close the defense case on June 13, 2006. He did so without issuing a reasoned written decision and with no explanation except that he had decided that he had heard enough witnesses. Courts have an inherent power to control proceedings and to impose limits on the length of time that a party has to present its case. However, the IHT trial chamber imposed its time limit in an essentially arbitrary manner, without previously setting a schedule for the defense and without giving the defense any prior ruling about how many days and court hours they would be permitted to take up. When the defense sought permission to bring additional witnesses, the presiding judge did not inquire into the relevance and materiality of each witness before refusing the request.

The court’s power to control the proceedings and the need for expedition must be balanced with the defendant’s right to a fair trial. As the ICTY Appeals Chamber noted in *Oric*,²¹³

²¹³ *Prosecutor v. Oric*, ICTY, Case No. IT-03-68, Interlocutory Decision on Length of Defence Case, July 20, 2005.

[T]he authority to limit the length of time and number of witnesses allocated to the defense case ... [is] always subject to the general requirement that the rights of the accused pursuant to Article 21 of the Statute of the International Tribunal²¹⁴ be respected. Thus, in addition to the question whether, relative to the time allocated to the Prosecution, the time given to the Accused is reasonably proportional, a Trial Chamber must also consider whether the amount of time is objectively adequate to permit the Accused to set forth his case in a manner consistent with his rights.

The IHT never engaged in the exercise of trying to determine what amount of time would be objectively adequate to permit the defendants to set forth their case in a manner consistent with their rights. It imposed the time limit in an ad hoc manner, and failed to issue any kind of written decision that explained how the time limit was consistent with the defendants' fair trial rights. The court acted in a way that suggested it was indifferent to or ignorant of the relevant procedural principles.

4. The Defendants' Right to Confront and Examine Witnesses

The defendant's right to confront and examine witnesses against him or her is a fundamental fair trial guarantee applicable to both common law and civil law systems. It is essential to test the credibility of witnesses and their evidence. The right requires that an accused should be given "adequate and proper opportunity to challenge and question a witness against him, either at the time the witness makes his statement or at some later stage in the proceedings."²¹⁵ This does not mean that every witness must be heard and cross-examined, but a conviction cannot be based substantially on the statements of witnesses whom the defense is unable to cross-examine.²¹⁶

²¹⁴ Article 21 of the ICTY Statute replicates the fair trial guarantees found in article 14 of the ICCPR.

²¹⁵ European Court of Human Rights, *Delta v. France* (App. 11444/85), Judgment of 19 December 1990; (1993) 16 EHRR 574, para. 36.

²¹⁶ European Court of Human Rights, *Kostovski v. The Netherlands* (App. 11454/85), Judgment of 20 November 1989; (1990) 12 EHRR 434; D.J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995), p. 212.

Two features of the Dujail trial violated the defendants' right to confront and examine witnesses against them: the reading of 29 prosecution witness statements into the court record without making any of them available for questioning by defense counsel, and the blanket use of protective measures that amounted to "constructive anonymity" for the overwhelming majority of prosecution witnesses who did testify.

a. Reading of 29 witness statements into the court record

On February 13, 2006, the trial chamber read 23 prosecution witness statements into the court record without any reasoned decision as to why the witnesses would not be required to attend in person to give their testimony. On March 1, a further six prosecution witness statements were read into the record without explanation. As noted above, of the 23 statements read on February 13, 13 had not been previously and were not subsequently disclosed to the defendants and their lawyers.

Many of the witness statements read into the record referred by name to individual defendants and purported to describe specific conduct by certain defendants. The right to question witnesses is often exercised at the investigative phase in civil law systems.²¹⁷ However, defense lawyers in the Dujail trial had not been invited to attend the investigative sessions at which witnesses were deposed, and thus had had no opportunity to question those witnesses. Hence, the witnesses whose statements were read into the record were never, at any stage of the proceedings, questioned on behalf of the defendants.

The Defense Office lawyers who were representing all the defendants at that time (due to a boycott by private defense counsel, described above in Section III.5) did not object to the court's conduct. When private defense counsel returned to court, they requested the recall of these witnesses to permit cross-examination.²¹⁸ The trial chamber essentially ignored the request, issuing no written decision as to why the witnesses would or would not be recalled and never explaining its decision to read the statements into the record.

²¹⁷ Caroline Buisman, Ben Gumpert and Martine Hallers, "Trial and Error – How Effective is Legal Representation in International Criminal Proceedings?" *International Criminal Law Review*, vol. 5, no. 1 (2005), pp. 1–82.

²¹⁸ Human Rights Watch–ICTJ trial observation notes, March 15, 2006.

The total number of prosecution witnesses and complainants who appeared before the IHT and gave *viva voce* evidence was 29. Thus, the 29 statements read represent half of all witnesses against the defendants. While some of the witness statements might have been of a kind which did not require cross-examination (because they were of a cumulative nature, or concerned background issues), a defendant *must* have the opportunity to question a witness whose statement concerns the defendant's acts and conduct.²¹⁹ By reading the statements into the record without differentiating between statements that concern individual defendants' acts and conduct, and those that do not, and by not providing any reasoned response to the private defense lawyers' request to have witnesses recalled, the trial chamber did not adequately safeguard the defendants' right to confront these witnesses.

b. Constructive anonymity and blanket use of protective measures

In-court “protective measures”—in which a witness is permitted to conceal her or his identity from the public, and in some cases to be shielded from the sight of the defendants in court—are indispensable tools for war crimes prosecutions. They can be instrumental in convincing witnesses that they can be protected from intimidation and retaliation, inside and outside the courtroom. However, protective measures must also be balanced with the defendant's right to confront the witness and test the witness's evidence, and thus must be applied on a witness-by-witness basis.²²⁰ Complete anonymity of witnesses, in which the defendant's lawyer can neither know the name of the witness beforehand nor has the practical possibility of observing the witness under questioning, is not consistent with the right to confront the witness.²²¹

²¹⁹ See, for example, rule 92 *bis* (A) of the ICTY Rules of Procedure and Evidence, which permits proof of facts by a written witness statement, where the statement goes to proof of a matter other than the acts and conduct of the defendant. See also *Prosecutor v. Milosević*, ICTY, Case No. IT-02-54, Decision on Prosecution's Request to have Written Statements Admitted under Rule 92 *bis*, March 21, 2002; *Prosecutor v. Galic*, ICTY, Case No. IT-98-29, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), June 7, 2002.

²²⁰ *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence, May 19, 2006, paras. 31–32; *Prosecutor v. Brdjanin and Talić*, ICTY, Case No. IT-99-36, Decision on Motion by Prosecution for Protective Measures, July 3, 2000, para. 13.

²²¹ European Court of Human Rights, *Van Mechelen v. Netherlands* (App. 21363/93, 21364/93, 21427/93, 22056/93), Judgment of 23 April 1997; (1998) 25 EHRR 647; ECtHR, *P.S. v. Germany* (App. 33900/96), Judgment of 20 December 2001. International tribunals have permitted complete anonymity in only one instance, the notorious “Witness L” case in *Prosecutor v. Tadić* (ICTY). “Witness L” lost his protective measures after it was discovered that he was not the person he claimed to be. *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on Prosecution Motion to Withdraw Protective Measures for Witness L, December 5, 1996. Since that episode, international tribunals have refrained from granting anonymity. See May and Wierda, *International Criminal Evidence*, p. 283.

Of the 29 prosecution witnesses and complainants testifying against the defendants at trial, at least 23 were “constructively anonymous.” That is, their names were deleted from the dossier before it was handed to the defense (indeed, all witness names were deleted) and they testified out of sight of the prosecution, the defense lawyers and the defendants, in a curtained witness box. Defense lawyers would be provided with the names of the witnesses to testify on the morning of the trial session at which the witness would speak. But the design of the courtroom and witness box was such that not all defense lawyers could observe the demeanor of the witness under questioning if the witness testified with the curtains of the witness box drawn.

The purpose of disclosing witness names in advance of the trial is to provide the defense with the opportunity to investigate witnesses in order to properly test their truthfulness and credibility.²²² Disclosing witness names one hour before testimony does not satisfy this purpose as it renders such investigation impossible. The IHT Rules require that the names of prosecution witnesses be disclosed to the defense 45 days before trial.²²³ Rule 48 provides that the court may order protective measures, which include non-disclosure of witness names to the public and the media, but the rule does not refer to withholding of witness names from the defense.

