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And Now from the Green Zone . . . Reflections on the Iraq Tribunal's Dujail Trial

Miranda Sissons

The Iraq tribunal is an odd creature.[1] It is an Iraqi-led mechanism designed and supported by foreigners. It is based on international law but relies heavily on Iraqi legal tradition and procedures. And it is a postconflict initiative in the midst of escalating war.

The tribunal's first trial has brought these and other problems to the fore. Eight individuals, including Saddam Hussein, have been tried on charges of crimes against humanity for actions taken against the residents of Dujail, a small village that was the site of an assassination attempt against the presidential motorcade on July 8, 1982. Hundreds of villagers were detained, tortured, killed, and exiled; those released from exile five years later returned to find their lands destroyed. The International Center for Transitional Justice (ICTJ) has monitored sessions of the Dujail trial regularly, independently, and on the ground.

Dujail is the first in a series of trials. As such it is the beginning of a longer accountability process. The case of *al-Anfal*, a second and much larger trial, began on August 21.[2] Focused on the regime's genocidal campaign against inhabitants of Iraq's Kurdish region in 1988, the tribunal's second trial chamber will have to manage proceedings reportedly involving at least 1,000 witnesses and ten times the documentary evidence of Dujail. Other crimes, such as those related to the 1991 intifada, are under active investigation.[3]

Iraqis have suffered horror that defies description. A fair and well-run tribunal could make a lasting contribution to transitional justice in Iraq. By establishing

[1] The tribunal's name in Arabic is *al-mahkama a-jana'iyya al-'iraqiyya al-'uliyya.* This can be translated as the Higher Iraqi Criminal Tribunal or Supreme Iraqi Criminal Tribunal. The tribunal has decided to call itself in English the High Iraqi Tribunal. Given the wide variety of possible acronyms, it is here referred to as the Iraq tribunal or simply the tribunal.

[2] "Al-Anfal" ("the spoils") is the title of the eighth chapter of the Quran.

[3] The intifada case deals with the Iraqi government's coordinated campaign of arrests, executions, and repression following a failed uprising by the Shia of southern Iraq in 1991.

judicial accountability for past crimes the Iraq tribunal could make a clean break with former official behavior—and open an era in which perpetrators are no longer untouchable. It could strengthen the new state's legitimacy by publicly fulfilling its obligations to victims and their families, as well as signal support for key democratic values, such as the rule of law.

How can we evaluate the tribunal's work thus far? This discussion is based on two key criteria. The first is fairness. Any credible trial must meet the standards of fairness defined by international human rights law, particularly the minimum fair trial guarantees contained in Article 14 of the International Covenant on Civil and Political Rights. The second criterion is that of effectiveness: Does the trial establish an unequivocal record of past crimes, does it assist in fulfilling obligations to victims, and does it enjoy legitimacy among the population whom it is designed to serve?

THE TRIBUNAL

The Iraq tribunal is a complex judicial mechanism designed to conduct multiple investigations, trials, and appeals. It is made up of investigative judges; prosecutors; judges belonging to three separate trial chambers; a cassation (appeals) chamber; a defense office; and many different administrative units. The tribunal's structure, legal framework, personnel, strengths, and weaknesses together make up the institutional setting in which individual trials take place.

The tribunal has continually struggled with three major issues: legitimacy, independence, and security. Each has an impact on fairness and effectiveness. Each has significantly influenced the tribunal's work to date.

Legitimacy

Make no mistake: the tribunal is an American creation. It has faced an uphill struggle to overcome its image as a piece of irrelevant and illegal coalition window dressing ever since it was created in December 2003.[4] Its strong reliance on the Regime Crimes Liaison Office (RCLO) does not help. The RCLO is based at the

[4] Coalition Provisional Authority (CPA) Order 48, "Delegation of Authority Regarding an Iraqi Special Tribunal," issued December 10, 2003. Iraqi criminal law did not include the offenses of genocide, war crimes, and crimes against humanity; by including them, the Iraqi Special Tribunal (IST) Statute effectively amended existing Iraqi criminal law. According to international humanitarian law (IHL), an occupying power is limited in the changes it can make to the penal laws of the country it occupies. For a discussion of the tribunal's creation, see ICTJ Briefing Paper, "Creation and First Trials of the Supreme Iraqi Criminal Tribunal," October 2005; available at www.ictj.org/images/content/1/2/123.pdf.

dilettante: with some five tribunal staff and three defense lawyers killed, the stakes of any kind of participation are high.

