

JUDGING HUMAN RIGHTS WATCH: AN APPRAISAL OF HUMAN RIGHTS WATCH'S ANALYSIS OF THE AD-DUJAYL TRIAL

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I. INTRODUCTION

On November 5, 2006, Trial Chamber 1 of the Iraqi High Tribunal (IHT) issued its verdict in the Ad-Dujayl trial.¹ That verdict convicted Saddam Hussein,² Barzan al-Tikriti,³ and Awad al Bandar⁴ of crimes against

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¹ See John F. Burns & Kirke Semple, *The Struggle for Iraq: Hussein is Sentenced to Death by Hanging*, N.Y. TIMES, Nov. 6, 2006, at A1.

² On July, 8, 1982, a group of approximately ten individuals attacked Saddam Hussein's convoy as it traveled through the village of Ad-Dujayl. *See* Borzou Daragahi, *A Tragic Test Case in Iraq*, L.A. TIMES, Oct. 18, 2005. In response, Saddam Hussein (then the president of Iraq) allegedly ordered military units, intelligence operatives, and others to descend upon the town. *See id.* Hundreds of people were arrested and detained for years without trial in a desert camp located near the Saudi border. *See* J. Comm. of Iraqi Intelligence Services and Iraq's Department of General Intelligence, *Minutes of J. Comm. Meeting of Iraqi Intelligence Services and Iraq's Department of General Intelligence*, Document IST.A4021.001.053-057 (Dec. 28, 1982) (discussing the transfer of 687 men, women, and children from Ad-Dujayl to a prison camp located in Muthanna Governorate). Saddam Hussein also referred approximately 148 men and boys for trial before Iraq's Revolutionary Command Council Court (RCCC) whereupon they were sentenced to death after a summary trial and executed. *See* Memorandum from Saddam Hussein, President, Iraq, to Revolutionary Command Council Court (May 27, 1984) [hereinafter Referral]; *see also* Presidential Decree No. 778 from Saddam Hussein, President, Iraq (June 16, 1984) Presidential Decree No. 778, (June 16, 1984) (Iraq). (IST.A0480.002.002-003) (approving the execution of those condemned to

humanity inflicted upon the civilian population of Ad-Dujayl following a failed assassination attempt against Saddam Hussein that occurred there in 1982. Each of these three defendants was sentenced to death. The IHT also

death). In addition, large portions of the town were razed—including the town's orchards—upon Saddam Hussein's orders.

³ Barzan al-Tikriti was the Director of Iraq's Department of General Intelligence (Mukhabarrat) in 1982 and supervised the investigation into the failed assassination attempt against Saddam Hussein. See Memorandum from Barzan al-Tikriti, Dir., Iraq's Gen. Dep't of Intelligence, to the Chairman of the Revolutionary Command Council (July 13, 1982). He allegedly ordered the arrests of hundreds of citizens from Ad-Dujayl and personally participated in the murder and torture of those who remained in his custody. See John F. Burns, *Defiant Hussein, Lashing Out at U.S., Goes on Trial*, N.Y. TIMES, Oct. 20, 2005, at A12.

⁴ Awad al-Bandar was President of the RCCC. The RCCC was a special court which sat outside Iraq's regular courts of general jurisdiction and reported directly to the President of Iraq. See generally INT'L COMM'N OF JURISTS, IRAQ AND THE RULE OF LAW 109–13 (1994). It primarily had jurisdiction over cases involving national security and its judiciary consisted, in part, of civil servants rather than professional judges. *Id.* at 110–12. According to the International Commission of Jurists:

Trials before the Revolutionary Court were conducted *in camera* and defendants did not enjoy adequate safeguards for their defence, since they were not permitted to contact their lawyers freely and without surveillance. The Judgements of the Revolutionary Court were final and could not be contested before any other official body; they were carried out immediately, except in the case of death sentences, which were carried out only after their ratification by the President of the Republic.

Id. at 112. On May 27, 1984, Saddam Hussein referred 148 men and boys to the RCCC for trial as a result of their alleged participation in the failed Ad-Dujayl assassination attempt. See Referral Memorandum, *supra* note 2. Approximately two weeks later, Awad al-Bandar sentenced all those referred to him to death despite the fact that some of the individuals referred were minors and despite the fact that forty-six had already died during investigation. See RCCC Decision No. 944/J/1984 (June 14, 1984); see also Death Certificate of Qasem Mohammed Jasim (Mar. 23, 1989) (IST.A4000.001.007,009,034,031) (indicating that the individual was fifteen years-old at the time Awad al-Bandar sentenced him to death); Memorandum from Counsel of the Revolutionary Command Intelligence Service (Feb. 9, 1987) (IST.A4019.007.078) (stating that forty-six people who Awad al-Bandar had sentenced to death in 1984 died during the investigation and interrogation process).

sentenced Taha Yaseen Ramadan⁵ to life, three other defendants⁶ to a term of fifteen years imprisonment, and acquitted one defendant⁷ of all charges.

On November 20, 2006, Human Rights Watch (HRW) issued a 94-page report (Report) that analyzed alleged substantive and procedural deficiencies of the first trial before the IHT.⁸ The HRW Report concludes that the Ad-Dujayl trial did not meet essential fair trial standards and that the credibility of the entire IHT process is doubtful.⁹ Two days later, Trial Chamber 1 issued a densely worded, single-spaced, 299-page opinion explaining its rationale for the November 5, 2006 verdict.¹⁰

On December 26, 2006, the IHT appellate chamber affirmed the trial chamber's death sentences in a 17-page written opinion and remanded back to Trial Chamber 1 the judgment against Taha Yaseen Ramadan with instructions to increase the penalty against him to death.¹¹ The Iraqi government executed Saddam Hussein on December 30, 2006 and Barzan al-Tikriti and Awad al Bandar on January 15, 2007.¹² On January 25, 2007, Trial Chamber 1 reconvened (ostensibly to increase Taha Yaseen Rama-

⁵ Taha Yaseen Ramadan was the head of Iraq's largest militia—the Popular Army—at the time of the failed assassination attempt. *See Obituary: Taha Yassin Ramadan*, BBC NEWS, Mar. 20, 2007, http://news.bbc.co.uk/2/hi/not_in_website/syndication/monitoring/media_reports/2333287.stm. He is alleged to have ordered units of the Popular Army to assist Iraq's intelligence and security forces in arresting citizens from Ad-Dujayl. In addition, Saddam Hussein purportedly ordered Taha Yaseen Ramadan to destroy the date orchards and palm trees in Ad-Dujayl in order to punish the town. *See Burns*, *supra* note 3, at A12. Taha Yaseen Ramadan supposedly ensured that Kurdish workers, who the Popular Army protected, accomplished this goal and bulldozed the town's palm groves and date orchards.

⁶ Abdullah Kadhim Roweed, Mizhir Abdullah Roweed, and Ali Diyah Ali were residents of Ad-Dujayl who assisted the Mukhabarrat and the Popular Army in the campaign of mass arrest which followed the failed assassination attempt against Saddam Hussein.

⁷ Mohammed Azzawi was a resident of Ad-Dujayl and had been charged with assisting the Iraqi government as it arrested citizens from Ad-Dujayl.

⁸ *See generally* Human Rights Watch, *Judging Dujail: The First Trial Before the Iraqi High Tribunal*, Nov. 20, 2006 [hereinafter HRW Report].

⁹ *See id.* at 88–89.

¹⁰ Al-Mahkama al-Jina'iyah al-'Iraqiya al-'Uliya [The Iraqi High Criminal Court], al-Dujail Opinion, available at <http://www.iraq-ihc.org/ar/doc/finalcour.pdf>, translated in Grotian Moment: The Saddam Hussein Trial Blog, English Translation of the Dujail Judgment, Dec. 2006, <http://www.law.case.edu/saddamtrial/dujail/opinion.asp>.

¹¹ Al-Hay'a al-Tamyiziya, al-Mahkama al-Jina'iyah al-'Iraqiya al-'Uliya [Cassation Panel, Iraqi High Criminal Court], al-Dujail Final Opinion, available at <http://www.iraq-ihc.org/ar/doc/ihidf.pdf>, translated in Grotian Moment: The Saddam Hussein Trial Blog, Unofficial English Translation of the Dujail Trial IHT Appellate Chamber Opinion, (Dec. 26, 2006), http://www.law.case.edu/saddamtrial/documents/20070103_dujail_appellate_chamber_opinion.pdf.

¹² *See* Marc Santora et al., *Witness Says He 'Gave Up'—Guilty in 148 Deaths*, N.Y. TIMES, Dec. 30, 2006, at A1; *see also* John Burns, *Confusion in Baghdad After Reports 2 Hussein Allies Were Hanged*, N.Y. TIMES, Jan. 15, 2007, at A7.

dan's sentence to death) with three of the five judges of the original panel either away from Iraq or otherwise absent.¹³ The IHT adjourned that court date stating that the defense attorneys had not received proper notice of the session.¹⁴

On February 12, 2007, Trial Chamber 1 reconvened with the same judges five judges who were present on January 25, 2007.¹⁵ Despite protests from the United Nations,¹⁶ the Council of Europe,¹⁷ defense counsel, and others, Trial Chamber 1 increased the sentence against Taha Yaseen Ramadan from life (which the original Trial Chamber had issued) to death.¹⁸ The IHT Appellate Chamber affirmed this sentence without written opinion on March 15, 2007.¹⁹ Taha Yaseen Ramadan was hung on March 20, 2007 thereby ending the Ad-Dujayl case.²⁰ The trial chamber judgment, the appellate chamber judgment, and the executions of Saddam Hussein, Barzan

¹³ See Associated Press, *Death Sentence is Delayed*, CINCINNATI POST, Jan. 25, 2007.

¹⁴ See *id.* (noting that Judge Ali Al-Kahachi adjourned the Court session scheduled for January 25, 2007 and moved it to February 12, 2007 "because the . . . lawyers are not present in the court because they were not notified"); see also Giovanni Di Stefano, *Ex-Iraqi VP Taha Ramadan Should be Freed or Retried*, Jan. 25, 2007, available at <http://jurist.law.pitt.edu/hotline/2007/01/ex-iraqi-vp-taha-ramadan-should-be.php> (stating that the Iraqi High Tribunal . . . has decided to adjourn the case of my client Taha Ramadan . . . because as a matter of law no defence lawyer had 'legally' been notified of the hearing).

¹⁵ See International Center for Transitional Justice and Human Rights Watch, *Iraq: Reverse Dujail Death Sentence for Ramadan* (noting that a panel of five judges from Trial Chamber 1 of the Iraqi High Tribunal held a "less than 30-minute" hearing on February 12, 2007 and increased Taha Ramadan's sentence to death despite the fact the three of the judges on the panel had not previously participated in hearing evidence against the defendant).

¹⁶ See Sinan Salaheddin, *Saddam Aide Sentenced to Hang: Court Ruling Comes Despite Challenge from Arbour Who Called Trial Flawed*, TORONTO STAR, Feb. 13, 2007 (observing that United Nations High Commissioner for Human Rights, Louise Arbour, "filed an unprecedented legal challenge with the Iraqi High Tribunal against imposing the death sentence on Ramadan").

¹⁷ See Interfax, *Iraq Executions "Exacerbate Chaos and Violence*, Feb. 13, 2007 (noting that the Council of Europe condemned the death sentence issued against Taha Yaseen Ramadan and that "the move undermines the prospects for accord in Iraq").

¹⁸ See Damien Cave, *Two Markets Bombed in Central Baghdad, Killing at Least 67 and Wounding 155*, N.Y. TIMES, Feb. 13, 2007, at A9 (noting that the Iraqi High Tribunal ruled that Taha Yaseen Ramadan "should follow his former boss to the gallows" despite objections from United States Officials and the International Center for Transitional Justice in New York).

¹⁹ See *Taha Yassin Ramadan Loses Appeal on Death Penalty*, Mar. 15, 2006, available at <http://www.ictj.org/en/news/features/1172.html>; see also Edward Wong & Damien Cave, *U.S. Troops to Fan out into 100 Garrisons to Secure Baghdad*, INT'L HERALD TRIB. Mar. 16, 2007, at 4 (stating that an "Iraqi appeals court ruled Thursday that Saddam Hussein's former vice-president, Taha Yassin Ramadan, would be hanged in the next 30 days").

²⁰ See Alissa J. Rubin, *Former Vice-President to Saddam Hussein Hanged on 4th Anniversary of War*, N.Y. TIMES, Mar. 20, 2007, at A8.

al-Tikriti, Awad al Bandar, and Taha Yaseen Ramadan were not analyzed or taken into account in the Report.

This article attempts to address some of the legal and factual inaccuracies of the Report and to correct them in view of the IHT's issuance of the trial and appellate judgments and the executions of Saddam Hussein, Barzan al-Tikriti, Awad al Bandar, and Taha Yaseen Ramadan. The purpose of this exercise is to ensure that the Report's conclusions can be more thoroughly analyzed and so that those who were not in Iraq and did not participate in the day-to-day operations of the Ad-Dujayl trial can better understand what occurred and the role that the U.S. Embassy's Regime Crimes Liaison's Office (RCLO)²¹ played as the trial unfolded.

This article does not opine about whether the Ad-Dujayl trial and appellate processes comported with international standards as such an analysis would require significant time and resources that are currently unavailable. Instead, this article limits itself solely to the issues and concerns raised in the Report. With this limitation in mind, this article will attempt to address (1) administrative problems specified in the Report and to determine whether the administrative criticisms that HRW levies against the IHT are correct; (2) procedural concerns in the conduct of the Ad-Dujayl trial and whether those concerns are grounded in fact or law; and (3) substantive concerns regarding the IHT's ability to conduct trials fairly.

II. ADMINISTRATIVE CONCERNS WITH THE IHT

HRW asserts that the IHT is incapable of handling many administrative tasks competently.²² In particular, the Report states that the IHT Defense Office, Security Protocols for Defense Counsel, IHT's Victims and Witnesses Protection Unit, Court Documentation, and Outreach and Communications Office were inadequate or sub-standard.²³ This article will briefly address each of these administrative areas in turn.

A. *IHT Defense Office*

HRW's discussion and criticism of the IHT Defense Office is largely inaccurate. In fact, the IHT's establishment and support of a func-

²¹ The President of the United States established the RCLO on May 13, 2004 to assist and advise the IHT as it tries members of the former regime for gross atrocities inflicted against the Iraqi people. *See* National Security Presidential Directive/NSPD 37 (May 13, 2004). The RCLO is headed by a regime crimes liaison, (and until recently) two deputies and a chief of staff. It has attorneys, investigators, security experts, and administrative staff (primarily based out of the U.S. Embassy-Baghdad) who advise the IHT on all matters associated with the IHT's operation.

²² *See* HRW Report, *supra* note 8, at 13-14.

²³ *See id.* at 12-36.

tioning and capable IHT Defense Office is a relative bright spot in the IHT process. By way of background, the IHT Defense Office was established pursuant to Rule 30 of the IHT Rules of Evidence and Procedure “for the purpose of ensuring the rights of accused.”²⁴ The IHT Defense Office is tasked, in part, with providing advice and assistance to “accused persons before the . . . Tribunal.”²⁵ Pursuant to Rule 30(1), the IHT Defense Office is managed by an Iraqi defense attorney who serves for a period of three years.²⁶

In addition, the IHT Defense Office maintains a staff of nine other qualified defense attorneys (in addition to the director)—all of whom (including the Director) were assigned as stand-by counsel to a particular defendant as the Ad-Dujayl trial moved forward and as the threat of boycott by privately retained counsel became imminent. The IHT also recognized the need for international advisers to assist the IHT Defense Office and, on February 20, 2006, appointed an international adviser (pursuant to Rule 21 and Rule 30(6)(a) of the IHT Rules of Evidence and Procedure and who commenced working with the IHT in mid-April of 2006) with many years of substantive international criminal law experience to advise the IHT Defense Office in complex international legal and other matters.²⁷ Despite the qualifications of the IHT Defense Office International Law Adviser (Defense Law Adviser)—which included graduating *summa cum laude* from his undergraduate university, obtaining a post-graduate research degree from the University of Oxford, obtaining a law degree with a specialization in public international law and international criminal law *with honors*, a PhD in the field of the law of armed conflict, and working for the war crimes section of his national Department of Justice, the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Court (ICC), and the United Nations in various capacities as a lawyer, investigator, and human rights officer—HRW mistakenly asserted that the Defense Law Adviser “was not a lawyer.”²⁸

Because of the Defense Law Adviser’s extensive experience in the field of international criminal law, the IHT Defense Office attorneys, although lacking international criminal law training themselves, were able to work closely with their adviser to represent each defendant capably on the evidence and law. A particularly telling moment of the partnership between

²⁴ IHT R. EVID. & P. 30(1).

²⁵ *Id.* R. 30(2)(C).

²⁶ *See id.* R. 30(1).

²⁷ See Letter from Jamal Mustafa, President, Iraqi High Tribunal (Feb. 20, 2006) (on file with author).