The Dujail trial chamber never issued a single ruling or order setting out the parameters of protective measures for a witness and explaining why the measures were justified. Instead, protective measures amounting to anonymity were applied in a blanket manner. The measures were also sometimes applied in a way that was nonsensical and self-defeating, indicating a lack of understanding of how to use protective measures effectively. For example, on February 13 and 14, 2006, five witnesses were permitted to testify while concealed by the drawn curtains of the witness box, even though their names had been read out in open court.

5. No Reasoned Written Decisions on Key Procedural Issues

The transparency of the Dujail trial was greatly diminished by the consistent failure of the court to publicly issue written decisions on key procedural issues, such as on

²²² *Lubanga*, para. 30; *Brdjanin and Talic*, para. 36.

²²³ IHT Rules of Procedure and Evidence, rule 41(1)(a).

its decision to close the defense case, its decision to read 29 witness statements into the record, or in response to defense motions accusing the presiding judge of bias. During sessions observed by Human Rights Watch, at least six written motions—addressing issues such as the time needed for the defense to prepare, security for defense counsel, recall of witnesses, scheduling of trial sessions, and the legality of the court—were submitted by private defense lawyers. No public written response on these issues was provided by the court. While some of the motions, such as the motion concerning the legality of the IHT, could be addressed in a final judgment, most of the motions concerned procedural concerns with bearing on the defendants’ fair trial rights. Ignoring them over the course of the trial runs the serious risk that the defendants’ rights will be irreversibly prejudiced because of the lack of a timely response by the court. Indeed, the failure of the court to respond with reasoned written opinions reinforces the impression that it was essentially indifferent to or unaware of the fair trial principles discussed above.

6. Judicial Turnover and Judicial Demeanor

a. Turnover of sitting judges

The IHT’s first trial chamber, which is responsible for adjudicating all questions of fact and law in the trial, consists of five judges.²²⁴ During the course of the Dujail trial, three members of the trial chamber as originally constituted permanently left the bench: Judge Rizgar Amin and Judge Saeed al-Hammashi (both mentioned above, see Section IV,1), and a third judge who recused himself after November 28, 2005. During the course of the trial, a fourth judge was frequently absent due to illness, and was replaced by an alternate. The IHT assigns alternate judges to each trial chamber, who follow proceedings via video from another room in the court building. It is unclear how many alternates are assigned to each trial chamber.

Substitution of judges is not an unknown occurrence when there is a long-running trial.²²⁵ The Rules of Evidence and Procedure of the ICTY and ICTR explicitly allow the

²²⁴ IHT Statute, article 3(4)(B).

²²⁵ See, for example, *Prosecutor v. Krajisnik*, ICTY, Case No. IT-00-39 & 40, Decision Pursuant to Rule 15 *bis*(D), December 16, 2004; *Prosecutor v. Milosevic*, ICTY, Case No. IT-02-54, Order Pursuant to Rule 15 *bis*(D), March 29, 2004; Order Replacing a Judge in a Case Before a Trial Chamber (President of the ICTY), June 10, 2004; *Prosecutor v. Nyiramasuhuko et al.*, ICTR, Case No. ICTR-97-21-T, Decision in the Matter of Proceedings Under Rule 15 *bis*(D) (Trial Chamber II), July 15, 2003; *affirmed by* Decision in the Matter of Proceedings Under Rule 15 *bis*(D) (Appeals Chamber), September 24, 2003.

substitution of one judge, even if the defendant objects, in order to avoid unnecessary interruption or repetition of proceedings.²²⁶ In deciding whether to continue with the proceedings where one judge leaves the bench, the international tribunals have applied an “interests of justice” test, taking into account a variety of factors including the ability to assess the demeanor and credibility of witnesses from the trial record; the interests of victims and witnesses; the progress of the case; and the financial costs of restarting the trial.²²⁷

On the other hand, the rules of the international tribunals envisage a one-off substitution, and certainly not a situation in which 80 percent of the trial chamber effectively turns over in the course of the trial. Where the trial chamber is the primary trier of fact, first-hand evaluation by judges of the demeanor of witnesses is of vital importance.²²⁸ While the video-recording of proceedings can be regarded as an acceptable “second-best” in conjunction with transcripts,²²⁹ in the Dujail case the overwhelming majority of prosecution witnesses testified behind a drawn curtain and thus their demeanor may not be observable by means of the video record of the trial. It is questionable whether a review of video-recorded trial proceedings can, in any event, be considered adequate where not one but four judges were permanently or temporarily replaced over the course of the trial. The turnover of judges in the Dujail trial undermined the integrity of fact-finding by the trial chamber.

b. Lapses in judicial demeanor by the presiding judge

The presiding judge was the public face of the Dujail trial. He was the only judge whose face was regularly broadcast on television, and had primary responsibility for the conduct of proceedings in court. Presiding judge Ra’uf Abdel Rahman, who replaced Judge Rizgar Amin in January 2006, faced aggressive and unruly defendants, and defense lawyers who engaged in tactics that would sorely try the patience of any

²²⁶ ICTY Rules of Procedure and Evidence, rule 15 *bis*; ICTR Rules of Procedure and Evidence, rule 15 *bis*.

²²⁷ See, for example, *Prosecutor v. Krajisnik*, Decision Pursuant to Rule 15 *bis*(D), para. 10.

²²⁸ *Prosecutor v. Karemera*, ICTR, Case No. ICTR-98-44, “Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera’s Motion for Leave to Consider New Material,” October 22, 2004, paras. 55–61; *Nyiramasuhuko*, Decision in the Matter of Proceedings Under Rule 15 *bis*(D) (Trial Chamber II), July 15, 2003, para. 33(e) (allowing substitution of one judge but noting that “the need for every judge to assess demeanor is certainly a very important one...”).

²²⁹ See, for example, *Prosecutor v. Krajisnik*, Decision Pursuant to Rule 15 *bis*(D), para. 14.

court.²³⁰ These strained circumstances led to deterioration in relations between the presiding judge and the privately retained defense lawyers over the course of the trial, for which the defendants and their lawyers bear heavy responsibility. At the same time, a judge remains bound by the obligation to maintain his impartiality, and the appearance of impartiality, throughout the proceedings.²³¹

Human Rights Watch is concerned that, during the course of the trial, the presiding judge committed a number of lapses of judicial demeanor that undermined his appearance of impartiality. He appears to have lost his temper numerous times, leading to exchanges of insults with the defendants, or erratic and often unexplained decisions limiting the rights of defense counsel to question witnesses.

During his questioning of defendant ‘Awwad al-Bandar on March 13, 2006, when al-Bandar was making his statement as a defendant, the presiding judge adopted a hostile tone, frequently interrupting the defendant and ultimately refusing to allow him to finish his statement, although it was clearly related to the case against him.²³² On June 5, the presiding judge made a statement to al-Bandar that suggested that the judge had closed his mind to a key fact in issue, namely, the duration of proceedings before the Revolutionary Court. The prosecution had alleged that al-Bandar had conducted the trial of the 148 accused men and boys from Dujail in less than an hour, while al-Bandar maintained that he had conducted the trial over 16 days:

Judge: Asking for dossiers [of the Revolutionary Court’s file] is the work of the defense but don’t ask us to do it.

Al-Bandar: The Americans have seized all the documents of the Iraqi government, and the court can ask them to bring it, but if you want to litigate me without knowing the truth ...

²³⁰ The conduct of private defense counsel is discussed further below.

²³¹ See, for example, IHT Rules of Procedure and Evidence, rule 7(4), which requires a judge to withdraw from a case if his independence or impartiality “might reasonably be in doubt.” It is an established principle of most legal systems that impartiality implies not only actual freedom from bias, but also the appearance of freedom from bias. See, for example, *Prosecutor v. Furundzija*, ICTY, Case No. IT-95-17/1, Judgment (Appeals Chamber), July 21, 2000, paras. 189-190; European Court of Human Rights, *Piersack v. Belgium* (App. 8692/79), Judgment of 1 October 1982; (1983) 5 EHRR 169, para. 30.

²³² Human Rights Watch–ICTJ trial observation notes, March 13, 2006.