The tribunal's leadership is a hidden but vital factor in explaining some of its problems. The first president of the court, an eminent Iraqi jurist, was supremely uninterested in such innovations as an outreach program or transcripts of tribunal sessions.[9] Nor was he able to defend the tribunal fully from political pressure or sorties by the Higher National Debaathification Commission, both of which successfully triggered a reshuffling of the first trial chamber's composition in January 2006. His death of natural causes in July 2006 deprived the court of a certain stability, but may present opportunities for new leadership to develop. Critical to this will be the attitude of the minister of justice, Hashim al-Shebli. His predecessor criticized the tribunal repeatedly and publicly. Let's hope for more effective protection of judicial independence in the future.

Security

Prosecutions for international crimes are generally a postconflict tool. The Iraq tribunal is operating in the worst security environment any tribunal has known to date. It is hard to run a fair and effective trial during conflict for a host of logistical and political reasons—even if the Iraq tribunal's building is located in the International Zone (IZ). Iraq's security situation has affected everything about the trial, from scheduling, outreach, and victim access, to equal treatment for the defense. And the tribunal's own management of these issues has been weak. To our knowledge at the time of writing there was still no functional witness protection program outside the IZ. Given the number of deaths that have occurred so far, either the tribunal and its American benefactors must provide better security outside the courtroom for all participants or they must truly consider a change of venue.

THE DUJAIL TRIAL

So much for the institutional setting: what about the Dujail trial? We cannot truly assess the Dujail trial's fairness until the trial chamber delivers its judgment, after which the case goes to cassation.[10] Likewise, it may be too early to pass

[9] The practices are innovative in that they exist neither in the Iraqi legal system nor in the civil law legal systems in the Middle East. They have been important tools, however, for most judicial mechanisms trying international crimes.

[10] Cassation is a process in civil-law legal systems that is roughly equivalent to appeal proceedings, although a cassation chamber generally has broader powers than an appeals chamber.

judgment on the trial's contribution to transition and the rule of law in the long term. But there are plenty of reasons for concern on both counts so far. The Iraq tribunal is clearly better and fairer than the Iraqi courts that preceded it during Saddam Hussein's rule. But that is not the standard that should apply. We are concerned about three issues of fairness: adequacy and effectiveness of the defense, fair trial standards, and the role of judges. Similarly, there are reasons for concern about the trial's effectiveness—specifically, about the prosecution and about the trial's outreach. We treat each issue in turn below.

Defense

Adequate and effective defense is the bedrock of fair trial proceedings, but it is difficult to achieve in practice. It has been a weak point of most tribunals since Nuremberg, though there have been improvements. One example is the Special Court for Sierra Leone, which has given the defense greater institutional support than many of its predecessors.[11]

Like other trials, defense actions during the Dujail trial have sparked controversy and are open to charges of a lack of professionalism—all the more so since the case promoted by private defense counsel has been mainly political, not legal: there has been a great deal of nationalism in defense tactics and arguments, but relatively little law.[12] At the same time, however, the relationship between the tribunal and defense counsel has been deeply colored by the legacy of dictatorship, that is, the tribunal's lingering presumption that the defense is an obstacle to justice rather than an integral part of the court.

To its credit, the tribunal has taken some steps to ensure the accused an adequate defense. It established a defense office (more on that later). It has, for the most part, allowed defendants generous time in the courtroom. It has resisted the temptation to impose counsel on defendants in early sessions, although defendants ended up with court-appointed lawyers in the final stages.