²⁸ HRW Report, *supra* note 8, at 34.

the Defense Law Adviser and the IHT Defense Office attorneys occurred when the privately retained attorneys for most of the defendants refused to present closing statements on behalf of their clients. In accordance with the IHT Statute and the IHT Rules of Evidence and Procedure, a slight and diminutive IHT Defense Office lawyer—who had been assigned to represent Saddam Hussein in the event that his privately retained attorneys proved unable to fulfill their duties—read a closing statement for Saddam Hussein on July 26, 2006.²⁹

What made this moment important for the IHT and for the IHT Defense Office was the fact that Saddam Hussein (immediately prior to the issuance of the closing) stood up and challenged the lawyer—declaring that he did not want this closing statement read and that, if the defense attorney proceeded to read this statement, he would be considered a personal enemy of Saddam Hussein and an enemy of the state of Iraq.³⁰ At the same time, the Defense Law Adviser was denounced by Saddam as an American spy, presumably on the strength of misinformation provided to that defendant by his retained counsel. Despite these threats, the Iraqi defense attorney presented an intelligent and cogent legal argument on behalf of Saddam Hussein (prepared with the assistance of the Defense Law Adviser and which cited relevant international law precedents) so that Saddam Hussein's rights would be protected.

HRW challenged this closing statement as well as the closings of other unrepresented defendants as somehow unfair because they were drafted with the assistance of the Defense Law Adviser (who according to HRW was not a lawyer even though he graduated from law school with honors), translated from English into Arabic, modified by the IHT Defense Office lawyers and presented in open court for the benefit of each defendant.³¹ HRW stated that this procedure somehow “indicat[ed] the underlying lack of capacity among the Defense Office lawyers themselves.”³² This criticism completely misses the mark. Whether the lawyers had the capacity themselves to prepare such a closing independently is irrelevant to the overall fairness of the Ad-Dujayl trial. The IHT Statute and IHT Rules of Evidence and Procedure presume that Iraqi criminal defense lawyers (like the judges and other participants in the trial process) would require assistance with complex issues of international criminal law.³³ That is why the Rules

²⁹ See *Timeline: Saddam Hussein Dujail Trial*, BBC NEWS, Dec. 4, 2006, http://news.bbc.co.uk/2/hi/middle_east/4507568.stm.

³⁰ See *Thinner Saddam Still Packs a Punch*, BBC NEWS, July 26, 2006, http://news.bbc.co.uk/2/hi/middle_east/5218514.stm (“Saddam Hussein objected to the court-appointed lawyer, describing him as his enemy.”).

³¹ See HRW Report, *supra* note 8, at 32.

³² *Id.*

³³ See IHT R. EVID. & P. 21, 30(6).

of Evidence and Procedure permitted the IHT to retain the services of an international law adviser who could fill this role.³⁴ In addition, the Defense Law Adviser fulfilled his ethical and professional duties with integrity by working day and night with each IHT Defense Office attorney to ensure that all defendants were capably represented.

Rather than indicating a lack of capacity, the carefully managed partnership between the Iraqi IHT Defense Office attorneys and the Defense Law Adviser ensured that the fundamental and basic rights of each defendant (including but not limited to their right to have a closing statement adequately prepared on their behalf) were protected. Both the Defense Law Adviser and the IHT Defense Attorneys should be credited for their work as opposed to criticized. And the crux of HRW's criticism regarding the IHT Defense Office (i.e., that the IHT Defense Office lacks the capacity to mount defenses in international criminal law cases)³⁵ continues to get redressed as the IHT Defense attorneys work with the Defense Law Adviser to review case law (ten thousand pages of case law from the ICTY, ICTR, Special Court for Sierra Leone [SCSL], and International Military Tribunal [IMT] was translated from English into Arabic and presented to all members of the IHT); undertake targeted training in cross-examination, international law, and other relevant matters; and work closely to develop defenses for their clients that properly apply the law to the facts.

Similarly inaccurate is the criticism that the IHT Defense Office "does not provide logistical, administrative, or other support to privately retained defense lawyers."³⁶ In fact, the Defense Law Adviser, whose offices contain computers, a conference room, a law library with Arabic and English materials, full and accurate copies of the Ad-Dujayl and Anfal investigative dossiers for all defense attorneys (private and public), worked almost as closely with the privately retained attorneys as he did with the public attorneys. Indeed, the IHT Defense Office and the Defense Law Adviser facilitated the release of exculpatory documents to privately retained lawyers, including the release of Awad al-Bandar's full Revolutionary Command Council dossier to Awad al-Bandar's attorney,³⁷ the transmission of documents to the IHT, and the overall facilitation (with RCLO support) of transportation, logistical, and security matters for privately retained counsel throughout the Ad-Dujayl trial.

³⁴ *See id.*

³⁵ *See* HRW Report, *supra* note 8, at 32.

³⁶ *Id.*

³⁷ *See* Receipt from Defense Attorney for Awad al-Bandar (June 20, 2006) (on file with author) [hereinafter Receipt from Defense Attorney]; *see also infra* note 126 and accompanying text.

HRW fails to acknowledge that the IHT Defense Office and the Defense Law Adviser accomplished these tasks despite the fact that the privately retained lawyers for Saddam Hussein were boycotting the Ad-Dujayl trial, had issued a letter to the IHT demanding that the Defense Law Adviser cease working with them,³⁸ and repeatedly attacked him and specific IHT Defense Office attorneys in the media.³⁹ When these bullying tactics failed, they released publicly the names of IHT Defense attorneys on Ba'ath party websites and released the name of the Defense Law Adviser to the press—thereby exposing these individuals to threat.⁴⁰

HRW states correctly that the IHT Defense Office itself (located in the same building as the IHT's administrative offices but separate from the Defense Law Adviser's office) lacks the basic tools for the IHT Defense attorneys to accomplish their goals.⁴¹ To rectify this problem, the RCLO made repeated requests to the IHT to refurbish these offices and to provide the IHT Defense Offices with secretarial support and computer equipment. When the IHT failed to provide even these basic items to the IHT Defense Office, the Defense Law Adviser utilized his assets as well as those provided by the RCLO (including computers, printers, libraries, and other materials) to work with each attorney so that they could fulfill their duties.

HRW also criticizes the security arrangements made for IHT Defense Office attorneys.⁴² With regard to security arrangements for IHT Defense Office attorneys, it is important to note that the IHT and Iraq's Prime Minister's Office located several apartments in the International Zone so that each attorney could relocate there safely. At first, the IHT Defense Office attorneys rejected these accommodations because they were smaller or not as well furnished as their private homes. Only after significant cajoling did several IHT defense attorneys agree to accept and relocate from their homes outside the International Zone to these apartments. The remainder of the IHT defense attorneys had (and still have) access to a secure location for them and their families inside the International Zone and they remain there often for weeks on end using the facility's computer, satellite, and Internet

³⁸ See Letter from Khaleel al-Dolami et. al, President, Saddam Hussein Defense Team, to Judge Ra'ouf Abdul Rahman, Presiding Judge, Trial Chamber 1 (June 13, 2006) (on file with author).

³⁹ See, e.g., AL SABAH, Jul. 19, 2006 (reporting on criticism about the IHT International Defense Adviser levied against him by lawyers for Saddam Hussein) (on file with author, along with multiple other Arabic news reports in which defense attorneys for Saddam Hussein attack the Defense Law Adviser).

⁴⁰ See *id.*; see also Al-Mahkama al-Jina'iyah al-'Iraqiya al-'Uliya [The Iraqi High Criminal Court], al-Dujail Opinion, available at <http://www.iraq-ihc.org/ar/doc/finalcour.pdf>, translated in Grotian Moment: The Saddam Hussein Trial Blog, English Translation of the Dujail Judgment, Dec. 2006, pt. 1, 26, <http://www.law.case.edu/saddamtrial/dujail/opinion.asp>.

⁴¹ See HRW Report, *supra* note 8, at 33.

⁴² See *id.* at 33–34.

capabilities so that they can live and work in safety until vacant apartments are located for them inside the International Zone. In short, every single IHT Defense Office attorney has access to secure permanent and semi-permanent housing inside the International Zone and the RCLO has repeatedly stressed that each and every attorney and their families should utilize these facilities so that they remain protected.

B. Security Protocols for Defense Counsel

The murders of at least three retained defense attorneys during the Ad-Dujayl trial were tragic black spots on the entire IHT process.⁴³ The loss of each member of the IHT family deeply impacted the IHT judges, prosecutors, fellow defense attorneys (public and private), defendants, and the RCLO. Even worse, the deaths of at least two attorneys were entirely preventable.

Specifically, the RCLO (after the killing of Sa'doun al-Janabi—a lawyer for Awad al-Bandar who was murdered on October 20, 2006)⁴⁴ offered each privately retained defense attorney secure housing inside the International Zone at (depending on the time) a safe house or a specially constructed defense attorney compound. These housing options (although far less comfortable than one's private home) were equivalent to the housing that was initially provided to IHT judges and prosecutors⁴⁵ and (at least with regard to the compound) identical to the housing that was provided to all members of the RCLO.⁴⁶ The safe house and compound had 24-hour electricity, Internet capabilities, a fully functioning dining hall, full access to the facilities of the Defense Law Adviser (including the conference room, law library, document repository, and other items described above), satellite television, hot and cold running water, and other basic amenities to live safely and to carry out one's work unmolested. Privately retained defense

⁴³ Sa'doun al-Janabi, an attorney for Awad al-Bandar, was abducted from his office in Baghdad and killed on October 20, 2006. See John F. Burns, *Lawyer's Slaying Raises Questions on Hussein Trial*, N.Y. TIMES, Oct. 22, 2005, at A1. On November 8, 2005 gunmen attacked Adel Muhammad al-Zubaidi and Thamir Mahmoud al-Khuzai, attorneys who represented Taha Ramadan and Barzan al-Tikriti. See John F. Burns, *Ambush of Defense Lawyers in Hussein Trial Kills One*, N.Y. TIMES, Nov. 9, 2006, at A8. Adel al-Zubaidi was killed while Thamir al-Khuzai was wounded and subsequently fled Iraq. Khamees al-Obeidi, a lawyer for Saddam Hussein was abducted from his home on October 21, 2006 and executed in Baghdad. See John F. Burns, *Hussein Lawyer Seized and Slain in Baghdad Raid*, N.Y. TIMES, June 22, 2006, at A1.

⁴⁴ John F. Burns, *Lawyer's Slaying Raises Questions on Hussein Trial*, N.Y. TIMES, Oct. 22, 2005, at A1.

⁴⁵ Multiple IHT judges and prosecutors lived for approximately two years in a cramped and dilapidated hotel located inside the International Zone. The hotel often lacked running water for days and electrical power was sporadic.

⁴⁶ RCLO staff members resided in trailers that were located inside the International Zone.

counsel were familiar with the facilities of both the safe house and the housing compound and resided in these locations during trial days and were always afforded the option of remaining there indefinitely.

Indeed, RCLO offered permanent housing inside the International Zone at these locations to privately retained defense counsel at no charge on numerous occasions after the murder of Sa'doun al-Janabi. RCLO stressed that, absent permanent relocation to the International Zone, there was no way the IHT, RCLO, or any other entity could guarantee the safety of private defense attorneys who worked with the IHT. In response, international lawyers working for Saddam Hussein (Ramsey Clark and Dr. Najeeb bin Mohammed al Nuaimi, in particular) vociferously derided this security package, claiming—without any experience whatsoever with regard to the political and security situation outside the International Zone vis-à-vis the political and security situation inside the International Zone—that relocation of defense attorneys and their families to the International Zone

ignores the fact that the International Zone includes the Interior Ministry which the defense believes controls some of the most dangerous deaths [*sic*] squads presently attacking persons associated with President Saddam Hussein, and Sunni's generally It also includes command personnel and elements of U.S. forces which are attacking Sunnis and others opposed to the U.S. occupation of Iraq. . . . There is not an area in Iraq with greater a concentration of hostility and potential for violence against persons associated with the administration of President Saddam Hussein and the legal defense of its leadership than the International Zone. Defense Counsel and their families cannot be safe in the International Zone.⁴⁷

Such statements do not reflect the reality of the actual political and security situation inside the International Zone. Throughout the Ad-Dujayl trial many Sunni members of Iraq's current government and their families resided safely inside the International Zone without fear or reprisal. Further, during the entire course of the Ad-Dujayl trial, not one single attack had ever been perpetrated against a member of the private IHT defense bar—let alone any member of Iraq's Sunni population—inside the International Zone whereas multiple members of the IHT private defense bar and Iraq's Sunni population had been targeted and killed while living outside the International Zone. Most importantly, the International Zone was the only location inside Iraq where U.S. Marshals, RCLO support staff, and others associated with the process could provide 24-hour, round-the-clock profes-

⁴⁷ Emergency Request to the Court to Act to Secure Protection of Defense Counsel, Their Families, Legal Assistants, Investigators, and Defense Witnesses and to Suspend Trial Proceedings Until Security is Provided, at 4–5, *Iraq Interim Gov't v. Saddam Hussein Al-Majid* (Iraqi High Criminal Court Dec. 5, 2005), available at <http://international-lawyers.org/Documents/motion2Dec2005.pdf>.

sional security protections and all the basic provisions needed to live a secure existence.

In view of these concrete realities, HRW's analysis of the defense counsel security situation (like the analysis of the defense attorneys themselves) was seriously misinformed. HRW's Report states "[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."⁴⁸ This is false.

The IHT and RCLO did develop a durable solution to the problem of security for private defense attorneys. For private attorneys who traveled to Iraq from outside of the country, RCLO representatives always facilitated secure transportation for them (at no charge) to and from the Baghdad International Airport and the International Zone. For all attorneys who wished to remain permanently and safely inside Baghdad with their families throughout the trial, at least two entirely separate housing facilities inside the International Zone (a safe house and a secure housing compound) were constructed, refurbished, and equipped at considerable expense. That the private defense bar rejected this and chose to remain living outside the International Zone with sporadic and untrained security guards as their only protection cannot form a basis for laying blame at the feet of the IHT and RCLO for the murders that followed.

C. *Victims and Witness Protection Program*

The Report's conclusions with regard to the IHT's Victims and Witness Protection Program are partially correct.⁴⁹ For example, the Report is correct in observing that the IHT failed to take long-term administrative steps that might have better ensured the safety of witnesses who testified in the Ad-Dujayl trial.⁵⁰ The reasons for this failure are complicated but revolve around a series of hard realities that the IHT faces in all of its operations, and HRW did not adequately factor these realities into the Report. First, the security situation in Iraq was and remains tenuous with car bombings, kidnappings, and summary execution of residents in many areas of the country being common occurrences. As such, the IHT's limited resources for protective measures were often spent on judicial officers, defense counsel, prosecutors, and their immediate families in the first instance, rather than on victims and witnesses.

Second, the security apparatus created by the IHT to protect those involved in the IHT process was often spread thin and ineffective. And when provided, IHT staff (including judges, prosecutors, and—as already discussed—defense counsel) failed to follow basic guidance on force pro-

⁴⁸ See HRW Report, *supra* note 8, at 23.

⁴⁹ See *id.* at 14–17.

⁵⁰ See *id.* at 16.

tection and other matters despite security recommendations provided by U.S. advisers.⁵¹ During my tenure in Iraq, an investigative judge and his son were killed, as were family members of the lead prosecutors for the Ad-Dujayl and Anfal trials, the brother-in-law of the chief judge to the Anfal trial, and the brother of a defendant in the Anfal trial.⁵²

Faced with such violence, the IHT moved many of its staff members and their immediate families into the protected International Zone, but budgetary, logistical, and other constraints prohibited the IHT or the RCLO from making any long term plans for victim and witness safety other than to provide safe transport to and from the IHT during trial days and to provide a secure location (separate from the locations that were provided to defense attorneys) for victims and witnesses to reside inside the International Zone immediately before and after they testified. It was not that the IHT or RCLO were blind to the needs of an adequate victims and witness protection program. Rather, the IHT and RCLO were faced with a constant triage mentality. Those closest to the process such as judges, defense counsel, and prosecutors were offered the most immediate and robust security packages as they faced the most imminent threat while those one step removed from the process were provided lower levels of protection.

These lower levels of protection permitted witnesses to testify from behind a closed curtain and to refrain from having their identities disclosed to the public. In other words, each witness was informed of their right to testify publicly or to shield their identity from public disclosure. IHT, RCLO, and U.S. Marshals met with each witness prior to testifying in order to determine whether the witness would testify in public or whether his or her specific security needs required shielding his or her identity from public disclosure. Given that each witness and victim who testified for the prosecution was from the city of Ad-Dujayl, given that Ad-Dujayl was a mixed Shiite and Sunni city in the heart of Iraq's Sunni population, and given the fact that sectarian violence in the city of Ad-Dujayl and neighboring Balad

⁵¹ For example, the U.S. Marshals agreed to fund an intensive training program for each IHT judge's and prosecutor's personal security detail. Despite this offer, not one single member of the IHT accepted it and agreed to have their security detailed professionally trained.