Judge: I don't do that, this is not a special court, I am not prosecuting you without fulfilling my conscience, I won't issue a sentence on 148 within one hour, I am not this type.²³³

(As noted in the Introduction to this report, whether the 148 men and boys charged over Dujail actually all stood trial is uncertain. The official record says 148 were tried and convicted, but a document dated July 5, 1987, and addressed by Saddam Hussein's son-in-law, Hussein Kamel, to Saddam Hussein states that 46 of the 148 accused had already died in detention by the time they were referred to trial. Another document produced in court in the Dujail trial was an extract of a court verdict from 1986 against an interrogator who had worked on the Dujail case and who had been convicted of misconduct. This document also stated that 46 persons died during interrogation, and that the interrogators sought to conceal the deaths for fear of reprimand.)

On May 15, 2006, the judge refused to allow defendants all to be present when defense witnesses gave evidence. For example, when a witness for defendant Ali Dayeh Ali gave evidence, the judge did not allow the other defendants to be present. This did not appear to be based on any misconduct by the other defendants, and no reasons were given. This continued for another trial day before the judge changed his mind, without explanation. Similarly, also on May 15, in a seemingly erratic manner, the judge refused to allow a defense lawyer to question his own witness, but later in the day permitted it without explanation. On May 24 the judge refused to allow defense lawyers to direct any questions to defense witness Tariq Aziz, exclaiming that "the defense team's aim is to insult the court,"²³⁴ although defense lawyers had not yet had a chance to pose any questions to Aziz before the judge reached this view. After the lunch recess, the judge reversed himself and permitted Aziz to be recalled for questioning, but with no explanation as to why he had disallowed questioning in the first place.

²³³ Human Rights Watch-ICTJ trial observation notes, June 5, 2006.

²³⁴ Human Rights Watch-ICTJ trial observation notes, May 24, 2006.

On June 12, 2006, the judge entered into an exchange of insults with defendant Barzan al-Tikriti before ordering the latter's removal from the chamber. Al-Tikriti had complained that witnesses for him were scared to come forward to testify:

Judge: Afraid of Whom? Ghosts?

Al-Tikriti: Afraid of the terrifying court.

Judge: You're terrifying!

Al-Tikriti: No, you're terrifying!

Judge: Why do you always have to be the hero? Get him out of here.²³⁵

On June 13, 2006, the judge derided a member of Saddam Hussein's defense team from the United States, Curtis Doebbler. When Doebbler rose to object to the closing of the defense case, the judge was observed to sneer at him and said (in Arabic), "We know his purpose. He comes here to hear his own voice and claim that he is an international lawyer."²³⁶ On July 24, during the closing statement for Barzan al-Tikriti, the judge exclaimed to al-Tikriti, "Since you were a child, you were drowned in blood."²³⁷ On July 26 the judge stated to defendant Saddam Hussein (whose lawyers were boycotting the closing sessions of the trial after the June assassination of their colleague Khamis al-Obeidi—see Section III.3, above), "Where are your lawyers? They incite violence, they took millions [of dinars] from Iraq and now they are outside Iraq. They are not lawyers, they incite violence."²³⁸ On July 27 the judge called 'Awwad al-Bandar "stupid" as he ordered him to resume his seat, after al-Bandar tried to interject in the reading of a defense statement on his behalf by a court-appointed Defense Office lawyer.

²³⁵ Human Rights Watch-ICTJ trial observation notes, June 12, 2006.

²³⁶ Cited in "Judge Declares End to Hearing of Defense Witnesses in Saddam Trial," Associated Press, June 14, 2006.

²³⁷ Human Rights Watch-ICTJ trial observation notes, July 24, 2006.

²³⁸ Human Rights Watch-ICTJ trial observation notes, July 26, 2006.

While none of these statements compels the conclusion that the judge was in fact biased against the defendants, they do not reflect well on the court's appearance of impartiality. At the very least, these outbursts suggest that relations between the presiding judge and the defendants and their retained lawyers had become so poisoned that the judge had considerable difficulty detaching his own feelings towards some of them from the conduct of the case.²³⁹

7. Conduct of Defense Counsel

The observed performance of Iraqi defense counsel—whether privately retained or appointed by the Defense Office—was generally poor. The absence of any training or instruction in international criminal law was evident in the failure of defense counsel to raise or discuss any relevant international criminal law principles during the course of the trial.²⁴⁰ As already noted, defense lawyers were not provided with international criminal law texts in Arabic until several months into the trial. Given that a trial of this kind was entirely outside the experience of Iraqi criminal lawyers, and in the absence of any attempt to build capacity through training, it is unsurprising that Iraqi defense counsel floundered. The observed level of preparation by private defense counsel and Defense Office counsel for questioning of witnesses was also poor, although this could in part be attributed to same-day disclosure of witness names and same-day notification of which witnesses would testify.

Some private defense counsel seemed more concerned to make political statements through their questioning of witnesses than to serve the interests of their clients by addressing the substance of the case against them. Combined with the tactic of boycotting proceedings (discussed below), the result was that it was difficult to discern any coherent defense case developed by private defense lawyers for each defendant, either factually or legally: no consistent and identifiable argument as to why the prosecution case was wrong or flawed was developed.

²³⁹ See, for example, the discussion in *Kyprianou v. Cyprus* (App. 73797/01), Judgment of 15 December 2005, paras. 129-131, in which the European Court of Human Rights found that the “emphatic language” used by judges in response to a contemptuous remark by defense counsel in a criminal case contributed to the conclusion that the judges had become “personally embroiled” in the case.

²⁴⁰ As noted above, the Defense Office lawyers did make substantive international criminal law arguments during the closing statements for the defendants, but these arguments were written on behalf of the Defense Office lawyers by the Defense Office's international advisor, and thus do not reflect the underlying capacity of the Defense Office counsel.

The use of boycotts became a common practice among some privately retained counsel.²⁴¹ Iraqi law requires that lawyers practicing in Iraqi courts must be respectful towards the court and not obstruct the course of justice or cause unreasonable delays.²⁴² The Iraqi code of legal professional ethics states that lawyers must appear in court on the set dates, should not try to delay the resolution of a case, and must facilitate the task of the judge.²⁴³ In the Dujail case, the defendants' lawyers' statement that they would boycott the case unless certain demands were met (such as the resignation of the new presiding judge) would appear to contravene their professional obligations under Iraqi law. It is also difficult to envisage a situation in which it would advance the interests of the lawyers' clients. The repeated threat and use of the tactic created the strong impression that some counsel deliberately sought to delay or obstruct the course of the trial. This tactic in fact greatly diminished the ability of privately retained counsel to raise legitimate and serious procedural concerns that did persist in relation to the trial.

During the course of the defense case, private defense lawyers for Saddam Hussein were accused of procuring the perjury of four defense witnesses.²⁴⁴ The witnesses had testified on May 30 and 31, 2006. Two had claimed that the chief prosecutor in the Dujail case had tried to bribe them into giving false testimony against Saddam Hussein. Another claimed that some of the individuals alleged by the prosecution to have been executed were in fact alive and living in Dujail, while the fourth witness claimed that a person whom he believed to be the chief prosecutor had attended a celebration in Dujail marking the anniversary of the assassination attempt against Saddam Hussein and that some attendees at that anniversary celebration had taken responsibility for the assassination attempt. The witnesses were detained after the end of the court hearing on May 31 on suspicion of perjury, and were interrogated by an investigative judge in the presence of court-appointed counsel. They are alleged to have confessed to having knowingly fabricated their testimony due to threats and inducements by one of Saddam Hussein's defense counsel, who allegedly had

²⁴¹ Privately retained counsel for Ali Dayeh Ali and for 'Abdullah Kadhim Ruwayid and Mizher 'Abdullah Kadhim Ruwayid did not participate in the boycotts to the same extent.

²⁴² Law of the Legal Profession, No. 173 of 1965, art. 50.

²⁴³ Lawyer's Professional Code of Conduct, June 16, 1987 (annexed to the Law of the Legal Profession), art. 9.

²⁴⁴ "Four witnesses in Saddam trial held," Associated Press, June 1, 2006.

coached them on what to say.²⁴⁵ Defense lawyers for Saddam Hussein claimed that the witnesses had been assaulted and detained incommunicado and that their confessions to perjury were coerced.²⁴⁶ The witnesses' confessions were read in court in the Dujail trial on June 5. Human Rights Watch has been unable to independently investigate the allegation that the detained witnesses were coerced into confessing perjury, but the confessions raise grave concerns about serious professional misconduct on the part of the implicated defense counsel.