Despite these efforts, relationships are icy and procedures are weak. In Iraq's terrible logistical and security environment, the tribunal appears to have failed to develop a sustainable and effective security arrangement for defense counsel,

[11] See Tom Perriello and Marieke Wierda, "The Special Court for Sierra Leone Under Scrutiny," ICTJ Prosecutions Case Studies Series, March 2006.

[12] This is not to say legal issues cannot also be political. But defense tactics such as repeated boycotts, claims of Iranian influence over Dujailis, and referring to defendants by their former titles have occupied more time and energy than discussion of evidence or charges. Indeed, the best lawyer in the courtroom was the defendant Barzan Ibrahim al-Hassan al-Tikriti, who could be depended on to loudly and regularly raise every point that might benefit his case.

or to have adequately anticipated the need for such arrangements in its early planning. The extent to which the court has facilitated defense communications or investigative needs is also unclear. The tribunal has also failed to adequately train, resource, and supervise its own defense office: the first sign of a change in attitude was the provision of an international defense adviser, five months into proceedings. More needs to be done.

The court must redefine its own understanding of the defense's role. The defense does not just serve the interests of the accused; it is a vital safeguard that serves the interests of the court, an integral partner in proceedings because it guarantees the court will at least meet minimum standards of fairness. Giving defendants latitude to speak to the case themselves is not the same thing as guaranteeing the right to adequate defense: defendants themselves may not have the skills to test evidence or present important arguments. Yes, the court needs better and more transparent tools with which to discipline any unprofessional behavior by counsel. But it also must fulfill its own responsibility to ensure the defendants are adequately represented. We say this in the interest of robust verdicts that will stand the tests of time.

Fair Trial Standards

As noted above, a full evaluation of the trial's fairness can only be made after the chamber issues its judgment. It is already clear, however, that the Dujail trial does not contribute or conform to international best practice: that opportunity was lost during the tribunal's establishment and the revisions to its statute in 2005. The real question is whether it will meet international minimum fair trial guarantees, as contained in Article 14 of the International Covenant on Civil and Political Rights and (mostly) reproduced in Article 19 of the tribunal's statute.[13] These guarantees include, among others, defendants' rights to equality before the law; to have adequate time and facilities for the preparation of their defense and to communicate with counsel of their own choosing; and to a fair and public hearing before a competent, independent, and impartial tribunal established by law.

[13] Other minimum guarantees include the rights of the defendant to: be informed of charges promptly and in sufficient detail; defend himself or through legal assistance of his own choosing; examine witnesses against him; obtain and examine witnesses on his behalf under the same conditions as witnesses against him; an expeditious trial; and review of his conviction and sentence by a higher tribunal. See International Covenant on Civil and Political Rights, Article 14; available at www.unhchr.ch/html/menu3/b/a_ccpr.htm. For a detailed discussion of the right to representation, see Human Rights Watch, "The Iraqi High Tribunal and Representation of the Accused: A Human Rights Watch Briefing Paper," February 2006, vol. 1; available at hrw.org/backgrounder/mena/iraq0206/iraq0206.pdf.

In addition to the fairness issues already discussed above, the ICTJ's on-the-ground observers have also noted three other issues that may substantially affect fairness, depending on how the judges evaluate related evidence.

The first is that of disclosure. Based on the ICTJ's independent research, disclosure of documentary and audiovisual evidence has been erratic. At least some defendants' lawyers were not given copies of statements their clients had made to the investigating judge; by our own count some forty documents were presented to the defense during the documentary phase of January 2006 that had not been previously disclosed.[14] This is symptomatic of the tribunal's communication more generally; it is shameful that English-language charging instruments were available on the Internet before they were given in Arabic to defense counsel.[15]

The tribunal has also relied heavily on witness testimony that is virtually anonymous. Unlike other tribunals that use confidential witnesses, it appears that the tribunal often disclosed witness identities to the defense only on the day of trial or even during the trial session. This severely limits the defense's ability to investigate or examine potential witnesses; a more standard disclosure period would be twenty-one to thirty days. This is no small matter. Because they pose such a danger to fair trial standards, such measures should only ever be applied on a case-by-case basis—and only after an evaluation of real needs. The bottom line is that the tribunal must balance carefully any real threat to witnesses with the least possible compromise of defense rights. The validity of the argument that such late disclosure is required to enhance witnesses' protection is undercut by the tribunal's failure to take important protective steps such as the careful redaction of witness statements or the creation of a coherent witness protection program.