⁵² See Robert F. Worth, 2 *From Tribunal for Hussein Case Are Assassinated*, N.Y. TIMES, Mar. 2, 2005, at A1, A8 (describing how investigative judge Parwiz Muhammad Mahmoud and his son, who also worked for the IHT, were killed in Baghdad); see also Sabrina Tavernise & Qais Mizher, *Iraqi Linked to Sunni Bloc Is Held in Plot, Military Says*, N.Y. TIMES, Sept. 30, 2006, at A6 (stating that "on Friday, Iraqi authorities announced the killing of the brother-in-law of the judge who is presiding over the trial of Saddam Hussein"); See Michael Luo, *Iraqis Ask Why U.S. Forces Didn't Intervene in Balad*, N.Y. TIMES, Oct. 17, 2006, at A8 (stating that "the older brother of Munkith al-Faroun, chief prosecutor in the so-called Anfal trial that began in Baghdad in August, was shot dead by unknown assailants at his home in the western Baghdad suburb of Jamma").

was high,⁵³ most witnesses and victims expressed a desire to testify from behind a closed curtain with their voices disguised. The IHT readily agreed to this measure for witnesses and victims testifying in the Ad-Dujayl trial so long as they exposed their identities to defense counsel immediately prior to testifying.

HRW criticizes these security decisions as “blanket protective measures” that violated each defendant’s due process rights.⁵⁴ Yet, nowhere in the Report does HRW take into account the substantive reality that, absent such measures, any witness who testified in public would likely have been murdered or would likely have had family members murdered in retaliation for their decision to testify in public.⁵⁵ Importantly, HRW also fails to acknowledge that each victim’s and witness’s statement was provided to all defense attorneys on August 10, 2005 so that the substance of all testimony was known many weeks prior to the commencement of trial.

HRW is correct in observing that the disclosed witness statements were redacted, thereby preventing defense counsel from ascertaining the identities of the witnesses until immediately before testifying.⁵⁶ Moreover, this process may have prevented defense counsel from developing potentially fruitful lines of cross examination with regard to a witness’s history and personal motivations for testifying. That said, the procedure employed permitted defense attorneys to prepare cross examination with regard to the substance of any testimony many months prior to the start of trial had the defense attorneys chosen to do so. In addition, the defense attorneys (if they concluded that a victim’s or witness’ particular identity and personal history was relevant to the credibility of his or her testimony) could have (upon receipt of a particular witness’ or victim’s identification papers at trial) investigated the witness’ or victim’s background thereafter and sought to recall the witness or victim and/or introduced impeachment evidence in the defense portion of the case.⁵⁷

⁵³ See Luo, *supra* note 52 (describing how an “explosion of sectarian violence over the weekend left dozens dead [in Balad and neighboring towns]”).

⁵⁴ See HRW Report, *supra* note 8, at 62–63.

⁵⁵ Notably lacking in the HRW report is the concrete fact that the threat these witnesses and victims faced came from two sources—members of Sunni militias who might target them for participating in the IHT process and members of the IHT private defense bar who might (and actually did) publicize the names of those participating in the IHT process to those who might do them harm.

⁵⁶ See HRW Report, *supra* note 8, at 63.

⁵⁷ In fact, the defense did exactly this. A complainant in an early portion of the Ad-Dujayl case testified that there was no assassination attempt against Saddam Hussein in 1982. See Transcript of Record at 4, *al-Dujail Trial*, (May 31, 2006) (No. 1) (on file with author) (replaying complainant testimony from December 21, 2005 in which the complainant stated that people refer to an assassination attempt against Saddam Hussein in 1982 “even though it never was”). The complainant testified that people had fired weapons into the air in celebra-

The only merit to HRW's Report with regard to this matter rests upon HRW's statement that the redaction of the witness names from the investigative dossier resulted in a violation of Rule 41(1)(A) of the IHT Rules of Evidence and Procedure.⁵⁸ According to Rule 41(1)(A), the Prosecution was obligated to notify the defense at least forty-five days prior to the commencement of trial of all the names of witnesses he intended to use to establish the guilt of the accused.⁵⁹ Because the IHT redacted the names of all such witnesses from the investigative dossier, it is likely correct that Rule 41(1)(A) was violated.⁶⁰

Although the trial chamber arguably could have created certain judicial exceptions to this rule (or at least addressed whether the failure to disclose the names of these witnesses in a timely fashion warranted the delay of trial), it did not. Likewise, the appellate chamber decision did not address this issue leaving the legal implications of the IHT's redaction of witness names unresolved. Self-evidently, the defense attorneys in the Ad-Dujayl trial, who never filed a written motion on this point, failed to preserve any objection they might have over the IHT's decision to redact the names of every witness from the investigative dossier. And this failure to raise this issue in writing may, in part, explain why neither Trial Chamber 1 nor the appellate chamber addressed this matter in their opinions. At best, the Anfal trial chamber, which followed the precedent set forth in the Ad-Dujayl trial and redacted the full set of witness identities from the referral file for reasons of witness security, should address this issue so guidance about the proper use of this technique is provided moving forward. To that end, the defense attorneys in the Anfal trial would do themselves, and the IHT, a service if they raised this specific argument in a detailed written submission to the tribunal.

The more difficult questions regarding victim and witness protection pertain to the limited world of witnesses who testified publicly during

tion of Saddam Hussein's visit to Ad-Dujayl. *See id.* at 3 (repeating testimony from December 21, 2005, in which the complainant stated that "one of our brethren . . . was delighted with our reception of the President . . . so [he] fired shots"). The defense was able to locate a video in which this complainant admitted to having shot directly at Saddam Hussein's motorcade in 1982 as part of a larger assassination attempt. *See id.* at 4 (playing videotape from July 4, 2004 in which the complainant states that in 1982 "faithful young men resolved to kill the tyrant for the salvation of the Iraqi people and the people of the entire region"). Trial Chamber 1 admitted this video into evidence and took it into account when determining how much weight to afford this witness's testimony. *See id.*

⁵⁸ *See* HRW Report, *supra* note 8, at 63.

⁵⁹ *See* IHT R. EVID. & P. 41(1)(A).

⁶⁰ Although this does not mitigate the prosecution's failure to comply with its disclosure requirements under Rule 41(1)(A), it bears noting again that the defense counsel similarly failed to comply with their disclosure requirements under Rule 41(1)(D). *See infra* notes 129-30 and accompanying text.

the Ad-Dujayl trial. More specifically, the first two witnesses in the Ad-Dujayl trial confronted Saddam Hussein and all seven other defendants during the first few days of trial and appeared before the entire world without fear and without hiding their names.⁶¹ This testimony was powerful and made an indelible imprint on the course of the entire Ad-Dujayl proceedings. Upon completion of this testimony, these witnesses remained in a safe location until such time as they decided to return to Ad-Dujayl. When these witnesses found their personal security situation threatened, they contacted representatives from the Iraqi government who took special precautions by providing the witnesses and their families safe housing in the International Zone and by providing them stipends and employment. Although these two witnesses and another have expressed a strong desire to relocate internationally, no country has agreed to accept these individuals and their families for permanent relocation despite repeated requests to several states on behalf of these witnesses from the RCLO.

The bottom line is that the procedures that the IHT employed to protect the vast majority of witnesses and victims did include pre-trial risk assessment, in-court protective measures based on risk assessments that RCLO, the IHT, and U.S. Marshals made on a case by case basis, safe transportation to and from the court and safe accommodation during court attendance. Unfortunately, post-trial follow-up and threat monitoring was and still is lacking as is a comprehensive and systematic relocation program—either internal to Iraq or internationally.

Whether such post-trial follow-up for all witnesses and victims and whether relocation agreements for those witnesses and victims who testified in public are feasible depends very much on the domestic security situation in Iraq and (with regard to international relocation) the ability of at least one state other than Iraq to accept these witnesses and victims and their families as permanent residents. Unless these two factors shift, the IHT's victims and witness protection procedures (although not perfect from a due process standpoint or from a protective standpoint) seem inevitable given the need to balance the lives of those testifying against the security situation in Iraq and the needs of defense counsel. Tellingly, HRW presents no offers of assistance or other credible alternatives that the IHT might have used to protect better the witnesses and victims while ensuring the defendants' right to cross examine them.

D. Court Documentation Unit

HRW rightly opines that Trial Chamber 1 had difficulty in cataloguing and tracking each and every defense motion and document submit-

⁶¹ See Robert F. Worth, *At Trial in Iraq, Witnesses Tell About Torture*, N.Y. TIMES, Dec. 6, 2005, at A1.

ted during the course of the IHT trial.⁶² This was partly due to the fact that the IHT lacked an effective administrator who could be tasked with maintaining a professional and competent registry.⁶³ Instead, the IHT relied upon court clerks who worked with each judge to compile an official record of all that transpired at trial. Unfortunately, this record (which included all defense motions and other documents) was voluminous and not shared with the public (including prosecutors and defense counsel) as it remained personal to the judges.

Moreover, the judges generally refrained from referring to the case file until such time as the opinion drafting process began. This had the unfortunate effect of creating confusion among the judges and other court participants as to whether a submission on a particular issue was already before the court. This problem was exacerbated further as the judicial composition of Trial Chamber 1 fluctuated. For example, Judge Rizgar Amin⁶⁴ may have

⁶² See HRW Report, *supra* note 8, at 17–19.

⁶³ Part of the reason for this problem rests on the fact that the IHT was originally named the Iraqi Special Tribunal (IST) and contained a separate Administration Department, headed by an independent Administrator who was responsible for “the administration and servicing of the Tribunal and the Prosecutions Department.” Coalition Provisional Authority Order Number 48, § 1(1), art. 9, CPA/ORD/9 Dec 2003/48 (Dec. 10, 2003), *available at* http://www.iraqcoalition.org/regulations/20031210_CPAORD_48_IST_and_Appendix_A.pdf. The democratically elected Iraqi Transitional Government rescinded the IST Statute and on October 18, 2005 published a new law—Law No. 10 of 2005—that, in part, amended, repromulgated, and restated the IST Statute. See Qanoon Al-Mahkamat Al-Jeena'eyyat Al-Eraqiyyat Al-Mukhtas [Statute of the Iraqi High Tribunal], Oct. 18, 2005, *available at* www.law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf (Iraq). The IHT Statute renamed the IST the IHT and (in relevant part) folded the Administrator’s powers into the IHT Office of Presidency—thereby subordinating the authority of the Administrator to the IHT’s President. See *id.* art. 7(1)(D) (stating that the IHT President is responsible for “[a]ccomplish[ing] the Court’s administrative work”).

⁶⁴ Judge Rizgar Muhammad Amin was the first presiding judge of Trial Chamber 1. See Robert F. Worth, *Fed Up, Judge in Hussein Trial Offers to Quit*, N.Y. TIMES, Jan. 15, 2006, at A6. He presided over the Ad-Dujayl trial from October 19, 2005 until January 14, 2006, whereupon he resigned due to public criticism over the way he was managing the trial. See *id.*; see also *infra* notes 199, 227 and accompanying text. Under Iraqi law, Judge Rizgar’s deputy, Judge Sa’eed al-Hamash should have assumed the role of acting presiding judge until such time as the trial chamber’s members met and elected a permanent presiding judge. See Statute of the Iraqi High Tribunal art. 3(4) (stating that each trial chamber “shall be composed of five judges who shall elect a president from amongst them to supervise their work”); see also Iraq Law on Judicial Organization, Law No. 160 of 1979, art. 14 (Dec. 10, 1979) (stating that “in case of absence [of the President] the senior judge of the Court shall replace him”); Robert Worth, *Ambush Traps Iraqi Patrol; 2 G.I.’s Die in Copter Crash*, N.Y. TIMES, Jan. 17, 2006, at A8 (noting that Judge Rizgar would likely be “replaced by Said al-Hamash”). This did not happen as Iraq’s Higher Commission of De-Ba’athification (HNCD) issued a letter alleging that Judge Sa’eed al-Hamash was a former member of the Ba’ath Party and therefore ineligible to serve on the IHT. See Qassim Abdul-Zahra, *Saddam Trial Judge ‘Once a Member of the Baath Party*, THE SCOTSMAN, Jan. 19, 2006, at 1 (reporting that the executive director of the HNCD issued a formal letter to the IHT objecting to the

accepted a particular document and recorded it with his clerk but Judge Ra'ouf Abdul-Rahman⁶⁵ may not have been familiar with the exact substance of any such submission (including motions or powers of attorney) or the date it was submitted unless he had recently reviewed the contents of the clerk's file.

The IHT's lack of a centralized collection point for the receipt and transmission of court submissions and its refusal to make public the contents of the clerk's files compelled defense counsel to resubmit motions and powers of attorney that were already included in the court's record and compelled defense counsel and the IHT to develop ad-hoc systems to ensure that the court actually considered relevant items. These systems depended on the judicial practices of the individual judge presiding over Trial Chamber 1 and changed along with the chamber's composition and the fluid political situation in Iraq's legal system.

For example, Judge Rizgar Amin and Judge Sa'eed Al-Hamash were comfortable with the receipt and transmission of court documents to defense counsel using electronic means and during their tenure, Trial Chamber 1 used email to communicate on a regular basis with defense counsel. Judge Ra'ouf Abdul-Rahman preferred to receive hard copies of all documents from defense counsel either immediately prior to the start of a trial session or in open court and repeatedly cited Iraqi law as requiring this to occur. Although the Iraqi Bar Association was expected to serve as the functional equivalent of a centralized after-hours collection point for defense counsel submissions, it supported a defense counsel boycott of the IHT for several months during the trial⁶⁶ and was later dissolved.⁶⁷ These events effectively limited the Iraqi Bar Association's role in the Ad-Dujayl Trial and compelled all defense counsel to abide by Judge Ra'ouf's practice of receiving documents only in court.

possibility that the deputy judge Sa'eed al-Hamash would replace the chief judge and demanding the Judge Sa'eed be replaced by a judge without alleged ties to the Baath Party); *see also infra* notes 214–18 and accompanying text. In response, the then IHT president (Judge Jamal Mustafa) transferred Judge Sa'eed to an alternate trial chamber as the De-Ba'athification process moved forward and appointed Judge Ra'ouf Abdul Rahman as the presiding judge of Trial Chamber 1.

⁶⁵ Judge Ra'ouf Abdul-Rahman replaced Judge Rizgar Amin as the presiding judge of the Ad-Dujayl trial on January 29, 2006. *See* Robert F. Worth, *Hussein Trial Erupts, and Expulsions Ensnare*, N.Y. TIMES, Jan. 30, 2006, at A13.

⁶⁶ *See* John F. Burns, *Hussein's Lawyers Refuse to Work with Iraqi Court*, N.Y. TIMES, Oct. 27, 2005, at A14 (stating that defense lawyers were boycotting the IHT and that the Iraqi Bar Association was calling for an "end to any involvement with the court . . .").

⁶⁷ *See Government Says it Dissolved Bar Association, Members Deny It*, ASSOCIATED PRESS WORLDSTREAM, Mar. 6, 2006 (reporting that the Iraqi government "ha[d] dissolved the Iraq Bar Association, naming a five-member committee to run the organization until elections for a new board are held").

HRW's claim that an investigative dossier, exceeding nine hundred pages, disclosed to defense attorneys on August 10, 2005 was illegible is not accurate.⁶⁸ Instead, the Court redacted personal information of various witnesses to ensure witness and victim safety until such time as trial commenced. As noted above, this shortcoming did prevent defense counsel from pursuing certain avenues of investigation and cross-examination that may have benefited them but the practical realities of conducting the Ad-Dujayl trial in a war zone (combined with the IHT's suspicion that certain members of the defense team were engaged in active insurgent activities against the government of Iraq) compelled the IHT to withhold this information from defense counsel until immediately prior to the witness' decision to testify. Contrary to HRW's statements, the IHT—through the IHT Defense Office and the IHT's Secure Evidence Unit (SEU)⁶⁹—did repeatedly respond to defense counsel complaints about illegible or missing documents by scouring the IHT archives for such items and providing them to the privately retained counsel as the trial moved forward.⁷⁰

These facts are critically omitted from HRW's Report as is an even more critical fact. The Ad-Dujayl referral file was made available to all attorneys on August 10, 2005—approximately three months before the Ad-Dujayl trial started. As of October 19, 2005, the date the trial began, only several attorneys actually took the time to come to the International Zone, obtain copies of the file, and review it. To my knowledge, all other defense attorneys never (throughout the course of trial) picked up the remaining copies of the Ad-Dujayl file and those copies remain in the IHT's custody today. Thus, for HRW to claim that the trial's fairness was somehow impacted because of an illegible case file is a bit unfair as the IHT endeavored to correct and did correct any errors or mistakes in the case file throughout the trial. It is more correct to state that, although the IHT's decision to redact the file may have impacted the fairness of trial, the majority of the privately retained defense counsels' decision to refrain from ever reviewing the file in its entirety, if it all, more deeply impacted the rights of each defendant to a fair trial.⁷¹

⁶⁸ See HRW Report, *supra* note 8, at 19–20.

⁶⁹ The IHT Secure Evidence Unit is charged with preserving any and all evidence received that is relevant to matters within the IHT's jurisdiction. See IHT R. EVID. & P. 26(1); see also *infra* note 125 and accompanying text.

⁷⁰ See, e.g., *infra* note 126.