The Defense Office lawyer appointed to represent Dujail defendant Muhammad 'Azzawi in September 2005 did not meet with his client before the opening of the trial, nor for a month after it opened.²⁴⁷ The court-appointed Defense Office lawyer failed to appear, without prior notice, on at least two occasions,²⁴⁸ and in all the sessions observed between October 2005 and January 29, 2006, the court-appointed Defense Office lawyer asked no questions. The role of Defense Office lawyers was dramatically enlarged upon the first boycott of the privately retained defense lawyers, which commenced on January 29, 2006, and lasted for three sessions (February 1, 13 and 14).²⁴⁹ On the first day that Defense Office lawyers were brought in to replace boycotting private counsel, the lawyers asked no questions of any of the three witnesses who testified for the prosecution. In the next three sessions, the Defense Office lawyers became more active, and did ask relevant questions, but generally showed little evidence of preparation. For example, when the former head of the Office of the President, Ahmed Hussein Samarra'i, gave evidence concerning the workings of that office—a critical issue in terms of identifying reporting lines of information and establishing what defendant Saddam Hussein knew about the abuses committed against residents of Dujail—the Defense Office lawyers did not ask a single question of the witness.²⁵⁰ On the same day, the

²⁴⁵ Paul Schemm, "Key Saddam Witnesses Say They Were Bribed, Coerced," Agence France-Presse, June 12, 2006. The perjury cases against the four witnesses appear to have been referred to ordinary Iraqi criminal courts for prosecution, and Human Rights Watch is unaware of the status of these cases.

²⁴⁶ Sinan Salaheddin, "Saddam Defense Protests Witnesses' Arrests," Associated Press, June 5, 2006.

²⁴⁷ Human Rights Watch interview with Defense Office lawyers, November 2005.

²⁴⁸ November 28, 2005, and March 13, 2006.

²⁴⁹ For a discussion of the relevant legal principles governing circumstances in which the court can impose lawyers against the will of defendants, see Human Rights Watch, *The Iraqi High Tribunal and Representation of the Accused*, February 2006.

²⁵⁰ Human Rights Watch–ICTJ trial observation notes, February 13, 2006.

court read the 23 witness statements into the court record without notice (mentioned above). No objection was raised by any Defense Office lawyer, although some of the witness statements pertained to the acts of individual defendants. When asked by Human Rights Watch why they did not object to the reading of the statements, a Defense Office lawyer responded that they did not wish to risk a reprimand from the judge.²⁵¹

²⁵¹ Human Rights Watch-ICTJ trial observation notes, February 13, 2006. The fear of antagonizing the court was underlined by another Defense Office lawyer interviewed by Human Rights Watch in October 2006: The lawyer noted that the Defense Office lawyers were dependent on the court for their security, and were for that reason reluctant to do anything that might incur the hostility or ire of the court. Human Rights Watch interview with Defense Office lawyer, Baghdad, October 2006.

V. Substantive Concerns

The brutality of the former Ba’thist government in Iraq was notorious, but the internal functioning of the “bureaucracy of repression” has not been systematically examined and documented. One of the significant incidental outcomes of attempting to establish individual criminal responsibility for systematic human rights violations is that, in order to link an accused individual with the crime, it is usually necessary to carefully reconstruct the functioning of the “criminal system” in which the individual acted.

The scale of criminal conduct implied in crimes such as crimes against humanity usually means that the “underlying acts” of the crime—mass killing, forced displacement, mass arrests—will be difficult to deny. However, attributing individual criminal responsibility for these acts further up the chain of political and military responsibility can be complicated by the fact that “system crimes ... are generally characterized by a division of labour between planners and executants, as well as arrangements in structure and execution that tend to make connections between these two levels difficult to establish.”²⁵²

The challenge of successfully prosecuting individuals who are alleged to be “planners” is that describing the events of the crime (“crime-base”) will generally not be enough: it will be necessary to “elucidate the elements of the operation of the machinery”²⁵³ by showing how political and security institutions regularly functioned, to whom information flowed as a matter of course, and what was known or reasonably knowable to those higher up in the system. Unless the orders or instructions given were patently criminal on their face,²⁵⁴ this kind of evidence is essential to showing that an accused person knew and intended that the criminal acts would be committed by persons under his or her control or acting in conjunction with him or her. Proving knowledge and intent is necessary to prove that an accused person is individually liable for a criminal act.

²⁵² Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Prosecution Initiatives* (United Nations, New York and Geneva, 2006), p. 12.

²⁵³ *Ibid.*

²⁵⁴ An example of such an order would be “torture all detainees,” or “kill all men and boys.”

Based on our review of the dossier of evidence in the Dujail case, and our observation of proceedings, Human Rights Watch is concerned that neither the investigative judge nor the prosecution in the Dujail case paid sufficient attention to gathering evidence that would prove the required kinds of knowledge and intention on the part of the defendants in the Dujail case to commit the crimes alleged. In particular, the case against the senior defendants was marred by a striking lack of “linkage evidence.” That is, an almost total lack of evidence establishing:

- the legal and practical authority of the numerous security organizations and political institutions implicated in the events at Dujail;
- structures of command and internal organization of these security organizations and political institutions;²⁵⁵
- the internal reporting lines and flows of information within these organizations, and how information could be expected to flow to individual defendants;
- the general context of human rights practices (such as the systematic use of torture) and violence by security organizations; and
- the nature of the historical relationship between the political institutions (such as the Office of the President and the Revolutionary Command Council) and the legal institution (the Revolutionary Court) implicated in the crime.

The absence of these kinds of evidence diminishes the persuasiveness of the prosecution case, because it makes it harder to establish that the high-level defendants knew or had reason to know that crimes would be committed as a result of orders that might have been legal on their face, or in the absence of explicit orders at all. These kinds of evidence are generally essential to reconstruct the political context

²⁵⁵ The doctrine of judicial notice has been applied by international criminal courts to permit judges to take notice of certain laws and public documents as “facts of common knowledge.” It might have been permissible for the IHT trial chamber to take judicial notice of Iraqi laws establishing the legal authority and structure of some political institutions and security organizations implicated in the events at Dujail. However, the practical functioning and exercise of authority by these organizations and institutions would still have to be established by evidence. Moreover, the court would still have to inform the prosecution and defense teams in respect of what exactly it intends to take judicial notice, so that both sides have an opportunity to comment or object. Judicial notice cannot be taken of a fact that would amount to an essential element of a crime, such as the intent and knowledge (*mens rea*) of the accused. The prosecution did not invite the court to take judicial notice of any facts not in evidence. See *Prosecutor v. Semanza*, Case No. ICTR-97-20, Decision on the Prosecutor’s Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, Nov. 3, 2000; *Prosecutor v. Karemera*, Case No. ICTR-97-24, Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, June 16, 2006, para. 47; *Semanza v. Prosecutor*, Judgment (Appeals Chamber), para. 192; *Prosecutor v. Fofana*, SCSL, Decision on Appeal Against “Decision on Prosecution’s Motion for Judicial Notice and Admission of Evidence”, May 16, 2005, paras. 28-31 and separate concurring opinion of Justice Robertson, para. 16.

in which the crimes took place, thus allowing the credible inference that senior political figures authorized, or had an unspoken agreement approving, the crimes.

1. Relevant Legal Principles

The defendants were charged uniformly with committing murder, torture, forced displacement, and unlawful imprisonment as a crime against humanity under article 12 of the IHT Statute.²⁵⁶ A crime against humanity is defined in the IHT Statute as “any of the following acts [in this case, murder, torture, forced displacement, and unlawful imprisonment] when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” A person has the necessary intention to commit a crime against humanity when he or she has the intention to commit the underlying act²⁵⁷ (for example, murder), and when he or she knows that there is an attack on the civilian population and that his or her acts form part of that attack.²⁵⁸

²⁵⁶ As noted in Section IV.2, above, these charges were expanded without notice to include enforced disappearance and other inhumane acts intentionally causing great suffering, after the close of the prosecution case. For the purposes of this discussion, the original charges will be considered.

²⁵⁷ The elements of each underlying offense must also be proved. Thus, a person charged with murder as a crime against humanity must have had the necessary intention and engaged in the necessary acts constituting the offense of murder, namely: an act or omission by the accused (or person for whom the accused has criminal responsibility) causing the death of the victim, and done with the intention to kill or cause serious injury. *Prosecutor v. Blagojevic and Jokic*, ICTY, Case No. IT-02-60, Judgment (Trial Chamber), January 17, 2005, para. 556; *Prosecutor v. Brdjanin*, ICTY, Case No. IT-99-36, Judgment (Trial Chamber), September 1, 2004, paras. 381–382.