The second issue is the reading into the record of some twenty-eight witness and complainant statements without an opportunity for cross-examination. This is a significant proportion of such testimony, and some of it bears directly on the acts of the accused. Depending on the role this evidence plays in coming to judgment, this omission could be cause for concern. The lack of an official transcript is likewise problematic (particularly for preparing appeals), although the tribunal

[14] We cannot verify whether audiovisual materials were disclosed prior to the session in which they were aired.

[15] On May 16, 2006, defense lawyer Najib al-Nuami requested written copies of the charging instruments that were read aloud on May 15. The presiding judge confirmed they were not yet available, but would be distributed as soon as they were printed. English-language versions were already available on the Grotian Moment trial blog, www.law.case.edu/saddamtrial.

has at times said that a summary record might be available to defense lawyers on request. If so, it has come too late for the actual conduct of trial proceedings.

The third issue is regularity of procedures. It is a cliché that the appearance of fairness is as important as fairness itself. But it's also true: without it, the tribunal lays itself open to criticism and confidence in its integrity will be weakened. The continuing absence of reasoned decisions on a host of defense motions—including one motion contesting the legitimacy of the court and another on the impartiality of the presiding judge—gives the impression of summary justice. Lapses in judicial demeanor ("Ever since you were a child you have been drowned in blood!") do not help.[16]

The problem of nonresponse to motions has been exacerbated by other procedural problems, such as the ease of accreditation of counsel and disclosure of witness identities, as discussed above. Regularity of procedures is a fair trial issue: no sport is possible if the rules of the game constantly change. In the future the tribunal will have to do better to demonstrate that it is making best efforts to regularize procedures and protect itself from accusations that it was set up to fail.

Role of Judges

The tribunal's judges have helped save the tribunal from utter disaster—despite the fact that five judges assigned to the first trial chamber have come and gone. Several are sitting as judges for the first time. They have made a good-faith effort to uphold standards they have rarely seen in practice, using rules and procedures that sometimes differ significantly from those of the Iraqi system. They have struggled to keep proceedings moving in the unaccustomed glare of the television cameras and have chosen to work productively with a non-RCLO judicial adviser.

The trial chamber and cassation judges are now being asked to determine a controversial case based on international norms that have no equivalent in Iraqi law, with only short-term training and minimal reference materials in Arabic. This is a nightmare scenario no jurist should face. It is vital that the judges have the strength and courage to genuinely wrestle with the evidence presented and that they provide detailed reasoning for their decision. Their judgments will be the test of their integrity and good faith.

[16] Presiding Judge Ra'uf Abd al-Rahman to defendant Barzan Ibrahim al-Hassan al-Tikriti, tribunal session July 24, 2006, ICTJ observer notes. The comment was made while warning the defendant against using his defense statement as an opportunity to incite violence.

Prosecution

Almost everyone, including members of the trial chamber, says that Dujail was a mistake. That is, the idea of beginning with a smaller trial was attractive, but much of the utility was lost when Saddam Hussein and other high-profile defendants were added to the proceedings at the last minute.[17] Dujail has used up valuable organizational capital on an incident that has less public resonance than other terrible crimes; it did not buy the tribunal time to hone its skills outside the media spotlight.

One limiting factor in Dujail has been the prosecution's difficulty in using its rich body of evidence to argue effectively how different elements in the Iraqi leadership operated together to detain, torture, exile, and execute: to show us the "system" behind the crime. Without even one expert witness, the judges have been given scant evidence upon which to decide complex issues of responsibility. This concern may seem trivial, given that the operation of much of this system may be common knowledge outside the courtroom—but it is not a legal nicety that is irrelevant to the wider population. We have heard Iraqi street cleaners, for example, arguing over the weak linkage between the crimes and the high-level defendants, aghast at the fact that superior responsibility might not have been clearly shown.