⁷¹ Fortunately, the IHT Defense Office had full and accurate copies of the entire Ad-Dujayl case file and their attorneys worked with the Defense Law Adviser (as described above) to prepare substantive and procedural defenses based on the evidence and law for each defendant. See *Timeline: Saddam Hussein Dujail Trial*, *supra* note 29 and accompanying text. In addition, the Defense Law Adviser made sure that a full copy of the Ad-Dujayl referral file was available at his office (which was also located in the same compound as the

E. Outreach and Communications Office

HRW's analysis of the IHT's outreach and communications programs is essentially correct.⁷² The IHT never embarked on a targeted program to educate the Iraqi people (and maybe more importantly—the Iraqi government) about the mechanics of the IHT process, the need to afford the defendants proper legal rights, the nature of the crimes being adjudicated before the IHT, and the reasons why a fair, neutral, and transparent IHT process was important to the Iraqi people. Instead the IHT's outreach program was limited to the appointment of the chief investigative judge as a public spokesperson, televised coverage of the trials, the creation of an Internet website that contained perfunctory information and was updated sporadically, the conduct of irregular press briefings, and the issuance of press releases at important junctures in the IHT process.

This failure is distressing. Judge Gabrielle McDonald (the first president of the ICTY) lectured the IHT in October 2004 about the need to create an effective outreach program and how such a program was created for the ICTY. Judge McDonald explained that one of the most important tasks she accomplished while serving as the president of the ICTY was to ensure that the ICTY's outreach program (which included developing literature, educational programs, and lectures in various regions of Bosnia, Serbia, Croatia, and elsewhere) became operational and was effective.

The IHT's failure to understand why the creation of a more comprehensive outreach program was important to the IHT process exacerbated many of the institutional and political problems the IHT faced as it moved forward with the Ad-Dujayl trial. Indeed, as Iraqis (inside and outside of government) witnessed the Ad-Dujayl trial commence and saw how Judge Rizgar Amin afforded the defendants the opportunity to cross-examine witnesses directly (as permitted by Iraqi law)⁷³ and otherwise treated the defendants in accordance with the bedrock legal principle that they were innocent until proven guilty⁷⁴ (such as by referring to the defendants by name instead of simply calling them “defendants”), they grew incensed and called for the IHT to treat the defendants more harshly.⁷⁵ Tellingly, public discord with the trial process resulted in several demonstrations in which members

private defense attorneys) so the defense attorneys could review the file even if they never picked up their own copy.

⁷² See HRW Report, *supra* note 8, at 24–28.

⁷³ See Iraq Law on Criminal Proceedings, Law No. 23, ¶ 168 (1971) (stating that “the public prosecutor, complainant, civilian plaintiff, a civil official, and the defendant may discuss the testimony via the court”).

⁷⁴ See IHT Statute, *supra* note 63, art. 19(2).

⁷⁵ See HRW Report, *supra* note 8, at 24–28.

of Iraq's Shiite majority called for the IHT to take a tougher stand against the defendants.⁷⁶

Of course, public outcry over the trial was not solely a result of a lack of education with regard to the nature of the IHT process. The defendants (particularly Saddam Hussein) and the defense counsel themselves deliberately sought to exacerbate the public's discontent with the trial process by continuously utilizing their right to examine witnesses as a platform for repeated and long-winded political diatribes. And Judge Rizgar's failure to temper the defense counsel's and defendant's tactics with more rigid courtroom control contributed further to the public's misperception that the Ad-Dujayl trial was being conducted in a manner that was too lenient on the defendants.

That said, the IHT would have served itself better by engaging in a nationwide public outreach campaign in the months leading up to the start of the Ad-Dujayl trial so that the Iraqi population could better understand the legal rights granted to each defendant and the specifics of what would unfold in the courtroom. Doing so might have balanced the climate of revenge against the defendants that permeated many sections of Iraqi society against the IHT's need to dispense fair justice. Such a campaign could have included educational television programs about the IHT that might have aired on Al-Iraqia television, the creation of a more robust website, the dissemination of literature describing the court process to the various provinces in Iraq and to the Iraqi government itself, and the establishment of a permanent outreach unit within the IHT to coordinate the IHT's outreach efforts. Had the IHT conducted such a campaign it is possible (but unknown) that some of the political pressure that was placed on the court by various sections of the Iraqi public and the Iraqi government during the Ad-Dujayl trial may have been lessened.

On a positive note, the IHT and RCLO did create a series of pamphlets, brochures, diagrams, and other materials (in Arabic and English) that were disseminated at the IHT courthouse so that local and international media representatives might better understand the Ad-Dujayl trial and the IHT itself. In addition, the RCLO attempted to hire an outreach coordinator to assist the IHT in establishing a permanent outreach program. Although no person has yet filled that position, the RCLO anticipates that it will fill this position shortly. Finally, the RCLO engaged in a partnership with the Institute for War and Peace Reporting to train local Iraqi journalists about the complexities of war crimes reporting so that they can better cover the IHT process as it moves forward. Unfortunately, these RCLO efforts will do

⁷⁶ See Exclusive Interview With Judge Rizgar Hama Amin, <http://iraqikurdistan.blogspot.com/2006/09/exclusive-interview-with-judge-rizgar.html> (Sept. 11, 2006) ("Shiite parties organized demonstrations just outside the green zone calling for immediate verdict and hanging of Saddam and his aids.").

nothing to impact the now complete Ad-Dujayl trial and will not bear long-term fruit if the IHT itself does not recognize the need for such an outreach program. It is critical to note too that the RCLO's assets, already under serious strain, must be supplemented by international actors if the IHT process (and particularly any IHT outreach program) is to succeed.

III. PROCEDURAL CONCERNS WITH THE IHT

HRW asserts that the IHT failed to handle many procedural matters related to the Ad-Dujayl trial in a manner that comported with international standards. The Report states that: (a) the defendants lacked adequate time and facilities to mount a defense; (b) the court failed to provide written decisions on key procedural issues; (c) the defendants were not informed properly of the charges against them; (d) the conduct of defense counsel was not conducive to a fair trial; (e) judicial turnover and the temperament of the judges negatively impacted the trial; and (f) Trial Chamber I was not independent from the judicial branch of Iraq's government. This article now addresses each of these criticisms.⁷⁷

A. *The Defendants Lacked Adequate Time and Facilities to Mount a Defense*

1. Late or Same Day Disclosure of Evidence

HRW alleges that the prosecution did not provide the privately retained defense attorneys with the incriminating documents that were to be used at trial such that the defendants could prepare their defenses.⁷⁸ This charge is not accurate. As already detailed, privately retained defense counsel were provided the entire investigative dossier and order of referral approximately two months prior to the start of trial.⁷⁹ The method of disclosure that the IHT utilized required the defense attorneys to visit the IHT

⁷⁷ In a somewhat redundant section of the Report, HRW repeats its criticisms that the IHT should not have permitted the Trial Chamber to read into the record complainant or witness statements if they were untested by cross-examination. See HRW Report, *supra* note 8, at 49, 61–62. HRW also restates its arguments that the redaction of witness' names from the investigative dossier violated the defendants' rights to due process. See *id.* at 62–63. As the redaction issue was addressed above, it will not be readdressed in this Section. See *supra* Section II(C). The witness statement issue is address once below. See *infra* note 85 and accompanying text.

⁷⁸ See HRW Report, *supra* note 8, at 49.

⁷⁹ See Al-Mahkama al-Jina'iyah al-'Iraqiya al-'Uliya [The Iraqi High Criminal Court], al-Dujail Opinion, available at <http://www.iraq-ihc.org/ar/doc/finalcour.pdf>, translated in Grotian Moment: The Saddam Hussein Trial Blog, English Translation of the Dujail Judgment, Dec. 2006, pt. 1, 23, <http://www.law.case.edu/saddamtrial/dujail/opinion.asp> (noting that the file was made available to all defense attorneys on Aug. 10, 2005 and again on Aug. 15, 2005).

courthouse so they could acquire a full set of all documents, witness statements, and other evidence that would be utilized at trial. Unfortunately, privately retained defense attorneys for multiple defendants never appeared at the courthouse to review, examine, or obtain the file despite repeated suggestions from the chief prosecutor and RCLO that they do so and despite the ease of access that they had to the files.⁸⁰ This lack of professionalism on the part of these defense attorneys was endemic throughout the trial and reflected an underlying truth that a majority of the private defense attorneys failed to exercise the legal rights afforded to them under the IHT Statute, the IHT Rules of Evidence and Procedure, and the Iraqi Law on Criminal Proceedings.

Relatedly, HRW charges that the prosecution engaged in “‘trial by ambush’ in which incriminating documents were not disclosed to the defense until the day that the document was in court by the prosecution.”⁸¹ Putting aside the fact that defense counsel could have (and often did) challenge the authenticity, relevancy, or propriety of introducing particular documents during the course of trial, the documents that were used at trial (with several exceptions) were all included in the investigative dossier. It is true that the defense counsel had no forewarning as to which of the previously disclosed documents the prosecutor would introduce on a particular trial day. But that is not “‘trial by ambush.’” That is how all document intensive complex litigations work. Had the defense attorneys wished to refer back to the documents included in the investigative dossier that was offered to them, they simply needed to look at the IST numbers that were included at the bottom-right corner of each and every document introduced at trial.

As to the limited world of documents that the prosecution disclosed during the course of trial and that was not included in the investigative dossier, it is critical to understand the fundamental differences between the civil law system as practiced in Iraq and the yardstick that HRW used to measure against the court—the common law based adversarial system. Unlike the common law system in which truth is derived by opposing parties delivering partisan arguments and interpretation about evidence to a neutral fact-finder composed of lay-people untutored in law, the civil law system is built on the notion that expert judges resolve disputed issues of law and fact and render determinations of guilt or innocence.⁸² Critical to this presumption is the ability of civil law judges to permit the parties to introduce evidence that is

⁸⁰ *See id.* (stating that “some defense attorneys, since they didn’t live in Iraq and do not attend but during the trial sessions, failed to receive their copies on the specified date”).

⁸¹ HRW Report, *supra* note 8, at 49.

⁸² Peter J. Messitte, *Common Law v. Civil Law Systems*, 4 ISSUES OF DEMOCRACY 24, 27–28 (Sept. 1999) (observing that in common law systems group of twelve ordinary citizens called a jury decides whether an accused is innocent or guilty while in a civil law system a judge actively investigates the case and makes findings of fact).

probative even if it was not disclosed at an earlier stage of the trial.⁸³ In this case, both the prosecution and defense introduced several documents, witness statements, movies, and other material that had not been previously disclosed. And the Tribunal granted tremendous leeway to both sides (as permitted under Iraqi law) to present this evidence—having never excluded anything that the prosecution or defense sought to introduce even if the evidence in question had not been previously disclosed.

Accordingly, it is unfair to claim that the prosecution engaged in “trial by ambush”⁸⁴ when all sides sought to introduce evidence not included in the investigative dossier, the court permitted all sides the opportunity to engage in this behavior, and Iraqi law (based upon civil law concepts of adjudication and not adversarial concepts of common law litigation) granted the judges the ability to conduct the trial in this manner.

HRW also takes issue (at least twice in the Report) with the IHT’s decision to read out the statements of twenty-three “prosecution witnesses into the court record, without making these witnesses available for questioning by the defense.”⁸⁵ This criticism too reflects a misunderstanding of the civil law system of Iraq. First, the witnesses to which HRW refers were not “prosecution witnesses.” The court read into the record the statements of twenty-three individuals who were levying specific complaints against the defendants. These “complainants”⁸⁶ were each interviewed by the investigative judge during the investigative portion of the case and/or the prosecution⁸⁷ as trial moved forward. The bulk of these complainant statements were included in the investigative dossier and were therefore part of the trial record and evidence before the court regardless of whether the complainant was present to testify live.

⁸³ See James G. Apple & Robert P. Deyling, A PRIMER ON THE CIVIL LAW SYSTEM 27 (1995) (noting that the “absence of the . . . jury also helps to explain the relative lack of restrictions on the admissibility of evidence in the civil law system”).

⁸⁴ HRW Report, *supra* note 8, at 49.

⁸⁵ *Id.* at 49, 61.

⁸⁶ Under Iraqi law, a trial begins with testimony from a “complainant.” See Law on Criminal Proceedings With Amendments, No. 23, ¶ 167 (1971), available at http://www.law.case.edu/saddamtrial/documents/Iraqi_Criminal_Procedure_Code.pdf. A complainant is an individual who is directly injured by criminal conduct and is therefore responsible for initiating criminal proceedings against the person responsible for injury. See *id.* ¶ 1(A). In contrast, a “witness” is an individual who did not necessarily suffer injury but who has evidence to offer which is relevant to the criminal proceedings which the complainant initiated. See *id.* ¶ 58.

⁸⁷ Technically under the civil system in Iraq, the prosecutors are prosecutorial judges and are endowed with the authority of investigative judges. See The Public Prosecution, No. 159, arts. 3, 39 (1979) (declaring that the public prosecution shall “exercise the jurisdiction of the examining magistrate in the locus delicti in case of his absence” and unlike the common law system shall “work in perfect neutrality”).

Iraqi law permits trial judges to rely upon any item contained in the investigative dossier (regardless of whether it is tested through cross-examination at trial)⁸⁸ because in the civil law system, the right of cross examination is highly circumscribed and preserved at both the investigative and trial stage primarily through the judges themselves and not the attorneys.⁸⁹ Stated differently, defendants and prosecutors do not verbally spar witnesses in the civil law system in order to find truth.⁹⁰ Instead, judges (either at the investigative or trial stage) are the principal interrogators of all witnesses.⁹¹

According to Iraqi law, neither the prosecution nor the defense has the right to question a complainant or witness directly.⁹² Instead, all questions must be directed at a complainant or witness through the judges.⁹³ It is entirely within the judges' discretion whether to pose a question to a particular individual.⁹⁴ The civil law system presumes that the judges (who have specialized in gathering evidence and discerning fact from untruths immediately upon graduation from law school)⁹⁵ or in limited circumstances, the prosecutors, will test a complainant's or witness' credibility when initially taking an investigative statement or at the trial stage if (in the trial chamber's discretion) they decide to call a particular witness or complainant to the stand. Furthermore, because the civil system presumes that judges (as professionally trained "truth seekers") have a better capacity than a lay jury to discern fact from fiction, most civil codes grant judicial officers broad discretion to permit anyone with relevant testimony to testify in court so long as the evidence offered will aid the judges in their truth seeking

⁸⁸ See Law on Criminal Proceedings With Amendments, No. 23, ¶ 172 (1971), available at http://www.law.case.edu/saddamtrial/documents/Iraqi_Criminal_Procedure_Code.pdf (stating that [i]f the witness does not appear . . . the court may decide to hear testimony previously given in the written record [and t]he testimony will be treated as though it were given in front of the court").

⁸⁹ See Apple & Deyling, *supra* note 83, at 28 (noting that in a civil law criminal trial "there is no counterpart to common-law cross-examination").

⁹⁰ See *id.* at 37.

⁹¹ See *id.*

⁹² See IHT R. EVID. & P. 57(1) ("[w]ith due consideration given to the provisions of Article (168) of the Iraqi Code of Criminal Procedure Law, questioning and cross examination of the witness shall be allowed for each case by the opponents to refute his statements"); see also Law on Criminal Proceedings with Amendments, No. 23, ¶ 168 (1971), available at http://www.law.case.edu/saddamtrial/documents/Iraqi_Criminal_Procedure_Code.pdf

⁹³ See IHT R. EVID. & P. 57(1).

⁹⁴ See Apple & Deyling, *supra* note 83, at 27.

⁹⁵ See *id.* at 38 (discussing how "[i]n the civil-law tradition . . . a recent law graduate selects the judiciary as a career and then follows a prescribed career path, first attending a special training institute for judges, and then acting as a judge in a particular geographic area").

capacity—even if this testimony is untested through cross examination and even if it was not included in the investigative dossier.⁹⁶

HRW's inability to understand the nature of civil law adjudication is reflected in its failure to cite relevant statutory authority from the Netherlands (itself a civil law jurisdiction) in which courts are permitted to rely upon a statement taken from an anonymous witness who was examined in the presence of an examining magistrate without the accused or his counsel being present.⁹⁷ Under the Dutch system, an examining magistrate may grant complete anonymity to a witness if there is a legitimate fear for the witness's life, health or safety, and the witness indicates that he "does not want to testify because of this danger."⁹⁸ When this occurs, the examining magistrate may take the witness' statement, refuse to disclose the identity of the witness to the defendant and counsel, and the witness does not have to appear at trial.⁹⁹

Self-evidently, a trial judge who relies upon this statement cannot assess the reliability of the witness directly.¹⁰⁰ Nevertheless, the Netherlands still permits trial courts to rely upon such written statements so long as three requirements are met.¹⁰¹ First, the examining magistrate must conclude that the witness was intimidated and will not testify without a guarantee of anonymity.¹⁰² Second, the case must involve a serious crime (such as murder, hostage taking, extortion, or robbery) punishable by imprisonment for at least four years.¹⁰³ Third, the judge cannot decide the defendant's guilt "solely on the basis of the statements of the completely anonymous witness."¹⁰⁴

The European Court of Human Rights examined the right of the Netherlands to use anonymous witnesses in *Kostovski v. The Netherlands*.¹⁰⁵

⁹⁶ See, e.g., Law on Criminal Proceedings With Amendments, No. 23, ¶ 171 (1971), available at http://www.law.case.edu/saddamtrial/documents/Iraqi_Criminal_Procedure_Code.pdf (stating that "[t]he court may hear the testimony of anyone who attends it and anyone who puts himself forward with information. It may summon any person to attend to deliver his testimony if it is considered that this testimony will help establish the truth").