A person charged with torture as a crime against humanity must have had the intention to commit torture, and know that his or her act forms part of an attack on a civilian population. Torture occurs under international criminal law when there is the intentional infliction, by act or omission, of severe pain or suffering, whether physical or mental. The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person. *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23&23/1, Judgment (Appeals Chamber), June 12, 2002, para. 142.

Forcible displacement of a population occurs under international criminal law when there is an intentional relocation or removal of persons from the territory in which they lawfully reside, involuntarily and without grounds permitted under international law. Relocation or removal is involuntary if it is the result of threat of force or coercion. *Prosecutor v. Simic et al.*, ICTY, Case No. IT-95-9, Judgment (Trial Chamber), October 17, 2003, para. 125.

Unlawful imprisonment occurs under international criminal law where an individual is deprived of his or her liberty without legal basis and with the intention by the accused (or persons for whom the accused bears criminal responsibility) of arbitrarily depriving the person of his or her liberty, or in the reasonable knowledge that his or her act or omission is likely to cause the arbitrary deprivation of physical liberty. *Simic*, para. 64.

²⁵⁸ See *Kordic and Cerkez*, Judgment (Appeals Chamber), para. 99.

Because of the vagueness of the notice of charges (as discussed above, Section IV.2), it is unclear what “mode of responsibility” is alleged against each of the defendants.²⁵⁹ However, based on the prosecution’s in-court statements, it seems to be that the four senior defendants (Saddam Hussein, Barzan al-Tikriti, Taha Yassin Ramadan, and ‘Awwad al-Bandar) were accused of having committed a crime against humanity by participation in a “joint criminal enterprise.” The four lower-level defendants (‘Abdullah Kadhim Ruwayid, Mizher ‘Abdullah Kadhim Ruwayid, ‘Ali Dayeh ‘Ali, and Muhammad ‘Azzawi²⁶⁰) appear to have been accused of “aiding and abetting” a crime against humanity by naming suspected Da’wa Party members to the then-minister of interior on July 8, 1982, and allegedly leading security forces to the homes of some individuals, who were then arrested, and some of them later executed.

A “joint criminal enterprise” is a means of committing²⁶¹ the crime alleged, namely, a crime against humanity. It is a “theory of liability” that, if its elements are proved, means that an accused is individually responsible for the underlying crime (the elements of which must also be proved). There are three kinds of joint criminal enterprise in international criminal law:²⁶² “basic,” “systemic,” and “extended.” Only the “basic” and “extended” forms are relevant to the events concerning Dujail.²⁶³

A “basic” joint criminal enterprise exists where all co-perpetrators, acting pursuant to a common criminal purpose, possess the same criminal intention.²⁶⁴ For example, participants in a joint criminal enterprise formulate a common plan to kill and each of them has the intent to kill, although each may carry out a different role. An “extended” joint criminal enterprise entails a situation where there is a common

²⁵⁹ Article 15(2) of the IHT Statute sets six modes of responsibility: direct commission; ordering, soliciting or inducing; facilitation, assistance or aiding and abetting; joint criminal enterprise; incitement (for genocide only); and attempting.

²⁶⁰ In its closing statement, the prosecution recommended the acquittal of ‘Azzawi.

²⁶¹ *Prosecutor v. Kvočka et al.*, ICTY, Case No. IT-98-30/1, Judgment (Appeals Chamber), February 28, 2005, para. 91.

²⁶² *Prosecutor v. Vasiljević*, ICTY, Case No. IT-98-32, Judgment (Appeals Chamber), February 25, 2004, para. 96; *Kvočka*, Judgment (Appeals Chamber), para. 82.

²⁶³ “Systemic” joint criminal enterprise is applied to “an organized system of ill-treatment. An example is extermination or concentration camps, in which the prisoners are killed or mistreated pursuant to the joint criminal enterprise [of running the camp].” *Vasiljević*, Judgment (Appeals Chamber), para. 98.

²⁶⁴ *Vasiljević*, Judgment (Appeals Chamber), para. 97

criminal purpose, but additional crimes outside the common criminal purpose are a natural and foreseeable consequence of carrying out the common purpose.²⁶⁵

The *criminal intent* that must be shown to prove guilt as a member of a “basic” joint criminal enterprise is the individual’s intention to perpetrate a certain crime (for example, murder, torture, or displacement), with this intent being shared by all other co-perpetrators.²⁶⁶ The criminal intent that must be shown to prove guilt as a member of an “extended” joint criminal enterprise is an intention to participate and further the common criminal purpose of a group. Responsibility for a crime other than one that was part of the common design arises if it was foreseeable that such a crime might be perpetrated by another member of the group, and the accused willingly took that risk.²⁶⁷ The intention of the accused can be determined either by manifest evidence, or by inference, where the inference of the accused’s intention is the *only reasonable inference* from the evidence.²⁶⁸ The fact that an accused holds a command role does not give rise to the presumption that he or she knew about the criminal acts of subordinates.²⁶⁹

The *acts* that must be established to prove guilt as a member of a joint criminal enterprise are the same irrespective of whether it is a “basic” or “extended” joint criminal enterprise. It must be proved that: a plurality of persons were involved; there was a common design or purpose involving the commission of a prosecutable crime; and the accused actually participated in this common design or purpose.²⁷⁰ The “common design or purpose” to commit the crime (in this case, a crime against humanity) need not be express, but can be an unspoken understanding inferred from the fact that a plurality of persons *acted in unison* to effect the criminal purpose.²⁷¹ However, an unspoken understanding among the members of the joint criminal enterprise should only be inferred if it is the *only reasonable inference* from the

²⁶⁵ *Kvočka*, Judgment (Appeals Chamber), para. 83.

²⁶⁶ *Vasiljević*, Judgment (Appeals Chamber), para. 101.

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*, paras. 129–132.

²⁶⁹ *Blaskić*, Judgment (Appeals Chamber), para. 62.

²⁷⁰ *Kvočka*, Judgment (Appeals Chamber), para. 96.

²⁷¹ *Vasiljević*, Judgment (Appeals Chamber), paras. 108–9.

evidence.²⁷² “Participation” in the common plan or purpose does not require physical perpetration of any of the underlying acts of the crime (such as murder or torture), but may take the form of assistance or contribution.²⁷³

2. Lack of ‘Linkage’ Evidence Relating to Knowledge and Intention

The documentary evidence collected by the investigative judge clearly establishes the parameters of the “underlying acts” constituting a crime against humanity: large-scale and prolonged arbitrary detention of a civilian population; torture and harsh conditions in detention leading to numerous deaths; and a summary trial followed by execution of over 100 individuals. Where the documentary evidence is largely silent is in respect of proving either an explicit or unspoken common purpose among senior defendants to commit these crimes, and that each defendant knowingly committed acts in furtherance of the common criminal purpose of committing a crime against humanity. It is here that expert and other evidence concerning the structure, internal organization, and past practice of the Ba’thist government security and political apparatuses was necessary to fill in the gaps and show the links between the “crime-base” and the leadership. “Linkage” evidence can be provided by experts in the politics, history, or military affairs of the country concerned, who can provide detailed contextual information to show how the individual accused fits into a chain of command, how his or her authority was exercised, and what level of knowledge he or she may be expected to have in the circumstances. In the Dujail case, no such expert evidence was presented.

The importance of compiling evidence that addresses the state of knowledge and intent of the defendants can be illustrated by considering the key documents relied upon by the prosecution to make its case against Saddam Hussein. The evidence collected by the investigative judge established that, in the immediate aftermath of the assassination attempt, Saddam Hussein ordered an investigation. The precise parameters of the order were never established by the evidence. On October 14, 1982, the Revolutionary Command Council issued an order, signed by Saddam Hussein, authorizing the expropriation of lands in Dujail for the purposes of an “agricultural

²⁷² *Brdjanin*, Judgment (Trial Chamber), para. 353.