Outreach

Most of the tribunal's problems are predictable, the logical consequences of a difficult and deteriorating operating environment. But the tribunal was (partly) founded on the premise that the tribunal would be more compelling for Iraqi victims if it were located on Iraqi soil and thereby accessible to them. This is a good theory, but to date the tribunal has squandered much of its potential by absolutely failing to engage in even basic outreach. These kinds of trials are complex even to professionals; yes, there is a tribunal spokesperson who briefs the media, but there has been no effort to explain judicial processes to the wider public, or to engage them in the tribunal's work. This neglect exacts two significant opportunity costs: it means Iraqis have little stake in, or understanding of, the workings of the Dujail trial, and that prospects for the trial's long-term legacy will be reduced accordingly.

[17] Official tribunal statements at the conclusion of the investigation phase of the Dujail trial did not list Saddam Hussein as one of the accused. See Iraqi Special Tribunal, "Investigation Into al-Dujail Crimes Concludes," February 26, 2005; available at www.iraq-ist.org/en/press/releases/0014a.htm.

A significant part of Iraqi public opinion is focused on the verdict and sentence. Expectations of public execution are high and will be hard to manage. Even the idea that the cassation chamber must hear the case before final judgment will be hard for many to accept. In failing at outreach the tribunal has also failed to assert its own personality, and to reinforce its overwhelming raison d'être: to impartially and convincingly determine individual responsibility for terrible crimes.

LESSONS AND PROGNOSIS FOR AL-ANFAL

The Dujail trial is intended to be the first in a sequence of prosecutions; next in line is al-Anfal, which opened in Baghdad on August 21. The security situation is a critical limiting factor. The tribunal cannot control events around it, but it must have robust mechanisms to safeguard the safety of all participants and the integrity of its proceedings. There may well come a point when logistical and security limitations are such that the trial cannot be called fair, open, or public; there must be some kind of backup plan in place before the situation reaches this point. Finally, there must be a more robust sense of where the greatest security dangers actually lie, so it does not become a convenient excuse for other shortcomings.

The al-Anfal case will be handled by a new set of judges, the five members of the second trial chamber. There are four lessons they should draw from the Dujail process:

1. All actors should present and test the evidence more skillfully.
2. There must be a more robust sense of the defense's role and a commitment to the practical and procedural consequences. The tribunal should not put itself at the mercy of defense whims, but it should have a clearer institutional commitment to respect the defense's role and reasonable needs.
3. There needs to be greater regularity in proceedings, including in the provision of reasoned decisions in response to motions. A trial transcript is also needed.
4. And the final lesson? Outreach, outreach, and outreach.

So, does the Iraq tribunal represent a victory for transitional justice? No, not yet. Dujail is probably a better and fairer trial than Iraq has ever experienced,

but the tribunal is a missed opportunity for international best practice. Compared to Iraq's history of midnight secret trials and public executions, it is a major step forward. But it should only be seen as a first, tentative step on the road to the rule of law.

Thus, we must ask, is the process so far enough? The answer is no: first, because the tribunal is still a work in progress; second, because it has not effectively engaged the Iraqi public; and third, because prosecutions in the absence of other justice initiatives are never enough. Less than a hundred perpetrators can be brought before the tribunal, even if it held numerous trials. Iraqis will need to think of other processes if they wish to provide meaningful accountability to hundreds of thousands (perhaps millions) of Iraqi victims. There are many avenues to pursue. Debaathification exists but is broken; flawed reparations legislation has been passed but has not yet been implemented; robust protections against current and future human rights abuse have not yet been put in place.

The tribunal can and should do much more to strengthen its work in the months ahead. The al-Anfal case will be a great challenge. And in the context of obvious and deepening impunity for current violence, it will be hard to care much about prosecutions based on yesterday's suffering. Good outreach, protection from political interference, and a stronger sense of the meaning of effective fair trial management will all be vital. But al-Anfal is a massive case, to do with massive crimes: despite the odds, it may be a real opportunity to hammer home a message of accountability and individual responsibility. As noted war-crimes scholar Gary Bass has written, "A well-run legalistic process is superior, both practically and morally, to apathy or vengeance."[18] The trick is to put that process in place.