⁹⁷ See Wet getuigenbescherming, (Staatsblad 1993, 603) (Feb. 1, 1994) Stb. 1993, 603 (Neth.). Under the Dutch Code, witnesses who face serious intimidation may testify anonymously. See A. BEIJER & A.M. VON HOORN, REPORT ON ANONYMOUS WITNESS USE IN THE NETHERLANDS 527 (1997), available at <http://www.library.uu.nl/publarchief/jb/congres/01809180/15/b25.pdf>.

⁹⁸ See BEIJER & VON HOORN, *supra* note 97, at 531.

⁹⁹ See *id.* at 531–32.

¹⁰⁰ See *id.* at 532.

¹⁰¹ See *id.* at 533.

¹⁰² See *id.*

¹⁰³ See *id.*

¹⁰⁴ *Id.*

¹⁰⁵ 166 Eur. Ct. H.R. (ser. A) at 25 (1989).

In that case, a Dutch trial court read out two statements from individuals who had provided evidence to an examining magistrate.¹⁰⁶ The defendant was never told the identity of the witnesses at trial and did not have a chance to cross-examine them.¹⁰⁷ In concluding that this practice violated the European Convention on Human Rights, the European Court of Human Rights observed that “in addition to the fact that neither the applicant nor his counsel was present at the [investigative] interviews—the examining magistrates themselves were unaware of the person’s identity . . . , a situation that cannot have been without implications for testing his/her reliability.”¹⁰⁸ Ultimately, the European Court of Human Rights did not prohibit the use of such testimony at the investigative stage of a civil law trial but did warn that a trial court should not consider the “subsequent use of anonymous statements as sufficient to found a conviction.”¹⁰⁹ Because the trial court had convicted the applicants “to a decisive extent” on the anonymous statements without granting the defendants the opportunity to cross examine them, the European Court of Human Rights concluded that the defendant’s right to a fair trial had been violated.¹¹⁰

In the Ad-Dujayl trial, the IHT’s introduction of twenty-three complainant statements (and later an additional six witness statements) met the standards set forth in *Kostovski* and permitted by civil law jurisdictions as the Netherlands. First, the statements in question were not taken from anonymous individuals. Each individual disclosed his or her identity to the investigative judge or the prosecutor at the time they provided their testimony. Thus, the investigative judge or prosecutor acting as investigative judge (who are obligated under Iraqi law to protect the defendants’ rights at all phases of the investigation and trial) had full abilities to question each individual about purported bias, hostility, or prejudice that might have impacted their testimony. Of course, it would have been better if defense counsel were present as is permitted under Iraqi law. But even if defense counsel were present, there is no guarantee that they would have been permitted to question the witnesses directly as civil law adjudication requires the defense attorneys to pose questions to all witnesses and complainants through the judge.

Second, the security situation in Iraq in which violence is endemic throughout the country is of such a qualitatively different nature than that

¹⁰⁶ *See id.* at 10.

¹⁰⁷ *See id.* at 12.

¹⁰⁸ *Id.* at 21.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

found in the European Union and analyzed in the *Kostovski* case¹¹¹ that the IHT had little choice but to afford testifying witnesses the privilege of withholding their names so that they and their family would not suffer retaliation. To this end, it is important to note that Complainant Number 1 had two cousins kidnapped, a nephew killed, and a brother shot through the legs and permanently crippled subsequent to the complainant's proffer of public testimony in the Ad-Dujayl trial.¹¹² The risk to these complainants and witnesses was therefore not abstract. It was constant and extended to all members of each complainant's and witness' family. Given these risks, it is remarkable that the IHT did ensure that the full names and identities of all witnesses and complainants were recorded in the investigative dossier so that (at a minimum) the judges could question them about their backgrounds and potential bias and that the only security measures taken were to redact the witness' and complainant's names from the copies of each statement that was provided to defense counsel.

Third, and maybe most importantly, the trial chamber did not decisively rely upon these witness and/or complainant statements in crafting its judgment. Instead the trial chamber relied primarily on the documentary evidence adduced at trial (that independent experts examined), the live witness testimony, and the statements of the defendants themselves. Thus, the Ad-Dujayl trial stood in marked contrast to the facts of presented in the *Kostovski* case and represented a situation in which the court properly balanced the critical needs of witness security against the due process rights of the defendants. In doing so, the IHT was well within the parameters of international human rights by reading twenty-nine witness and complainant statements into the record when the investigative judge and trial chamber had full knowledge of each witness' or complainant's identity and the IHT refrained from relying decisively on these statements when drafting its opinion.

¹¹¹ In the *Kostovski* case, the court granted anonymity to the witness in question who had information about a series of bank robberies. *See id.* at 11–13. The witnesses claimed (for reasons which were never specified) that they required anonymity in order to ensure their safety. *See id.* at 9–10. In comparison, the violence level in Iraq (at the time of the Ad-Dujayl trial) was extremely high as militias loyal to both Sunni insurgents and conservative Shiites engaged in summary kidnappings, executions, car bombings, suicide attacks, and torture against all sections of Iraq's society. The level of violence in the Dujayl region was especially bad as the multi-ethnic town (and neighboring Balad) experienced sectarian strife between rival Sunni and Shiite groups. *See* Michael Luo & Qais Mizher, *26 Killed in Revenge Attacks Outside Baghdad*, N.Y. TIMES, Oct. 15, 2006, at A18.

¹¹² *See* Brian Bennett, *Saddam's Revenge*, TIME, Oct. 9, 2006, at 30–31.

2. Non-Disclosure of Exculpatory Evidence

HRW's assessment with regard to the non-disclosure of exculpatory evidence to defense attorneys is verifiably false.¹¹³ All such evidence was included in the investigative dossier and to the extent that additional exculpatory material was discovered or requested at trial, it was disclosed to the defendants. For example, at trial, Awad al-Bandar made repeated requests to locate the entire investigative dossier he used when trying 148 men and boys for the failed 1982 assassination attempt in Ad-Dujayl. The IHT Defense Office, acting upon this request, located the file in the IHT's Secure Evidence Unit and on June 20, 2006, provided it to Awad al-Bandar's lawyer who signed a written document acknowledging receipt.¹¹⁴ Importantly, the disclosure of this document occurred while the defense portion of the Ad-Dujayl trial was ongoing and (despite Awad al-Bandar's protests in open court that the document would prove that the trial he had conducted was fair) was not utilized because of the incriminating nature of the evidence therein. The Report does not explain these facts and instead states wrongly that the IHT failed to exercise its rights to locate exculpatory evidence such as this.

3. Non-Disclosure of Trial Session Notes

HRW alleges that the trial was unfair because a verbatim transcript of the Ad-Dujayl proceedings was not made available.¹¹⁵ Although a verbatim transcript of each day's sessions was not made, court scribes maintained a long hand record of the events that transpired each day. Unfortunately, these records remained close to the judges and were not shared with the prosecutors or the defense counsel. RCLO recognized that these long-hand notes may not be entirely accurate and that both defense attorneys and the prosecution may need accurate records of each trial day. The RCLO therefore commissioned the production of verbatim transcripts of the Ad-Dujayl and Anfal trials. These transcripts were made by sending the videotaped footage from the Ad-Dujayl trial to a series of stenographers who transcribed each day's events and then translated the transcription from Arabic into English.¹¹⁶ Upon receipt of the transcripts, RCLO expected to redact relevant security information and present them to defense attorneys working on the Ad-Dujayl case. Because of the time consuming nature of this proc-

¹¹³ See HRW Report, *supra* note 8, at 52–53.

¹¹⁴ Receipt from Defense Attorney, *supra* note 37.

¹¹⁵ See HRW Report, *supra* note 8, at 53.

¹¹⁶ RCLO decided to translate the Arabic transcripts into English so that RCLO staff members, international advisers to the Trial Chamber and Defense Office, and English speaking privately retained defense attorneys could access the full trial record.

ess, the transcripts were not complete in time to be provided to defense counsel in the Ad-Dujayl trial.

The transcripts were, however, provided to Trial Chamber 1 so that it could rely upon them (in addition to the scribes' long handed notes) in drafting its opinion. It is expected that the IHT will redact these transcripts in due course so that the names of witnesses and defense attorneys will not get released. Once this process is completed, it is hoped that the IHT will post these transcripts on its website so that the international community can understand better what actually happened during the course of the Ad-Dujayl trial. It is also expected that the IHT will obtain relevant transcripts for the Anfal trial and redact relevant security information so that they can be presented to defense counsel in time to prepare for the defense portion of the Anfal case. If this occurs, the ability of the defense to better prepare for the allegations levied against their clients in the Anfal trial will be improved and the flaw identified in HRW's Report with regard to accurate court reporting will be corrected.

4. Chain of Custody Documentation and Handwriting Experts

HRW criticizes that the Ad-Dujayl trial as unfair because the defense attorneys were precluded from introducing international experts to analyze the signatures on various documents.¹¹⁷ This argument confuses the role of experts in a civil law trial. In the civil law system, the court itself hires experts to assist it in ascertaining truth.¹¹⁸ Indeed, as officers of the court, the experts are responsive only to the judges—as opposed to the prosecution or defense.¹¹⁹ The experts are tasked with remaining neutral and to provide an unbiased opinion as to the issues before them.¹²⁰ As Iraq is a civil law country, its criminal procedure code follows these dictates, and expert testimony is only permitted if the court so requests.¹²¹ The defense's

¹¹⁷ See HRW Report, *supra* note 8, at 57–58 (stating that “by denying the defendants the opportunity to call their own expert to offer an opinion, the court does not appear to have considered the requirement of equality at arms”).

¹¹⁸ See Sir David Edward, Evidence, Proof, Fact-Finding, and the Expert Witness 7 (Apr. 29, 2004), available at [http://www.law.du.edu/david_edward/publications/pdf/CD/Proof,%20Fact-finding%20and%20the%20Expert%20Witness%20\(7th%20Sir%20Michael\).pdf](http://www.law.du.edu/david_edward/publications/pdf/CD/Proof,%20Fact-finding%20and%20the%20Expert%20Witness%20(7th%20Sir%20Michael).pdf) (stating that in the civil law system it is the judge, as opposed to the advocates, who “may decide that it would be a good to idea to have a report from an expert”).

¹¹⁹ See *id.* at 8 (stating that in the civil law context, expert witnesses are “are simply one tool in the judge’s armoury of decision making. They are one way in which a judge may go about deciding on an element in the case that needs to be established one way or another.”).

¹²⁰ See *id.*

¹²¹ Law on Criminal Proceedings With Amendments, No. 23, ¶ 69 (1971), available at http://www.law.case.edu/saddamtrial/documents/Iraqi_Criminal_Procedure_Code.pdf (stating that the “magistrate or investigator may . . . appoint one or more experts to offer opinions on matters connected to the offence being investigated”).

and HRW's contention that international partisan experts (retained by the defense) were required to protect their rights therefore has no merit when viewed in light of these civil law traditions—that are widely different than the traditions of partisan expert witnesses utilized in adversarial courts.

To understand better the situation in the Ad-Dujayl Trial with regard to handwriting experts, one must also be aware that Trial Chamber 1 retained an initial panel of handwriting experts who reviewed the original signatures on each contested document and compared these signatures against handwriting exemplars that only certain defendants provided. The panel then submitted its conclusions as to the validity of each signature (in writing) to the trial chamber. For those defendants who refused to provide handwriting exemplars, the IHT warned them that their refusal would be construed against them. Once Trial Chamber 1 received the initial handwriting reports from the first panel of experts, it immediately retained another expert panel to review again each challenged document. This second panel was retained in order to ensure that the rights of the defendants were better protected.

Trial Chamber 1 then considered the factual findings of both panels of experts when drafting its verdict and deciding whether to afford a particular document any weight. HRW's contention that the defense should have been provided with the identities of these experts¹²² does not address the security concerns of the handwriting experts. Every handwriting expert participating in the Ad-Dujayl trial (in view of the security situation and in view of the privately retained defense bar's consistent pattern of releasing the names and identities of people participating in the IHT process on the Internet) demanded that their identities remain concealed from the private defense bar and the public.

HRW further alleges that the Ad-Dujayl trial was unfair because the court did not require chain of custody evidence to be introduced at trial.¹²³ HRW properly alleges that “[i]nformation concerning the source and chain of custody of a document is essential to assess how much weight should be placed on the document.”¹²⁴

Although such evidence was not introduced at trial, it is maintained with the SEU, which documents the manner of receipt of every document in its possession. In fact, each document in the SEU's possession is catalogued with a description of the date of seizure, person responsible for seizure, and transfer of custody of such documents from the point of collection to the SEU. Once a documents arrives at the SEU, the chain of custody information is recorded, each document is meticulously analyzed by IHT investiga-

¹²² See HRW Report, *supra* note 8, at 58.

¹²³ See *id.* at 56.

¹²⁴ See *id.*

tors for relevancy to a particular case, the document is labeled with a unique identifying number, summarized, translated, and scanned into the IHT's computerized document management system so that judges and prosecutors are able to access the collection via the Internet and are able to have the document's full history before them. Privately retained defense attorneys are not provided full access to the IHT's document management system for security reasons,¹²⁵ but they are able to conduct searches by submitting queries to the IHT Defense Office for relevant documents. This protocol was used, for example, to locate Awad al-Bandar's missing Revolutionary Command Council Court file.¹²⁶

Given the SEU's history of meticulous record keeping, it was shortsighted of Trial Chamber 1 not to inquire with the SEU about the chain of custody of specific documents when presented with challenges regarding their veracity. Trial Chamber 1's decision to refrain from presenting this evidence in court is even more puzzling considering that the SEU itself had identified a representative during the Ad-Dujayl trial to testify about the protocol for seizing, cataloguing, and maintaining documents in the SEU. Additionally, the persons responsible for seizing the bulk of the documents entered into evidence at the Ad-Dujayl trial were also prepared to testify as to the location, method, and manner of seizure of a vast majority of the challenged documents.

For reasons not entirely clear to the author, Trial Chamber 1 decided that evidence of this type was not relevant despite numerous discussions on this point with international advisers. The trial chamber instead limited itself to analyzing the signatures on any document in question through handwriting experts. Upon reflection, Trial Chamber 1 would have injected more transparency into the process had it introduced chain of cus-

¹²⁵ The documents contained in the IHT's electronic archives contain the names, addresses, and other identifying information of thousands of witnesses, complainants, and other individuals relevant to the IHT process. Because the IHT has concerns that members of the privately retained defense bar may threaten, intimidate, or distribute information about these individuals to the public, it has refrained from giving the privately retained defense bar full access to the IHT document management system. Although the IHT initially considered providing such access to the private defense bar, the conduct of the privately retained defense attorneys during the course of the Ad-Dujayl trial, which included allegations of witness intimidation, the subornation of perjury, and releasing the names of individuals associated with the IHT on an insurgent website, www.albasrah.net, caused the IHT to reconsider this idea and to limit itself to the conduct of queries and release of documents from the IHT document management system through the IHT Defense Office.

¹²⁶ To locate this document, the defense attorney for Awad al-Bandar consulted with representatives of the IHT Defense Office who then submitted relevant document queries to the director of the SEU. The director of the SEU produced all documents associated with the queries to the Defense Law Adviser who then reviewed the documents until the missing file was located. The file was then provided to Awad al-Bandar's defense attorney. *See* Receipt from Defense Attorney, *supra* note 37.

tody evidence into the record—particularly since the IHT had nothing to hide. Hopefully, the Anfal trial chamber will learn lessons from the Ad-Dujayl trial and inquire more diligently about the chain of custody of documents should this issue arise in that case.

5. Scheduling of Trial Sessions and Closing of the Defense Case

HRW asserts that Trial Chamber 1 should have conducted a pre-trial conference and set the court schedule with the participation of defense counsel.¹²⁷ Because civil law adjudication is non-partisan, there is no requirement for the IHT to set its schedule with the participation of defense counsel. That said, each trial chamber conducts its business according to the rules that it sets to conduct trial. Thus, Trial Chamber 1 did not conduct a pre-trial hearing to set court scheduling matters, but Trial Chamber 2 (which is adjudicating the Anfal trial) learned from the lessons of Ad-Dujayl and conducted a pre-trial hearing with all participants to set the court's schedule.

HRW also alleges that the Ad-Dujayl trial was unfair because the court perfunctorily closed the defendant's cases without consultation or reason.¹²⁸ This charge is false. The court permitted fifty-six witnesses to testify on behalf of the defendants (in comparison the court heard inculpatory live testimony from twenty-eight complainants/witnesses and heard inculpatory written testimony from thirty-two others) and devoted approximately half of the trial to the conduct of the defense case. The court ended the defense case (in accordance with civil law traditions) after engaging in multiple discussions (both in open court and in chambers) with the defense counsel about their specific needs and requirements with regard to their cases.