²⁷³ *Prosecutor v. Krnojelac*, ICTY, Case No. IT-97-25, Judgment (Appeals Chamber), September 17, 2003, para. 31; *Kvočka*, Judgment (Appeals Chamber), para. 263.

redevelopment” project and requiring compensation to be paid to the expropriated (except for certain persons detained in relation to the assassination attempt).²⁷⁴ On May 27, 1984, Saddam Hussein signed a document referring the cases of 148 individuals accused of involvement in the assassination attempt²⁷⁵ to trial before the Revolutionary Court;²⁷⁶ the referral was based upon the recommendation of legal advisors who reviewed a 361-page dossier of evidence compiled against the 148 individuals. The decision of the Revolutionary Court, convicting all 148 individuals and sentencing them to death by hanging, was issued on June 14, 1984, and on June 16, 1984, Saddam Hussein signed an order ratifying the death sentences.²⁷⁷ The death sentences appear to have been implemented in March 1985. The haste with which the accused persons were tried and convicted, and with which the death sentences were ratified, clearly raises real suspicions that the process was no more than part of a de facto plan to carry out extrajudicial executions.

However, no evidence was presented from which the intent and state of knowledge of Saddam Hussein could be discerned or inferred in relation to these actions. The critical issue to be resolved in deciding whether this amounted to committing a crime against humanity is whether Saddam Hussein knew and intended that referring 148 persons to the Revolutionary Court would result in their conviction and execution. In the absence of direct incriminating evidence that Saddam Hussein and Revolutionary Court judge ‘Awwad al-Bandar expressly colluded with each other, evidence establishing that Saddam Hussein had knowledge about the way in which the Revolutionary Court functioned or that he directly controlled its proceedings would be needed. One would expect this evidence to set out the structure and actual functioning of the Revolutionary Court, its legal and practical relationship with the Office of the President, its legal and practical non-independence from the policies and will of the president, and its historical treatment of persons alleged to be a

²⁷⁴ The order refers to a list of names of these individuals appended to the order, but the list was not attached to the order produced in court.

²⁷⁵ The accused persons referred to the Revolutionary Court were charged under articles 156 and 175(2) of the Iraqi Penal Code of 1969, which criminalize intentional attempts to violate the independence, unity or security of Iraq.

²⁷⁶ The power of the then-president of Iraq to refer to the Revolutionary Court cases concerning threats to the internal or external security of the state was provided for in Revolutionary Command Council Decision No. 1016 of August 1, 1978, promulgated in *Al-Waqa’i al-Iraqiya* No. 1096 of August 14, 1978.

²⁷⁷ For the evident contradiction between the official record of 148 accused having been tried and sentenced, and reports that up to 46 had already died in custody prior to the trial, see Section IV,6.b, above.

“security threat” against the state. As a corollary, to prove that former Revolutionary Court judge ‘Awwad al-Bandar was guilty of participating in a joint criminal enterprise to murder persons from Dujail, evidence establishing that he knowingly acted in furtherance of the then-president’s criminal plan or policy must be shown. One way of showing this would be to demonstrate that the Revolutionary Court (along with other exceptional courts in Iraq under the former Ba’thist government) regularly acted as an extension of state policy and its judges were not independent of the then-president. Thus, in the famous *Altstotter Case* before the Nuremberg Tribunal, certain judges who worked in Nazi Germany’s legal system were held criminally responsible for certain judicial decisions implementing National Socialist laws because the judges were proved to have knowingly and deliberately contributed towards the effectuation of a criminal plan of racial persecution directed by the Nazi Party and the state. As part of proving its case, the prosecution in *Altstotter* traced the degeneration of the German legal system under Nazism and the corrosion of judicial independence, and showed how the defendant judges had a history of taking instructions from the Nazi leadership in regard to specific cases.²⁷⁸

Neither the investigative judge nor the prosecution gathered any evidence concerning these issues. The laws creating the jurisdiction of the Revolutionary Court, its procedures, the methods of appointing its judges, and other relevant information were never put before the IHT trial chamber. The history of the use of special and exceptional courts by the former Ba’thist government to effect state policy, which was extensive, was also not the subject of evidence. These absences suggest that neither the investigative judge nor the prosecution had an adequate grasp of what international criminal law requires to be proved in order to convict a person accused of a crime against humanity, in the context of these actions.

In a similar vein, no evidence was presented concerning the structure and internal organization of the several governmental institutions and security apparatuses that

²⁷⁸ *The Trial of Josef Altstotter and Others*, United States Military Tribunal at Nuremberg, 17 February to 4 December 1947, reported in *Law Reports of Trials of War Criminals* (Buffalo, NY: W.S. Hein & Co., 1997), Vol. VI, pp. 1-110. The investigative judge and the prosecution in the Dujail case focused on the unfairness of the trial before the Revolutionary Court, and the evidence indeed suggests that the trial was summary and highly unfair. However, subjecting a person to an unfair trial is not listed as one of the underlying acts that can amount to a crime against humanity under article 12 of the IHT Statute. As the court in *Altstotter* pointed out, showing arbitrary behavior by the judge in the courtroom is not sufficient; rather it must be proved that the arbitrary behavior amounted to participation in a criminal policy or plan. *Ibid.*, p. 81.

played a role in the events concerning Dujail, and what the leaders of these various institutions knew or could have been expected to know concerning the actions of their subordinates. For example, the Ba’th Party’s “Popular Army” militia was alleged to have played a role in the response to the assassination attempt against Saddam Hussein, by arresting suspects and delivering them to the custody of the General Intelligence Directorate and the General Security Directorate (*Mudiriyyat al-Amn al-‘Amm*) and in subsequently razing orchards in Dujail.²⁷⁹ Taha Yassin Ramadan was the national commander of the Popular Army, and appears to have been accused of having command responsibility²⁸⁰ for the acts of the Popular Army in Dujail. Yet no evidence was ever presented concerning the command structure of the Popular Army, the actual and legal authority of Ramadan as commander, who were his subordinates or who had actual command of the Popular Army in Dujail, and what the reporting lines were between Ramadan and his subordinates. Ramadan was also alleged to have been a member of an ad hoc committee comprising representatives of security agencies that was responsible for coordinating the response to the assassination attempt at Dujail, but the powers, membership, and structure of this committee were never the subject of any evidence.

Important political organs such as the Revolutionary Command Council, the National Security Council, and the Office of the President all appear to have played a role in the response to the assassination attempt at Dujail. However, the membership, powers, and internal organization of these political organs was not the subject of any evidence, making it impossible to determine whether, for example, a report submitted to the National Security Council concerning the fact that nearly 800 persons from Dujail had been detained²⁸¹ would have come to the attention of Saddam Hussein, Taha Yassin Ramadan, or Barzan al-Tikriti. The paths through which information flowed from the security apparatus to the political leadership, and

²⁷⁹ The wanton destruction of property is not one of the underlying crimes that can form part of a crime against humanity under article 12 of the IHT Statute. Hence, it is puzzling that the prosecution focused mostly on Ramadan’s alleged role in supervising the razing of the orchards in Dujail, as even if this was proved, it would not amount to a crime against humanity unless it was proved to be part of the crime of persecution—something with which Ramadan was never charged.

²⁸⁰ Due to the vagueness of the charges, it is unclear whether Ramadan was in fact alleged to have had command responsibility for the acts of the Popular Army, or whether he was primarily accused of being a participant in the joint criminal enterprise of the leadership group.

²⁸¹ Report from then-Minister of Interior Sa’doun Shaker to the National Security Council, dated December 28, 1982, stating that 393 men over age 19 and 394 women and children from Balad and Dujail were in detention.

the kinds of information that could be expected to reach the political leadership about the security apparatuses' response to Dujail, were not part of the evidence compiled by the investigative judge.

The systematic use of torture in interrogation in Iraq, and the history of disproportionate violence on the part of the former Ba'thist government's security forces, was also never the subject of any evidence. If the use of torture and excessive force can be shown to be a common practice by security forces, and has been previously brought to the attention of the political leadership (for example, by reports submitted by human rights nongovernmental organizations or through the human rights organs of the United Nations), it becomes harder for senior government officials to claim that they did not know that torture would occur under interrogation by personnel of the intelligence and security agencies.

In respect of the four lower-level defendants, charged with "aiding and abetting" crimes against humanity in Dujail, no evidence was presented concerning their state of knowledge and their intent when allegedly participating in the arrest operations. In order to be found guilty of "aiding and abetting," an accused must be proved to: know that the acts he or she is committing will assist in the commission of the specific crime by the principal;²⁸² be aware of the essential elements of the crime including the principal's intention to commit the crime;²⁸³ and be aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed.²⁸⁴ Thus, the lower-level defendants in the Dujail case (who were charged with aiding and abetting murder, torture, forced displacement, and unlawful imprisonment as a crime against humanity) must be shown to have known that their acts would assist in the commission of murder, torture, forced displacement, and unlawful imprisonment; have been aware of the principals' intention to commit these crimes; and have been aware that one of the crimes will probably be committed. Neither the investigative judge nor the prosecution produced evidence relevant to proving these issues: for example, no evidence addressing the question of whether the lower-level defendants knew or reasonably would have known that

²⁸² *Blaskic*, Judgment (Appeals Chamber), para. 45.