[18] Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000), p. 310.

Contributors

Allen Buchanan is Professor of Public Policy Studies and Philosophy at Duke University. His research is in political philosophy, with a focus on international issues, and bioethics, with a focus on the ethics of genetic interventions with human beings. He is the author of *Marx and Justice: The Radical Critique of Liberalism* (1982); *Ethics, Efficiency, and the Market* (1985); *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (1991); and *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (2003). He is also coauthor (with Dan W. Brock) of *Deciding for Others: The Ethics of Surrogate Decision Making* (1989) and (with Dan W. Brock, Norman Daniels, and Daniel Wikler) of *From Chance to Choice* (1999).

Martin S. Flaherty is Co-Director of the Crowley Program in International Human Rights and Leitner Family Professor of International Human Rights at Fordham Law School in New York City. He has taught at Princeton in the Program in Law and Public Affairs at the Woodrow Wilson School, as well as in China, Korea, and Northern Ireland. A former law clerk for Justice Byron R. White and Member of the Council on Foreign Relations, he has led or participated in human rights missions to Northern Ireland, Turkey, Hong Kong, Mexico, Malaysia, Kenya, and Romania. His writings on U.S. constitutional and foreign relations law, legal history, and international human rights have been published in such journals as the *Yale Law Journal*, *Columbia Law Review*, and *Michigan Law Review*.

Robert O. Keohane is Professor of International Affairs, Princeton University. He is the author of *After Hegemony: Cooperation and Discord in the World Political Economy* (1984) and *Power and Governance in a Partially Globalized World* (2002). He is the coauthor (with Joseph S. Nye) of *Power and Interdependence* (third edition, 2001), and (with Gary King and Sidney Verba) of *Designing Social Inquiry* (1994). He has served as the editor of the journal *International Organization* and as the president of the International Studies Association and the American Political Science Association. He is a member of the American Academy of Arts and Sciences and the National Academy of Sciences.

David Mellow is Instructor of Philosophy at the University of Calgary and writes in the area of applied ethics. In 2003, he completed his Ph.D. dissertation at the University of Calgary on just war theory, and he continues to write and publish on that topic. He is also currently exploring issues related to the topic of filial obligations.

Kingsley Chiedu Moghalu is the author of *Global Justice: The Politics of War Crimes Trials* (2006) and *Rwanda's Genocide: The Politics of Global Justice* (2005). He recently served as a member of the Redesign Panel on the United Nations Internal Justice System appointed by the secretary-general as part of the reform of the UN, and was Legal Advisor to the International Criminal Tribunal for Rwanda from 1997 to 2002. He has also worked for the United Nations in New York, Croatia, Cambodia, and Geneva, and his op-ed commentaries have been published in

the *International Herald Tribune*, *Washington Post*, and other publications. He holds a Ph.D. from the London School of Economics and Political Science, an M.A. from the Fletcher School of Law and Diplomacy at Tufts University, and the LL.B. from the University of Nigeria, Nsukka.

Gerhard Øverland is Postdoctoral Fellow at the Ethics Program at the University of Oslo and Visiting Scholar at the University of California, Berkeley. He specializes in moral and political philosophy and the ethics of war. His work has been published in the *Journal of Moral Philosophy*, *Public Affairs Quarterly*, and *Ethics*.

Miranda Sissons, an Australian, is Senior Associate and Head of Iraq Program at the International Center for Transitional Justice (ICTJ). She is a specialist in human rights and international humanitarian law (IHL) in the Middle East. Before joining the ICTJ, she worked as a researcher and consultant at Human Rights Watch; helped develop Arab civil society networks on the International Criminal Court; and served in the Australian diplomatic service. She has authored numerous publications on human rights and IHL issues in the Middle East and elsewhere. She holds a B.A. from Melbourne University and an M.A. in international relations from Yale University, where she was a Fulbright Scholar.