For those who witnessed the defense portion of the Ad-Dujayl trial, the dance in which the privately retained defense bar was engaged would have seemed comical had it not consumed so much of the tribunal's time. Day after day, privately retained defense counsel entered the court with a particular witness list and made requests to transport the identified individuals to the IHT. The very next day, these same attorneys would substitute the previously issued list with a new list and then repeat the process multiple times over the course of weeks.¹²⁹

¹²⁷ See HRW Report, *supra* note 8, at 58–59.

¹²⁸ See *id.* at 59.

¹²⁹ For example, on May 24, 2006, Judge Ra'ouf grew exasperated with this practice and chastised defense counsel by stating, "You have submitted ten lists and not just one, ten lists. You are not allowed to submit a list every day, it is not allowed at all." The defense attorney replied that "we have submitted one list and not ten like you are claiming If you have proof that we have submitted ten lists, then show it to us and present it to this court." Judge Ra'ouf responded by waiving multiple witness lists at the defense attorney (including the one

They did this even though the IHT Rules of Evidence and Procedure require that they submit their witness lists fifteen days prior to the start of trial.¹³⁰ Notwithstanding this rule and the private defense attorneys' repeated practice of last-minute witness list alteration and substitution, the IHT continuously accepted the new witness lists and the introduction of any and all witnesses whom the defense presented in court. The IHT's patience with the defense counsel's behavior was only cut short after several weeks of witness shuffling and after the IHT concluded that the defense attorneys were not capable of introducing further evidence that was either probative or relevant to the issues before it. Even more critical, is that the court made this ruling after four of the witnesses whom the defense attorneys for Saddam Hussein introduced admitted to the commission of perjury.¹³¹ There is therefore no merit to HRW's contention that Trial Chamber 1 engaged in unfair trial practices when it cut short the defendant's case on June 13, 2006. By that date, the court had extended every courtesy required to ensure that the defense counsel were able to present their arguments to the IHT, and the defense counsel had simply abused the IHT's trust.

HRW's statement that the trial chamber should have provided a written explanation as to why it cut short the defense counsel case on June 13, 2006¹³² also lacks merit as Iraqi law does not contain any requirement for the issuance of interlocutory written decisions. Instead, Iraqi law permits the court to issue rulings from the bench and to reserve the actual reasoning for its decisions in the final written judgment. And the Ad-Dujayl written judgment did provide a fully detailed explanation as to why the court ended the defense counsel presentation. In the trial chamber's view, the evidence that the defense continued to present was irrelevant, cumulative, and focused primarily on the defendants' character as opposed to the specific elements in the case.¹³³ Deciding to end the defense portion of the case for

he had submitted that day) and stated, "Today you submitted a list, and everyday you do so, and then you add another."

¹³⁰ See IHT R. EVID. & P. 41(1)(D).

¹³¹ See Al-Mahkama al-Jina'iyah al-'Iraqiyah al-'Uliyah [The Iraqi High Criminal Court], al-Dujail Opinion, available at <http://www.iraq-ihc.org/ar/doc/finalcour.pdf>, translated in Grotian Moment: The Saddam Hussein Trial Blog, English Translation of the Dujail Judgment, Dec. 2006, pt. 1, 12, <http://www.law.case.edu/saddamtrial/dujail/opinion.asp>; see also *infra*, note 156 and accompanying text.

¹³² HRW Report, *supra* note 8, at 59–60.

¹³³ See, e.g., Al-Mahkama al-Jina'iyah al-'Iraqiyah al-'Uliyah [The Iraqi High Criminal Court], al-Dujail Opinion, available at <http://www.iraq-ihc.org/ar/doc/finalcour.pdf>, translated in Grotian Moment: The Saddam Hussein Trial Blog, English Translation of the Dujail Judgment, Dec. 2006, pt. 2, 52, <http://www.law.case.edu/saddamtrial/dujail/opinion.asp> (stating that "[m]ost of [Hussein's witnesses'] statements were either general or irrelevant . . . or based upon what they heard others say (hearsay) or focused on proving that there was an attempt to assassinate the former president").

these reasons was principled and legally correct (as opposed to “indifferent to or ignorant of the relevant procedural principles”)¹³⁴ in view of how the defense counsel conducted their portion of their case and in view of the lack of probative evidence that the defense witnesses had offered.

B. The Court Failed to Provide Written Decisions on Key Procedural Issues

HRW argues that “[t]he transparency of the [Ad-Dujayl] trial was greatly diminished by the consistent failure of the court to publicly issue written decisions [and address] ... at least six written motions—[on] 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.”¹³⁵ This statement is (like many in the Report) correct as an absolute matter but incorrect in terms of the specifics of what occurred at trial and incorrect in light of Iraqi law.

First, there are no provisions in Iraqi law that required Trial Chamber 1 to issue written decisions on procedural issues until such time as the final judgment was released. Instead, Iraqi law required the trial chamber to issue oral bench decisions on various defense submissions either immediately after receipt or shortly thereafter. The IHT reserved its right to provide written justifications for these decisions in the final judgment, which was released on November 22, 2006. And that judgment effectively disposed of at least eight legal issues that defense counsel raised in writing during the course of trial including: (1) the defense counsel’s use of the *lex mitior* principle to challenge to the IHT’s power to impose the death penalty; (2) the IHT’s legitimacy; (3) the defense claim that it did not receive the investigative dossier in a timely fashion; (4) defense claims that security conditions in Iraq (and the killing of three defense attorneys) rendered the trial unfair; (5) the defense request that Judge Ra’ouf recuse himself for bias; (6) defense claims that Saddam Hussein was entitled to head of state immunity; (7) arguments with regard to the ex-post facto application of laws (including crimes against humanity) against the defendants; and (8) defense counsel contentions that the IHT summarily cut off the defense counsel case in an ad-hoc and arbitrary manner.

With regard to these motions, HRW also fails to note that each and every one of these issues was rejected in open court at various stages of the Ad-Dujayl trial by either Judge Rizgar or Judge Ra’ouf. Thus, HRW’s statement that Trial Chamber 1 ignored procedural motions¹³⁶ is not correct. Rather, the IHT considered these procedural requests, rejected them orally

¹³⁴ HRW Report, *supra* note 8, at 60.

¹³⁵ *Id.* at 63–64.

¹³⁶ *See id.* at 63–64.

to defense counsel, and placed its reasoning for these rejections in the final judgment. Such practice comports with controlling Iraqi law and international law.¹³⁷ To the extent that the trial chamber's final judgment did not address other key procedural issues (such as why it read twenty-nine complainant and/or witness statements into the record or redacted the referral file) in writing, it is only because the defense attorneys did not present such arguments to the court in writing. If these arguments were not presented to the IHT in writing, the IHT did not respond in writing.

C. *The Defendants were Not Informed of the Charges*

HRW's primary criticism with regard to notice of the charges to the defendants rests upon the assertion that the relevant documents that were disclosed failed to identify the "theory of liability" that the IHT would apply at trial.¹³⁸ Stated differently, HRW declares that the defendants were not provided with proper evidence of the specific facts that might demonstrate whether they were being tried under a theory of command responsibility, joint criminal enterprise, conspiracy, or some other theory of liability set forth under Article 15 of the IHT Statute.¹³⁹ With regard to this specific point, it is important to note that each defendant was provided with a summary order of referral on August 10, 2005 in conjunction with the entire dossier of evidence that would be used to try the defendants. HRW states that this disclosure was insufficient to meet international standards because it "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."¹⁴⁰ This statement is correct and the IHT should ensure that future orders of referral do not suffer this shortfall.

At the same time, this statement again fails to acknowledge how the civil law system of Iraq differs from the adversarial system used in other courts—such as the United States. In the civil law system utilized in Iraq, the Order of Referral indicates that an investigative judge has determined that there is enough evidence to warrant a trial on specified charges.¹⁴¹ The Ad-Dujayl Order of Referral specified that each defendant was charged with the crimes against humanity of premeditated murder, forcible transfer, im-

¹³⁷ See, e.g., *Prosecutor v. Norman*, Case No. SCSL-2003-07/08/09-PT, Decision on the Application for a Stay of Proceedings and Denial of Right to Appeal, ¶ 31 (Nov. 4, 2003) (holding that the Special Court for Sierra Leone need not stay all proceedings until the Trial Chamber could rule on the lawfulness of certain procedures).

¹³⁸ See HRW Report, *supra* note 8, at 45.

¹³⁹ See *id.* at 46–48.

¹⁴⁰ See *id.* at 46.

¹⁴¹ See Law on Criminal Proceedings With Amendments, No. 23, ¶ 130(B) (1971), available at http://www.law.case.edu/saddamtrial/documents/Iraqi_Criminal_Procedure_Code.pdf.

prisonment, and torture. The specific facts relevant to these charges were not set forth in the Order of Referral as Iraqi law does not require this specificity. Rather, the facts underlying these charges were set forth in the approximately nine hundred pages of evidence disclosed in conjunction with the dossier. Accordingly, the judges, defense counsel, and prosecutors were obligated to review the investigative dossier to discern the facts that were relevant to each charge and to each defendant. Admittedly, this procedure compels the defense attorneys to actually come to the IHT and pick up the dossier so they can review it and understand the facts relevant to the charges set forth in the Order of Referral, but the judges themselves bear the same burden.

It is important to note, however, that, even if the Ad-Dujayl Order of Referral was deficient and that even if the defense counsel had to undertake significant independent analysis to understand how the evidence in the case file was relevant to the charges, the Order of Referral was supplemented during the course of the Ad-Dujayl trial by a more detailed charging instrument.¹⁴² In accordance with Iraqi law, Trial Chamber 1 reviewed the sufficiency of the evidence in the case file by hearing complainants, witnesses, reviewing documents, and calling experts to testify. And on May 15, 2006, the trial chamber decided that the evidence presented in the investigative dossier and reviewed in court was sufficient to warrant the issuance of an additional notice instrument to the defendants—the formal charging document.¹⁴³ The formal charging document for each defendant contained detailed substantive charges and (unlike the order of referral) specified modes of liability for these charges that were tailored to each defendant. HRW is correct in pointing out that, subsequent to the issuance of these detailed charging documents, the defendants were immediately forced to begin presenting their defenses and that this “effectively den[ied the defendants] any opportunity to revise or amend their defense in accordance with the more detailed notice [of the formal charging document].”¹⁴⁴ But the Report nowhere acknowledges that the defendants had approximately five months thereafter to synthesize their defenses on the basis of this revised notice. This is so because the court permitted the defendants until October 1 to submit closing briefs to the IHT.

¹⁴² Interestingly, the defendants themselves never complained to the IHT for more detailed charging instruments which contained the specificity demanded in HRW’s report.

¹⁴³ John F. Burns, *Hussein Ruling Seems to Raise Execution Odds*, N.Y. TIMES, May 16, 2006, at A1 (describing Trial Chamber 1’s decision to issue the formal charging document to the defendants on May 15, 2006); See Law on Criminal Proceedings With Amendments, No. 23, ¶ 187 (1971), available at http://www.law.case.edu/saddamtrial/documents/Iraqi_Criminal_Procedure_Code.pdf.

¹⁴⁴ HRW Report, *supra* note 8, at 47.

The above facts demonstrate that, although there were problems in notice to the defendants, each and every defendant was aware of the specific charges to be presented against them in court and of the evidence relevant to those charges as early as August 10, 2005. And the defendants had approximately five months after the issuance of formal charges (which did meet international standards) to mount any defenses to the court based upon either the charges or the modes of liability relevant to each defendant.

D. Conduct of Defense Counsel

HRW's statement that the "performance of Iraqi defense counsel—whether privately retained or appointed by the Defense Office—was generally poor" is correct with a few caveats.¹⁴⁵ The privately retained defense bar and the IHT Defense Office (although generally lacking training or instruction in international criminal law) were each capably assisted with international legal assistance. For example, Saddam Hussein was assisted throughout his trial by several lawyers with international legal expertise including Dr. Najeeb al-Nuaimi (a former Minister of Justice of Qatar who has litigated cases before the International Court of Justice), Ramsey Clark (a former Attorney General of the United States), Issam Ghazzawi (a Jordanian lawyer with significant international criminal law expertise), and others.¹⁴⁶ Similarly, the Defense Law Adviser advised the IHT Defense Office and (when requested) privately retained defense attorneys for all defendants about matters of international criminal law.¹⁴⁷

HRW states wrongly in the Report that "[t]he 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."¹⁴⁸ To the contrary, defense counsel raised multiple public international law or international criminal law issues to the IHT during the Ad-Dujayl trial. These issues included, but were not limited to, the IHT's legitimacy, ex-post facto application of law, *lex mitior*, and other complex issues of law in written submissions that were presented at various points during the course of the Ad-Dujayl.¹⁴⁹ Likewise, Judge

¹⁴⁵ See *id.* at 69.

¹⁴⁶ See John Simpson, *Anger and Exits at Saddam Trial*, BBC NEWS, Dec. 5, 2005, http://news.bbc.co.uk/2/hi/middle_east/4498960.stm (describing how the defense team for Saddam Hussein, including three foreign lawyers—the former U.S. Attorney General Ramsey Clark, the former justice minister of Qatar, Najeeb al-Nuaimi, and a Jordanian, Issam al-Ghazzaw—walked out of court).

¹⁴⁷ See *supra* note 36 and accompanying text.

¹⁴⁸ HRW Report, *supra* note 8, at 69.

¹⁴⁹ See Al-Mahkama al-Jina'iyah al-'Iraqiyah al-'Uliya [The Iraqi High Criminal Court], *al-Dujail Opinion*, available at <http://www.iraq-ihc.org/ar/doc/finalcour.pdf>, translated in Grotian Moment: The Saddam Hussein Trial Blog, English Translation of the Dujail Judg-

Rizgar Amin conducted a half day of oral argument on issues such as the IHT's legitimacy early on in the Ad-Dujayl trial. And (as already noted) the IHT Defense Office attorneys presented substantive closing statements that raised a host of international criminal law arguments.

This is not to say that privately retained defense counsel worked to preserve the integrity of the IHT process. Lawyers for Saddam Hussein consistently engaged in outrageous political speeches and outright contempt of the IHT. For example, a Lebanese lawyer working for Saddam Hussein, Bushra al-Khalil, repeatedly insulted Judge Ra'ouf and, at one court session, displayed pictures of prison abuses in Abu Ghraib.¹⁵⁰ At another court session she even went so far as to remove her defense counsel robes and hurl them at the bench.¹⁵¹ Notably, Judge Ra'ouf never instituted criminal sanctions against her (or any defense attorneys) for this behavior although the IHT Statute and Iraqi law would have permitted him to detain and fine her for this misbehavior.¹⁵²

Private defense attorneys for Saddam Hussein, along with others, also engaged in repeated boycotts—thereby abandoning their clients in a capital case—and refrained from ever advancing a coherent theory on the evidence, which might have benefited their clients.¹⁵³ Instead, they stood by as defendants such as Saddam Hussein and Barzan al-Tikriti confessed to ordering various levels of atrocities committed against the citizens of Ad-Dujayl and otherwise limited their legal arguments to repeated and cursory rants against the “occupiers.” HRW's statement that “[t]he repeated threat and use of the [boycott] tactic created the strong impression that some counsel deliberately sought to delay or obstruct the course of the trial” is entirely correct.¹⁵⁴ Most importantly, HRW is accurate in observing that the pri-

ment, Dec. 2006, pt. 1, 26–44, pt. 2, 1–6, <http://www.law.case.edu/saddamtrial/dujail/opinion.asp>.

¹⁵⁰ See Edward Wong, *Saddam Admits he Swiftly Doomed 148 Villagers*, INT'L HERALD TRIBUNE, Apr. 6, 2006, at 5 (stating that “[i]n the midafternoon, one of Saddam's lawyers, a Lebanese woman named Bushra Khalil, stood up with posters of naked men in Abu Ghraib who had been abused by the Americans in the infamous scandal, prompting bailiffs to escort her out as she yelled at the judge”).

¹⁵¹ See Hassan M. Fattah, *For a Shiite, Defending Hussein is a Labor of Love*, N.Y. TIMES, June 24, 2006, at A4 (describing how in May 2006, when Judge Ra'ouf cited Bushra al-Khalil “for speaking out of turn, ordering guards to forcibly eject her from court[, she] pulled off her judicial robe and threw it on the floor, pushing guards who were grabbing at her hands”).

¹⁵² See Law on Criminal Proceedings With Amendments, No. 23, ¶ 153 (1971), available at http://www.law.case.edu/saddamtrial/documents/Iraqi_Criminal_Procedure_Code.pdf (providing that if an individual violates the administrative procedures of the court, the judge “may rule immediately for detention for 24 hours or a fine not exceeding 3 dinars”).

¹⁵³ See HRW Report, *supra* note 8, at 70.