²⁸³ *Prosecutor v. Aleksovski*, ICTY, Case No. IT-95-14/1, Judgment (Appeals Chamber), March 24, 2000, para. 162.

²⁸⁴ *Blaskic*, Judgment (Appeals Chamber), para. 50.

their acts would assist in the commission of murder or torture or other crimes was ever introduced. Indeed, during their interrogation by the investigative judge, the defendants were not even questioned about what they knew or believed would happen to those individuals who were arrested during the aftermath of the assassination attempt in Dujail.²⁸⁵

Overall, the case prepared by the investigative judge in relation to the events in Dujail in 1982 suffered from important gaps in terms of the kinds of evidence necessary to prove intent, knowledge, and criminal responsibility on the part of the defendants. When preparing the case, it appears that neither the prosecution nor the investigative judge paid sufficient attention to the requirements of what must be proved under international criminal law in order to establish specific, individual criminal responsibility of each defendant for the abuses that were committed against the people of Dujail.

Some of the evidentiary gaps may also be explained by the intense pressure placed on the IHT by the Iraqi government to move forward with a trial of Saddam Hussein as early as possible.²⁸⁶ According to a judge with knowledge of internal deliberations of the IHT trial chamber, when the Dujail case was first referred to trial in July 2005, the trial chamber judges found the dossier of evidence to be insufficient to move forward with a trial and remitted it to the investigative judge for further investigation.²⁸⁷ The investigative judge appealed, and the Appeals Chamber, under what the judge described as “intense political pressure,”²⁸⁸ ruled that the trial should proceed.

²⁸⁵ Statement of ‘Abdullah Kadhim Ruwayid Fandi al-Mashaikh, February 21 and 28, 2005; Statement of Ali Dayeh Ali al-Zubeidi, May 5, 2005; Statement of Mohammad ‘Azzawi ‘Ali al-Marsumi, April 27 and June 1, 2005; Statement of Mizhir ‘Abdullah Kadhim Ruwayid Fandi al-Mashaikh, February 21 and 28, 2005.

²⁸⁶ Over the course of 2004 and 2005, senior figures in the Iraqi government made numerous statements demanding that the trial of Saddam Hussein start quickly, or promising that the trial was imminent. See “Talabani: Saddam to Stand Trial within Two Months”, *Al-Sabah al-Jadeed*, June 1, 2005, as reported in Institute for War and Peace Reporting, *Iraqi Press Monitor*, No. 253, October 1, 2005; “Barzani Calls for Speedy Trial for Saddam,” *Al-Mutamar*, June 8, 2005, as reported in Institute for War and Peace Reporting, *Iraqi Press Monitor*, No. 258, October 1, 2005; “Speed Up Saddam’s Trial, Allawi Tells Court,” Reuters, August 16, 2004; “Former Saddam Henchmen to Face Trial from Next Week: PM,” Agence France-Presse, December 15, 2004; “Iraqi FM Hopes for Saddam Trial by Year’s End,” Agence France-Presse, June 21, 2005; “Iraqi leader says judges wasting time on Saddam case,” *AFX News Ltd*, June 24, 2005; and “Talabani: Saddam likely to face trial soon,” Associated Press, May 31, 2005.

²⁸⁷ Human Rights Watch Interview with IHT judge, Baghdad, March 2006.

²⁸⁸ *Ibid.*

VI. The Role of International Advisors

The institutional design of the IHT makes the non-binding advice of international advisors the principal mechanism to address the underlying lack of capacity of the Iraqi legal system in respect of trying international crimes. The IHT Statute envisages advisors in each of the branches of the court—judicial, prosecutorial, and defense²⁸⁹ (but not the administration)—as an alternative to direct participation of international personnel. In reality, the RCLO has been the only source of international advisors to the investigative judges and the prosecution, and the RCLO has frequently been forced to step in and resolve gaps left by the poor administration of the court (such as witness protection and defense counsel security). As a result, the already significant role of the RCLO²⁹⁰ expanded to the oversight of key logistical and administrative requirements for the conduct of the Dujail trial. As one IHT judge put it, the RCLO functioned at times as the “executive authority” of the IHT.²⁹¹

Apart from RCLO personnel, only two other individuals have been appointed as advisors to the court: one to the IHT trial chamber during the Dujail trial, and the other to the IHT Defense Office from April 2006. Both of these individuals have very significant experience and expertise in international criminal law and procedure, and do appear to have had some impact in preventing even more serious defects in the trial than those documented in this report. Ultimately, however, advisors have not been able to correct or prevent the significant fair trial concerns that arose over the course of the trial.²⁹²

A further concern with relying on advisors as the only mechanism for international expertise is the lack of transparency concerning the extent of the advisors’ role. As previously noted, the closing statements for the Defense Office lawyers in the Dujail trial (the privately retained defense lawyers then staging a boycott) were substantially

²⁸⁹ See above, Section II, “Background.”

²⁹⁰ See Human Rights Watch, *The Former Iraqi Government on Trial*, p. 17.

²⁹¹ Human Rights Watch interview with IHT judge, Baghdad, November 2005.

²⁹² The advisor to the trial chamber has left the court and no replacement for him has yet been found, leaving the trial chamber in the Anfal trial currently without a non-RCLO international advisor.

written by the Defense Office international advisor. When some defendants made this claim in court, the presiding judge flatly denied it. The court's false denial creates the unfortunate impression that the court is trying to hide or conceal the advisor's role, and encourages the perception that the advisors "stage manage" the proceedings.

A direct and significant role by international personnel is to be welcomed and encouraged, but must be transparent. Advisors have proven a poor substitute for direct international involvement as co-counsel, judges, and administrators, such as occurs in the War Crimes Chamber for Bosnia-Herzegovina.²⁹³

The lack of other non-RCLO advisors can be attributed to several factors. The cost of maintaining an advisor (who stays at either the UK or US Embassy) runs between US\$20,000 and \$70,000 per month, and European governments other than the UK have not provided significant financial assistance to the IHT because of the likelihood that the court will apply the death penalty in its sentencing (all EU donor countries are abolitionist). Another factor appears to be the reluctance to be involved in what is perceived as a US-dominated process. Any international personnel directly assisting the IHT will be heavily dependent on the RCLO and the US military to facilitate their entry and exit from Iraq, and to provide logistical support (and potentially accommodation) while in Iraq. No entity with an arms-length relationship from both the US and Iraqi government currently serves as the practical vehicle for channeling, managing, and supporting potential international assistance to the IHT.²⁹⁴ Given the serious problems in the administration of the court, the IHT administration has no capacity to directly manage and support international advisors.²⁹⁵ Indeed, the then-president of the IHT generally declined to make written requests for further international advisors, even though as president he had primary

²⁹³ International involvement in the War Crimes Chamber is subject to a planned phase-out over several years, to ensure both that sufficient expertise is available to conduct trials that meet international standards, *and* that local ownership is achieved over time. See Human Rights Watch, *Looking for Justice*, p. 7.

²⁹⁴ The International Bar Association was the nongovernmental organization that provided some training support to the IHT judges and facilitated the recruitment of the non-RCLO trial chamber advisor. However, the advisor, once recruited, depends on the US and UK Embassies for day-to-day support in Iraq.

²⁹⁵ This can be contrasted with the Registry of the War Crimes Chamber of Bosnia-Herzegovina, which is "internationalized" through the appointment of experienced international staff persons as registrar and in other key posts such as witness protection and head of the defense office. The Registry oversees the recruitment and management of international staff, and is also the recipient of donor funds for the court as a whole. The international personnel of the Registry are then gradually phased out once the institution is able to function effectively and has gained the confidence of donors.

responsibility for authorizing advisors to assist the court.²⁹⁶ Finally, the grave and deteriorating security conditions in Baghdad over the course of 2005 and 2006 have deterred potential international advisors.

²⁹⁶ IHT Statute, arts. 7(2), 8(9), 9(7).