¹⁵⁴ See *id.*

vately retained defense bar's threat and use of boycott "greatly diminished the ability of privately retained counsel to raise legitimate and serious procedural concerns that did persist in relation to the trial."¹⁵⁵

Even more disturbing was a series of events that transpired on May 30–31, 2006. On those days, four witnesses for Saddam Hussein testified that they had met Chief Prosecutor Jaa'far Al Mousawi at a July 2004 memorial service for the victims of Ad-Dujayl.¹⁵⁶ The witnesses testified further that Prosecutor Jaa'far had offered them money to testify against Saddam Hussein.¹⁵⁷ Defense attorneys for Saddam Hussein purported to prove this allegation by playing a video of the memorial service in question.¹⁵⁸ On the video was a man who the defense claimed was Prosecutor Jaa'far Al-Mousawi.¹⁵⁹ In response to the video display, the prosecutor denied that he was present during the memorial service and stated that he had never visited Ad-Dujayl.¹⁶⁰ Prosecutor Jaa'far then called a man who looked somewhat similar to him into the room (Abd al-Aziz Muhammad Bandr) and asked whether he was the man on the video.¹⁶¹ Abd al-Aziz Muhammad Bandr stated that he was the man on the video and that he had organized the memorial service.¹⁶² The full Trial Chamber, prosecutors, and entire defense team acknowledged without doubt that the man on the tape was Abd al-Aziz Muhammad Bandr and not Prosecutor Jaa'far Al-Mousawi.¹⁶³

Notwithstanding, at least one more witness for Saddam Hussein was called to testify. This witness claimed again that he had seen Prosecutor Jaa'far Al-Mousawi at the 2004 Ad Dujayl memorial service and that Prosecutor Jaa'far was videotaped there.¹⁶⁴ Prosecutor Jaa'far then walked

¹⁵⁵ *Id.*

¹⁵⁶ See Al-Mahkama al-Jina'iyah al-'Iraqiya al-'Uliya [The Iraqi High Criminal Court], al-Dujail Opinion, available at <http://www.iraq-ihc.org/ar/doc/finalcour.pdf>, translated in Grotian Moment: The Saddam Hussein Trial Blog, English Translation of the Dujail Judgment, Dec. 2006, pt. 1, 12, <http://www.law.case.edu/saddamtrial/dujail/opinion.asp>.

¹⁵⁷ *See id.*

¹⁵⁸ *See id.*

¹⁵⁹ *See id.*

¹⁶⁰ *See id.*

¹⁶¹ *See id.*

¹⁶² *See id.*

¹⁶³ On June 12, 2006, for example, Defense Attorney Najib Al-Nuami testified, "When the CD was shown, I personally said this is not the general prosecutor in the CD." See Transcript of Record at 32, *al-Dujail Trial*, (June 12, 2006) (No. 2) (on file with author).

¹⁶⁴ For example, the witness explained that he was at a party commemorating the failed assassination attempt against Saddam Hussein and that the participants kept talking

about how proud they were, and they were showing off about the assassination attempt in 1982. Sir, before the party ended they shared pictures of all the victims of this treacherous incident. While I was among them, I saw a man, and I asked

around to the witness box, and asked the witness to take a close look at his face.¹⁶⁵ The witness examined Prosecutor Jaa'far and swore that he had seen Prosecutor Jaa'far at the memorial service and that Prosecutor Jaa'far was the man on the video.¹⁶⁶ The witness testified further that he had dined with several people who defendant Awad al-Bandar allegedly ordered executed in 1983.¹⁶⁷ The witness then claimed that twenty-three people whom Awad Al-Bandar allegedly executed were alive.¹⁶⁸

When the witness was asked to identify victims who were allegedly alive, he began to read names off of a handwritten paper.¹⁶⁹ The court asked whether the witness could name people who were allegedly alive without the aid of the paper.¹⁷⁰ The witness was unable to do so and provided the paper to the court.¹⁷¹ The court then asked the witness to write the names of people who were allegedly alive on a separate sheet of paper.¹⁷² The witness was able to provide only a few names, and the names provided did not match the names on the list that the court previously confiscated.¹⁷³ Even worse, the witness's handwriting was completely different than the handwriting on the confiscated list.¹⁷⁴ When the court asked the witness whether he had written the original list of allegedly surviving victims from Ad Du-jayl, the witness stated that the names were provided to him by an unknown source.¹⁷⁵ In view of this admission, the court ordered each witness (four in total) who had testified about Prosecutor Jaa'far's alleged appearance at the

who he was. They told me that he was a lawyer. It turns out, Your Honor, that he was the Chief Prosecutor.

See Transcript of Record at 13, *al-Dujail Trial*, (May 31, 2006) (No. 3) (on file with author).

¹⁶⁵ The witness declared several times that he could confirm Prosecutor Jaa'far's attendance at the service, declaring, "[b]y Allah's will, I saw you, but not that time." See *id.* at 30.

¹⁶⁶ See *id.*

¹⁶⁷ Al-Mahkama al-Jina'iyah al-'Iraqiya al-'Uliya [The Iraqi High Criminal Court], *al-Dujail Opinion*, available at <http://www.iraq-ihc.org/ar/doc/finalcour.pdf>, translated in Grotian Moment: The Saddam Hussein Trial Blog, English Translation of the Dujail Judgment, Dec. 2006, pt. 1, 13, <http://www.law.case.edu/saddamtrial/dujail/opinion.asp>.

¹⁶⁸ See *id.*

¹⁶⁹ See Transcript of Record at 13, *al-Dujail Trial*, (May 31, 2006) (No. 3) (on file with author).

¹⁷⁰ See *id.*

¹⁷¹ See *id.* at 14.

¹⁷² See *id.* at 15.

¹⁷³ See *id.*

¹⁷⁴ Upon receipt of the list of names, Judge Ra'ouf stated, "[n]o, this pen is black, and the other pen is—this is not even your handwriting." See *id.*

¹⁷⁵ See *id.* at 18–20 (stating that the witness had intermittently received the names from the newspapers, from attorneys, and from various unknown sources).

2004 memorial service bound over for investigation into alleged perjury in violation of paragraphs 251 and 252 of Iraq's 1969 Penal Code.¹⁷⁶

On Friday, June 2, 2006, the IHT conducted an investigative session with each of the witnesses.¹⁷⁷ The witnesses were represented by an IHT appointed defense attorney from the IHT Defense Office as well as the Defense Law Adviser.¹⁷⁸ The witnesses were questioned individually and together by a representative from Trial Chamber 1 and a representative (not Prosecutor Jaa'far) from the IHT Prosecutor's Office about whether they had seen Prosecutor Jaa'far Al-Mousawi at the 2004 Ad-Dujayl memorial service. The witnesses were also asked whether Prosecutor Jaa'far had offered them money to testify against Saddam Hussein.

In response to these questions, two witnesses stated that they were not from Ad-Dujayl and that they had never visited Ad-Dujayl even though they had testified that they were born and raised in Ad-Dujayl.¹⁷⁹ One witness was born and raised in Baghdad while another was from Taji.¹⁸⁰ The witnesses stated that defense attorneys for Saddam Hussein had ordered them to claim that they were from Ad-Dujayl.¹⁸¹ The witness also admitted that defense attorneys for Saddam Hussein told them to claim that Prosecutor Jaa'far had attempted to bribe them.¹⁸² All the witnesses stated that they were not at the 2004 Ad-Dujayl memorial service.¹⁸³ The witnesses also stated that defense counsel for Saddam Hussein offered them housing in Damascus, Syria and jobs in the event that they testified as instructed on behalf of Saddam Hussein.¹⁸⁴ One witness stated that he worked for an American contractor in Tikrit and that defense counsel had kidnapped his

¹⁷⁶ Al-Mahkama al-Jina'iyah al-'Iraqiyyah al-'Uliyyah [The Iraqi High Criminal Court], al-Dujail Opinion, available at <http://www.iraq-ihc.org/ar/doc/finalcour.pdf>, translated in Grotian Moment: The Saddam Hussein Trial Blog, English Translation of the Dujail Judgment, Dec. 2006, pt. 1, 12–13, <http://www.law.case.edu/saddamtrial/dujail/opinion.asp>.

¹⁷⁷ See *id.*

¹⁷⁸ See Transcript of Record at 28, *al-Dujail Trial*, (June 12, 2006) (No. 2) (on file with author) (declaring “[a]ll these testimonies are video taped with video and audio, and in the presence of the general prosecutor and an attorney representing these witnesses who later on became defendants”).

¹⁷⁹ See Al-Mahkama al-Jina'iyah al-'Iraqiyyah al-'Uliyyah [The Iraqi High Criminal Court], al-Dujail Opinion, available at <http://www.iraq-ihc.org/ar/doc/finalcour.pdf>, translated in Grotian Moment: The Saddam Hussein Trial Blog, English Translation of the Dujail Judgment, Dec. 2006, pt. 1, 13, <http://www.law.case.edu/saddamtrial/dujail/opinion.asp>.

¹⁸⁰ See *id.*

¹⁸¹ See *id.*

¹⁸² See *id.*

¹⁸³ See *id.*

¹⁸⁴ See *id.*

son and told him that, if he did not testify on behalf of Saddam Hussein, his son would be killed.¹⁸⁵

Each witness stated that they were transported to Syria where they met with a former bodyguard of Saddam Hussein name named Abu Omar and defense attorney Khaleel Al-Dolami.¹⁸⁶ The witnesses stated that Khaleel al-Dolami and Abu Omar coached them on what to say when testifying on behalf of defendant Saddam Hussein.¹⁸⁷ The fourth witness stated that Abu Omar provided him a list of twenty-three names.¹⁸⁸ According to the witness, Abu Omar ordered him to claim to the IHT that the twenty-three people were still alive even though defendant Awad al-Bandar had ordered them executed.¹⁸⁹ The witness stated that he brought this list with him to the IHT and used it when testifying until such time as the Presiding Judge confiscated it and asked him whether the handwriting therein was his own.¹⁹⁰

After the investigation session concluded, each witness was provided with a statement that they reviewed, modified, and signed with the assistance of their attorney.¹⁹¹ The matter was then referred to the Al-Karkh criminal court for further investigation and prosecution.¹⁹² Each witness was photographed and examined for signs of mistreatment and released on bail.

The defense attorneys' response to the exposure of this potentially criminal conduct was to claim that the witnesses had been assaulted and detained incommunicado. This claim (like so many other unfounded claims of torture and abuse levied against the IHT throughout trial) was utterly false as the witnesses were detained in a location that permitted independent

¹⁸⁵ See *id.*; see also Transcript of Record at 22, *al-Dujail Trial*, (June 12, 2006) (No. 2) (on file with author) (declaring that the witness worked "with the Rafidain Security Contingent for six months from March till September").

¹⁸⁶ See Al-Mahkama al-Jina'iya al-'Iraqiya al-'Uliya [The Iraqi High Criminal Court], al-Dujail Opinion, available at <http://www.iraq-ihc.org/ar/doc/finalcour.pdf>, translated in Grotian Moment: The Saddam Hussein Trial Blog, English Translation of the Dujail Judgment, Dec. 2006, pt. 1, 13, <http://www.law.case.edu/saddamtrial/dujail/opinion.asp>.

¹⁸⁷ See *id.*

¹⁸⁸ Transcript of Record at 27–28, *al-Dujail Trial*, (June 12, 2006) (No. 2) (explaining that the witness stated that Ahmad Addoushi (a.k.a Abu Omar) had provided him the names and that "against every name there was a remark that this man is alive and well, and the other was executed after the Dujayl incident, or is that, he resides in Iran and the other died a natural death before the events").

¹⁸⁹ See *id.*

¹⁹⁰ See *id.*

¹⁹¹ See *id.* at 28.

¹⁹² Al-Mahkama al-Jina'iya al-'Iraqiya al-'Uliya [The Iraqi High Criminal Court], al-Dujail Opinion, available at <http://www.iraq-ihc.org/ar/doc/finalcour.pdf>, translated in Grotian Moment: The Saddam Hussein Trial Blog, English Translation of the Dujail Judgment, Dec. 2006, pt. 1, 13, <http://www.law.case.edu/saddamtrial/dujail/opinion.asp>.

monitoring and videotape of the entirety of their incarceration. More importantly, the investigative session against the four witnesses commenced only when (at the commencement of a perfunctory bail hearing that was supposed to take only minutes) one witness stated to IHT representatives that other witnesses were complicit in perjury and had threatened him harm upon release. Instead of torture, the chief prosecutor ordered a spaghetti dinner for the witnesses (since it quickly became apparent that the short bail hearing was transforming into a more lengthy affair) and simply told all present to treat each witness with respect. Upon release, each witness was again videotaped and asked whether they were mistreated. They all stated that they were treated fairly, transported back to the secure witness camp inside the International Zone whereupon they left Iraq.

In a testament to the IHT's professionalism, Judge Ra'ouf read each investigative statement in open court on June 12, 2006 to the defendants who had retained the implicated defense attorneys—thereby alerting the defendants about the conduct of their attorneys.¹⁹³ In spite of this, each defendant remained confident in their attorney's abilities, never requesting to change defense counsel or for a mistrial in view of their counsel's conduct.

As HRW acknowledges, the witness' confessions and events that led to these confessions "rais[ed] grave concerns about serious professional misconduct on the part of the implicated defense counsel."¹⁹⁴ Conduct such as this, as well as the release of names of participants in the IHT process on insurgent websites, such as www.albasrah.net, called into question the professionalism of certain members of the retained defense teams.¹⁹⁵ It also revealed the extent to which particular private defense attorneys were willing to compromise their integrity as part of their efforts to discredit the prosecution. Most importantly, this conduct greatly contributed to the breakdown of trust between the court itself and the private defense bar such that the court ceased to take private defense counsel seriously.

HRW's criticism that the IHT Defense Office attorneys were not robust in their questioning is also true.¹⁹⁶ Fortunately, the Defense Law Adviser worked increasingly close with the IHT Defense Office attorneys so that the level of cross-examination (although not perfect) improved during the course of the Ad-Dujayl trial and (as already noted) it is hoped that the Defense Law Adviser is able to impress upon the IHT Defense Office the need for increased professionalism through training, review of their work,

¹⁹³ See Transcript of Record at 21–29, *al-Dujail Trial*, (June 12, 2006) (No. 2).

¹⁹⁴ See HRW Report, *supra* note 8, at 71.

¹⁹⁵ See Al-Mahkama al-Jina'iyah al-'Iraqiyah al-'Uliyah [The Iraqi High Criminal Court], *al-Dujail Opinion*, available at <http://www.iraq-ihc.org/ar/doc/finalcour.pdf>, translated in Grotian Moment: The Saddam Hussein Trial Blog, English Translation of the Dujail Judgment, Dec. 2006, pt. 1, 26, <http://www.law.case.edu/saddamtrial/dujail/opinion.asp>.

¹⁹⁶ HRW Report, *supra* note 8, at 71–72.

and other measures that are ongoing. Notably, the one defendant acquitted of all charges, Mohammad Azzawi, was represented by an IHT Defense Office attorney throughout the course of the Ad-Dujayl trial.

E. Judicial Turnover and Judicial Temperament Negatively Impacted the Ad-Dujayl Trial

HRW's criticisms of the Ad-Dujayl trial because of the repeated turnover of sitting judges are accurate.¹⁹⁷ Judicial turnover occurred for many reasons including resignation, political interference, illness, and perceived conflicts of interest. This meant that, whenever a permanent judge was absent, the IHT was required to place an alternate judge (who had reviewed the Ad-Dujayl investigative dossier and who followed the proceedings each day via closed circuit television in the robing room of the IHT) on Trial Chamber 1.

This procedure initially permitted the trial to move forward without any prejudice to the defendants. This is so because the IHT had at least two alternate judges who were fully versed in the Ad-Dujayl trial. As judicial turn-over continued, the IHT president was forced to appoint new alternate judges (who had no experience with the trial) to sit in for judges who were not present. The impact of this judicial turn-over certainly impacted the course of the Ad-Dujayl trial in multiple ways and is a critical component of HRW's analysis that bears further study to ensure that similar problems do not arise with other trials before the IHT.

HRW also criticized the judicial demeanor of Judge Ra'ouf Abdul Rahman as undermining the "appearance of impartiality" of the Ad-Dujayl trial.¹⁹⁸ This criticism is unwarranted as Judge Ra'ouf's temperament did not impact the fairness of the Ad-Dujayl trial.

By way of background, Judge Ra'ouf Abdul Rahman was compelled to stand in for Judge Sa'eed al-Hamash after Judge Sa'eed was transferred to another judicial chamber as a result of interference in the IHT's activities by Iraq's Higher National Commission for De-Ba'athification (HNCD)¹⁹⁹ and after Judge Rizgar resigned because of public criticism

¹⁹⁷ *Id.* at 64–65.

¹⁹⁸ *Id.* at 66.

¹⁹⁹ *See supra* note 64 and accompanying text; *see also infra* notes 214–18 and accompanying text. The HNCD was established during the tenure of the Coalition Provisional Authority (CPA) and is charged with removing from public employment former members of the Ba'ath Party who held the rank of Regional Command Member, Branch Member, Section Member, or Group Member. *See* Coalition Provisional Authority Memorandum No. 7, CPA/MEM/4 Nov 2003/7, § 1, *available at* http://www.iraqcoalition.org/regulations/20031104_CPAMEM0_7_Delegation_of_Authority.pdf (last visited Apr. 24, 2007); *see also* CPA/ORD/16 May 2003/01, § 1(2), *available at* http://www.iraqcoalition.org/regulations/20030516_CPAORD_1_De-Ba_athification_of_Iraqi_Society_.pdf (last visited Apr. 24, 2007). The

about his complacent demeanor towards the defendants.²⁰⁰ At this time, the defendants and defense counsel themselves were proving difficult to control and, almost daily, attempted to hijack the courtroom with political speeches, threats of violence towards people in the courtroom, boycott demands, and other types of disruptive behavior. Thus, Judge Ra'ouf stepped into a volatile courtroom in which the defendants were unruly and in which any appearance of leniency towards the defendants resulted in stinging public criticism.