VII. Death Penalty

Human Rights Watch opposes the death penalty as an inherently cruel and inhumane punishment. As noted above, the death penalty will be widely applicable for crimes tried before the IHT.²⁹⁷ Human Rights Watch expresses its grave concern that article 27(2) of the IHT Statute makes the carrying out of death sentences handed down by the tribunal mandatory, by prohibiting the commutation of death sentences by any government official. The mandatory application of the death penalty, without any opportunity for clemency, directly violates Iraq's human rights obligations under the ICCPR. Article 6(4) of the ICCPR states that "anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases." The Iraqi constitution provides that the President of the Republic is required to ratify death sentences before they are implemented,²⁹⁸ and thus the IHT Statute's prohibition on amnesty or commutation appears to infringe upon the constitutional authority of the president.

Article 27(2) also requires that a sentence be executed no later than 30 days after a final decision is handed down. This creates the possibility that a person charged in several cases can be tried, convicted, and executed for one of those cases before any other cases are subject to public trial, and as such is likely to deprive victims, witnesses, and the Iraqi people as a whole of the opportunity to conclusively establish which individuals were legally responsible for some of the worst human rights violations in Iraq's history. The execution of convicted individuals while other charges are pending against them means that there may never be a public accounting of the evidence for and against them in relation to these events.

²⁹⁷ See note 39, above, concerning the history of the application of the death penalty in Iraq after 2003.

²⁹⁸ Constitution of Iraq, art. 72(h).

VIII. Conclusion

This report has documented serious procedural flaws in the IHT's conduct of the Dujail trial. These included:

- government actions that undermined the independence and perceived impartiality of the court;
- a failure to ensure adequately detailed notice of the charges against the defendants;
- numerous shortcomings in the timely disclosure of incriminating evidence, exculpatory evidence and important court documents;
- violations of the defendants' basic fair trial right to confront witnesses against them; and
- lapses of judicial demeanor that undermined the apparent impartiality of the presiding judge.

The court's conduct, as documented in this report, reflects a basic lack of understanding of fundamental fair trial principles, and how to uphold them in the conduct of a relatively complex trial. The result is a trial that did not meet key fair trial standards. Under such circumstances, the soundness of the verdict is questionable. In addition, the imposition of the death penalty—an inherently cruel and inhumane punishment—in the wake of an unfair trial is indefensible.

Apart from the conduct of the trial itself, this report has shown that the IHT as an institution has struggled to competently perform administrative functions that are essential to a fair and effective trial. The tribunal lacks a functioning outreach program, a competent witness protection program, and a Defense Office that could effectively ensure a vigorous defense for the accused. Some of these administrative failings have been exacerbated by the sharp deterioration in the security environment from 2004, but poor security conditions do not adequately explain the deficiencies in the functioning of the court. Rather, the facts gathered by Human Rights Watch point to a fundamental lack of capacity on the part of administrators, judges, prosecutors, and defense lawyers. Some of the failings of the court highlighted in this report, such as

the complete absence of an outreach and communications strategy, are now much harder to correct due to the security situation, but the court failed to take the opportunity to develop a program when security conditions were more permissive.

The concerns documented in this report point to the need for significant reforms in the structure and functioning of the IHT if it is to have a real chance of conducting subsequent trials that are fair and credible. The current design of the IHT is not conducive to effective international assistance in the conduct of the trial. The court's structure needs to be revised to ensure international participation at all levels, and the creation of an effective and independent court administration to oversee the integrity of the institution as a whole. In the absence of these reforms, the credibility of the IHT as an independent, fair, and effective judicial institution is fundamentally doubtful.

IX. Recommendations

To the Iraqi Government

- Desist from using article 4(4) of the IHT Statute to remove or relocate sitting trial judges. All questions of bias must be left to the Appeals Chamber of the IHT pursuant to its rules.
- Discourage statements by government officials and political figures concerning the guilt or innocence of defendants before the IHT, concerning the courtroom conduct of judges, or concerning the substance of any ongoing trial.
- Discourage statements by government officials that could in any way be seen as attempts to bring public pressure on the IHT and its judicial decision making.
- Uphold security arrangements agreed upon by government officials with the IHT and private defense lawyers, regarding the provision of salaries for armed guards for defense lawyers.

To the Iraqi Parliament and the IHT

- Revise the IHT Statute to permit individuals with experience in international criminal trials to participate directly in the trial process as judges, co-prosecutors and co-defense counsel, alongside Iraqi personnel.
- Revise the IHT Statute to create the Administrative Department as an independent entity, led by an individual experienced in managing complex criminal trials and judicial institutions, and tasked with servicing the requirements of the defense as well as the prosecution and judiciary.
- Revise the IHT Statute to reduce the administrative role of the president of the court.
- Revise the IHT Statute to delete article 4(4) of the IHT Statute and to amend article 33 concerning former membership of the Ba'th Party. Dismissal of judges on the grounds of former membership of the Ba'th Party should only occur after an individualized assessment of the past conduct of the judge, that assessment to be undertaken by the disciplinary procedures established under the IHT Statute.

- Revise the IHT Statute to remove the requirement that a judge or prosecutor be a spokesperson for the court.
- Abolish the death penalty.

To the IHT

- Immediately institute an outreach program administered by a person with expertise in communications.
- Establish a protocol for communications with private defense counsel, and devise methods of verifying delivery of documents and motions, while taking into account difficulties faced by counsel in reaching the court offices out of court sessions.
- Develop training programs for administrative staff.
- Recruit an experienced professional in witness protection to develop and manage a comprehensive witness protection program.
- Institute a protocol for due diligence in the review of evidence and documents held by the court, to ensure thorough and complete disclosure of exculpatory evidence under the IHT Rules.
- Supervise disclosure of evidence by the prosecution to minimize or avoid late or same-day disclosure of incriminating evidence.
- Ensure timely disclosure of witness identities to the defense.
- Develop a reasoned approach to the application of in-court protective measures.
- Appoint an official, with necessary support staff, responsible for ensuring security arrangements for defense counsel. Develop and implement a comprehensive and well supervised security plan for defense counsel.
- Respond to motions concerning fundamental procedural issues in a timely manner and with reasons.
- Institute a practice of maintaining a verbatim written transcript of court proceedings, to be disclosed on a regular basis to all parties to the case.
- Develop a practice of regularly scheduling status conferences well before the beginning of the trial to objectively assess the readiness of both sides for trial, and issue scheduling orders setting out a timetable for hearing.
- Ensure the proper legibility and adequate organization of the dossier of evidence when provided to the defense, and ensure disclosure of defendants' interrogation statements to the defense.

- Institute intensive and ongoing training for Defense Office lawyers in international criminal law and procedure. Appoint an experienced international criminal lawyer as an advisor to the head of the Defense Office.
- Ensure the provision of logistical and other administrative support to private defense lawyers, through the Defense Office.

X. Acknowledgments

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Judging Dujail

The First Trial before the Iraqi High Tribunal

The Iraqi High Tribunal (IHT) has the daunting task of bringing to justice those responsible for grave human rights violations committed in Iraq under the Ba'athist Government. But at the same time, the court is a newly-created institution in a recently-reconstituted legal system, in which lawyers and judges were isolated from developments in international criminal law and had no experience in investigating and trying complex international crimes. The capacity of the IHT to fairly and effectively prosecute international crimes has been questioned since its creation under the U.S.-led occupation.

Based on 12 months research and observation, and dozens of interviews with judges, prosecutors, defence lawyers and other key actors, Human Rights Watch's report provides the most comprehensive analysis of the first trial conducted by the IHT, for crimes against humanity committed against the Iraqi town of Dujail in 1982. The report documents serious administrative, procedural and substantive legal defects in the conduct of the case.

The picture that emerges from this report is of an institution struggling with all aspects of conducting these legally and factually complicated trials, and also beset by external problems: misunderstanding and hostility in public opinion, and from political leaders; grave and increasing security threats to all participants; a bitterly divided legal profession, and; a deepening reluctance by other international actors to assist the process. These limitations have meant that, in the Dujail trial, the court has not met essential fair trial standards and the credibility of the trial process is doubtful. The report proposes root-and-branch reforms to the IHT to enable it to meet the challenge of delivering justice for massive human rights violations.

Abdullah Kadhim al-Ruwayid, a defendant in the Dujail trial, addresses the first trial chamber of the Iraqi High Tribunal as Chief Judge Ra'uf Abdel Rahman gestures in the foreground, while former Iraqi president Saddam Hussein looks on: February 13, 2006 in Baghdad, Iraq.

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