On the very first day that Judge Ra'ouf sat on the Ad-Dujayl trial, he attempted to exert a level of control over the courtroom that Judge Rizgar had failed to provide.²⁰¹ When court convened that day, the defendants and defense counsel hurled insults at Judge Ra'ouf and refused to obey his orders. In accordance with Iraqi law, Judge Ra'ouf simply ejected the defendants and defense attorneys who were recalcitrant, appointed substitute counsel, and moved forward with trial.²⁰² The message this sent to all involved with the trial was clear—the court was in control and would not tolerate anything other than the careful weighing of evidence.

As the defendants and defense counsel intermittently misbehaved or engaged in periodic outbursts, Judge Ra'ouf usually (but not always) erred on the side of caution and restraint. For example, on one notable day of trial, Barzan al-Tikriti appeared wearing only his pajamas.²⁰³ He proceeded to insult the court by calling Judge Ra'ouf (whose name means kindness in Arabic) neither “merciful nor forgiving.”²⁰⁴ He then refused to recognize the court's authority and stubbornly rose from his seat, sat on the courtroom floor with his back to the judge, and remained there over the objection of the prosecution and other participants in the court.²⁰⁵ Judge Ra'ouf (instead

Iraqi Government ratified the creation of the HNCD and embedded its operation in Iraq's Constitution. *See* IRAQI CONST. art. 135 (stating that the HNCD “shall continue its function as an independent commission, in coordination with the judicial authority and the executive institutions within the framework of the laws regulating its functions”).

²⁰⁰ *See supra* note 64 and accompanying text; *see also infra* note 227 and accompanying text.

²⁰¹ *See* Worth, *supra* note 65, at A13.

²⁰² *See e.g., id.* (stating that “the new chief judge order[ed] all four lead defendants removed from the courtroom—one of them kicking and screaming as he went”); *see also* Law on Criminal Proceedings With Amendments, No. 23, ¶ 158 (1971), *available at* http://www.law.case.edu/saddamtrial/documents/Iraqi_Criminal_Procedure_Code.pdf (stating that the “defendant may not be removed from the court room . . . unless he violates the rules of the court, in which case procedures continue as if he were present”).

²⁰³ *See* Hamza Hendawi, *Saddam Back in Court, Lashes out at President*, A.P., Feb. 13, 2006 (observing that Barzan al-Tikriti attended court in a “white undershirt and long, brown underwear”).

²⁰⁴ Transcript of Record at 2, *al-Dujail Trial*, (Feb. 13, 2006) (No. 1).

²⁰⁵ Robert F. Worth, *Prosecutors of Hussein Press Charges of Execution*, N.Y. TIMES, Feb. 14, 2006, at A8 (stating that Barzan al-Tikriti “was dragged out kicking and screaming after

of growing irate and ejecting Barzan al-Tikriti, as would have occurred in almost any other court) simply proceeded forward with the trial with the defendant's back to him.²⁰⁶

This patience and professionalism was reflected at other points in the trial—such as when the defense counsel (as already described) repeatedly revised witness lists during the course of the defense case in violation of the IHT Rules of Evidence and Procedure.²⁰⁷ For approximately two weeks, Judge Ra'ouf continued to accept these revised witness lists and whatever witnesses the defense brought to court without censure when he could have (according to law) simply halted the defense case unilaterally as a result of the defense attorneys' failure to comply with the rules.²⁰⁸ Of course, there were moments in which Judge Ra'ouf did lose his temper and respond to insults (either actual or perceived) hurled at him from the defendants or the defense bar, but these moments were the exception and not the general rule.

HRW criticizes Judge Ra'ouf's behavior as erratic, using as one example an event that occurred at trial on May 24, 2006.²⁰⁹ On that day, Judge Ra'ouf refused to allow defense lawyers to direct any questions to defense witness Tariq Aziz.²¹⁰ Judge Ra'ouf's initial reason for doing this, stemmed from his anger over the fact that each of the defendants had already questioned Tariq Aziz and provided long speeches that intermittently focused on evidence before the court while also insulting it. Thus, when the defense attorneys wished to continue questioning Tariq Aziz, Judge Ra'ouf cut them off stating:

Your defense is mainly building on insults to the members of the court, and defaming the court. You do not have a defense plan. Defamation of

his last courtroom appearance, complained repeatedly about his treatment, and at one point sat down on the floor, facing away from the judge, and appeared to fall asleep”).

²⁰⁶ *See id.*

²⁰⁷ *See supra* note 130 and accompanying text.

²⁰⁸ *See* IHT R. EVID. & P. 41(1)(D); *see also supra* note 130 and accompanying text.

²⁰⁹ HRW Report, *supra* note 8, at 67.

²¹⁰ Tariq Aziz provided testimony justifying Saddam Hussein's reprisals against the civilian population of Ad-Dujayl as a legitimate response to the failed assassination attempt against him in 1982. *See* John F. Burns, *Hussein's Former Envoy Gushes with Adulation on the Witness Stand*, N.Y. TIMES, May 25, 2006, at A1, A8. Tariq Aziz also stated that he dined frequently with Barzan al-Tikriti “[s]o if he was busy for a few days, killing and slaughtering people in this case, he would have told me. Since he didn't, it's clear, he cannot have been involved.” *Id.* This testimony was largely irrelevant, and Tariq Aziz admitted that he had no official or personal involvement with the events which took place in Ad-Dujayl after the failed assassination attempt. *See id.*

the court and its members [is] your only plan of defense. You have been informed that the court will not give [you] more chances to ridicule [it].²¹¹

When Judge Ra'ouf adjourned for lunch, he immediately reflected on this decision, reconsidered, and permitted the defense counsel to question Tariq Aziz, despite the fact that Judge Ra'ouf felt the evidence Tariq Aziz had presented was mostly irrelevant and the defendants (who had already questioned Tariq Aziz) had insulted the court and used their time to speak about matters extraneous to the Ad-Dujayl case. This willingness to reconsider rulings, with a view towards getting them right, should be applauded rather than criticized.

F. Trial Chamber 1 Lacked Political Independence

HRW alleges that various organs of the Iraqi government interfered with the ongoing Ad-Dujayl trial such that the court's independence was compromised.²¹² This charge is the most serious charge levied against the entire IHT process and has substantial merit. The first type of interference catalogued in the HRW Report came about because of the Iraqi government's ability to utilize loopholes in the IHT Statute to inject itself directly into the IHT process. The second type of interference was indirect and involved members of the Iraqi government, or more generally, Iraq's civil society publicly criticizing the IHT process, individual judges involved with the Ad-Dujayl trial, or the defendants. This section of the article will address each of these types of interference.

1. Political Interference

An example of this first type of interference can be found in the manner in which Iraq's Higher National Commission for De-Ba'athification (HNCD)²¹³ utilized Article 33 (which prohibits any members of Iraq's former Ba'ath Party from serving on the Tribunal) of the IHT Statute to replace sitting judges on the IHT.²¹⁴ The HNCD repeatedly levied accusations of Ba'ath Party membership against multiple judges and prosecutors without providing any evidence to the accused and despite the fact that the HNCD lacked jurisdiction to enforce Article 33 against the IHT.²¹⁵ Although, it was

²¹¹ Transcript of Record at 81, *al-Dujail Trial*, (May 24, 2006) (No. 1).

²¹² See HRW Report, *supra* note 8, at 38.

²¹³ See *supra* note 199.

²¹⁴ See Statute of the Iraqi High Tribunal art. 33 ("No person who was previously a member of the disbanded Ba'ath Party may be appointed as a judge, investigative Judge, public prosecutor, an employee or any of the personnel of the Court.").

never completely clear who was directing the activities of the HNCD, this “committee” was obviously a tool of some person, persons, or group to interfere with the IHT. A notable target of the HNCD during the Ad-Dujayl trial was Judge Sa’eed al Hamash—the original Deputy Presiding Judge of Trial Chamber 1.

In a troubling display of the HNCD’s ability to use Article 33 to impact the Ad-Dujayl trial, Judge Sa’eed was reassigned to an alternate trial chamber upon the IHT’s receipt of allegations of Ba’ath Party membership from the HNCD.²¹⁶ The timing of these HNCD allegations were disturbing in that they were levied against Judge Sa’eed two days after he became the acting presiding judge (after the resignation of Judge Rizgar) of Trial Chamber 1 and after more than two years of service on the court.²¹⁷ And it was only because of the HNCD’s interference with the IHT process that Judge Ra’ouf Abdul Rahman became the presiding judge of Trial Chamber 1.²¹⁸

The Iraqi government also demonstrated that Article 4(4) of the IHT Statute could be used as a tool to intervene in the IHT process. Article 4(4) permits the “Presidency Council in accordance with a proposal from the Council of Ministers . . . [to] transfer Judges and Public Prosecutors from the Court to the Higher Judicial Council for any reason.”²¹⁹ HRW’s Report notes that this provision was used to remove the presiding judge of the Anfal trial (as opposed to the Ad-Dujayl trial) for comments he made on September 14, 2006 and beforehand that executive branch officials and others such as the IHT president and the chief prosecutor of the Anfal trial²²⁰

²¹⁵ Although the HNCD is generally charged with removing the upper four levels of the Ba’ath Party from public employment in Iraq; it has no jurisdiction over the IHT. *See id.* The reason for this is that the IHT is an independent entity within the Iraqi government that is not subordinate to any other government entities. *See IRAQI CONST.* art. 131 (stating that the IHT will “continue its duties as an independent judicial body, in examining the crimes of the defunct dictatorial regime and its symbols”); *see also* Statute of the Iraqi High Tribunal art. 1(1) (stating that the IHT enjoys complete independence from the Iraqi government). Because the IHT is independent, it has its own self-contained de-ba’athification provision in Article 33 which the IHT itself is obligated to police. *See id.* art. 33. Although the HNCD has acknowledged in writing that it lacks jurisdiction to remove judges and prosecutors from the IHT, it sometimes files charges against members of the IHT. *See supra* note 64.

²¹⁶ *See supra* note 64.

²¹⁷ *See id.*

²¹⁸ *See id.*

²¹⁹ Statute of the Iraqi High Tribunal art. 4(4).

²²⁰ For example, on September 13, 2006, the chief prosecutor of the Anfal trial requested that Judge Abdullah resign because of alleged bias towards Saddam Hussein. *Timeline: Anfal Trial*, BBC NEWS, Jan. 8, 2007, http://news.bbc.co.uk/2/hi/middle_east/5272224.stm (last visited Apr. 24, 2007). The next day, the Chief Judge responded to a statement from Saddam Hussein by telling him that he “was not a dictator.” *Id.*

interpreted as demonstrating leniency towards Saddam Hussein.²²¹ The involvement of the executive branch in the removal of Judge Abdullah, which is documented in HRW's Report, is yet another example of how politicians used poorly drafted provisions of the IHT Statute to interfere with the IHT process and to fundamentally tamper with ongoing judicial proceedings.

The impact of such tampering directly altered the course of both the Ad-Dujayl and Anfal trials in ways that are difficult to ascertain and must not be countenanced. In order to ensure that such interference does not continue to occur, the Iraqi National Assembly should amend Article 33 and Article 4(4) of the IHT Statute. More specifically, the Iraqi National Assembly should alter Article 33 of the IHT Statute so that it prohibits only the four highest levels of the Ba'ath Party from serving on the IHT.²²² Modifying the IHT Statute in this manner will eliminate the disparity between the de-Ba'athification provisions in the IHT Statute (which prohibits any members of the Ba'ath Party from serving on the IHT) and the lower standard contained in Iraq's national de-Ba'athification law (which prohibits only the upper four levels of the Ba'ath party from maintaining a position in Iraq's regular government). This, in turn, will remove any threat of de-Ba'athification from either the IHT itself or the HNCD against long-standing and respected members of Iraq's judiciary serving on the IHT who may have joined the Ba'ath Party as a requirement to enter Iraq's judiciary but never actively pursued Ba'ath ideals or goals during their career.

Likewise, Iraq's National Assembly should modify Article 4(4) of the IHT Statute to clarify the role of the Council of Ministers and Presidency Council in transferring judges from the IHT to the Supreme Judicial Council. As currently drafted, Article 4(4) can be read in two ways.

One may read Article 4(4) in conjunction with Article 4(5) to conclude that Article 4(4) is simply an administrative mechanism by which the Council of Ministers and Presidency Council can remove judges for reasons that do not relate to performance. The reason for this is that Article 4(5) of the IHT Statute²²³—as opposed to Article 4(4) which contains no such language—is the only provision that sets forth parameters to remove a judge or prosecutor for misconduct. If Article 4(5) is the only provision that permits a judge to be removed for misconduct or performance related reasons, then Article 4(4) cannot be used to remove a judge for performance related reasons. If one accepts this line of interpretation then Article 4(4), no matter

²²¹ HRW Report, *supra* note 8, at 40; *see also* Paul von Zielbauer, *Judge Tells Hussein, 'You are Not a Dictator'*, N.Y. TIMES, Sept. 15, 2006, at A6; Richard A. Ooppel Jr., *After Remark, Judge in Trial of Hussein Loses His Post*, N.Y. TIMES, Sept. 20, 2006, at A10.

²²² *See supra* note 215.

²²³ *See* Statute of the Iraqi High Tribunal art. 4(5) (stating that “[t]he term of service of a judge or prosecutor . . . shall end . . . [i]f he is convicted of a non-political felony. If he presents false information. [Or] [i]f he fails to perform his duties without a legitimate reason.”)

how broad its language, cannot be read to grant the Council of Ministers and Presidency Council the power to remove a judge or prosecutor for cause.

Unfortunately, the Iraqi government continues to reject this view. The Iraqi government interprets Article 4(4) as permitting it to remove judges for any reason whatsoever—including misconduct or poor performance. This position renders Article 4(5) superfluous and violates a basic canon of statutory interpretation which requires one to interpret all provisions in a statute so that each provision has meaning. Even worse is the broad language contained in Article (4) that the Iraqi government relies upon to support its view that it can remove any IHT judge or prosecutor for any reason whatsoever. Article 4(4) states expressly that the Council of Ministers and Presidency Council may transfer judges and prosecutors from the IHT “for any reason.”²²⁴ This language certainly grants the Council of Ministers and Presidency Council a colorable claim to exert power over the IHT and to remove sitting judges (even during trial) citing poor performance if political aims so dictate.

Such power is a direct threat to the independence of any member of the IHT—particularly in light of how the Iraqi government ignored Article 4(5) and utilized Article 4(4) to remove Judge Abdullah from the Anfal trial²²⁵ and in light of the Iraqi government’s expressed desire for the IHT to treat many defendants before the IHT harshly.²²⁶ To ensure that the Iraqi government is stripped of the power to wield Article 4(4) in a manner that compromises further the integrity of the IHT, the National Assembly of Iraq should amend it to state something to the effect that the “Presidency Council, upon a recommendation from the Council of Ministers, may transfer judges and prosecutors from the tribunal to the Supreme Judicial Council, only upon resignation from the IHT, dissolution of the IHT, or termination from the IHT in accordance with Article 4(5).”

2. Indirect Political Interference

The second type of interference catalogued in HRW’s Report is indirect in nature and consequently more difficult to remedy. It pertains to the issuance of public statements by members of Iraq’s government to the media about the conduct of trial and the demeanor of those participating in the IHT process. Judge Rizgar Amin (the original presiding judge of the Ad-Dujayl trial) resigned from the Ad-Dujayl trial because of stinging criticism

²²⁴ See *id.* art. 4(4).

²²⁵ See *supra* notes 220–21 and accompanying text.

²²⁶ See *infra* notes 232–34 and accompanying text.

he received from various sections of Iraq's government in the media.²²⁷ Iraq's then Minister of Justice called Judge Rizgar incompetent and accused him of making multiple errors during the course of the Ad-Dujayl trial.²²⁸ A legal committee loyal to Muqtada al-Sadr²²⁹ issued at least one letter directly to Judge Rizgar Amin accusing him of failing to manage the IHT in accordance with law and demanding that he resign.²³⁰ And representatives from the prime minister's office and various members of Iraq's parliament denounced Judge Rizgar as weak and inept.²³¹ The then-president of the IHT and other sectors of Iraq's government compounded these pressures further by failing to issue any statements of support in favor of Judge

²²⁷ See Robert F. Worth, *Fed Up Judge in Hussein Trial Offers to Quit*, N.Y. TIMES, Jan. 15, 2006, at A6 (stating that Judge Rizgar Amin submitted his letter of resignation as chief judge in Saddam Hussein's trial because he was frustrated with the IHT's failure to defend him against widespread criticism); see also Nazhad Khasraw Hawramany, *Iraqi Kurdistan: Exclusive Interview with Judge Rizgar Hama Amin* (Sept. 11, 2006) <http://iraqikurdistan.blogspot.com/2006/09/exclusive-interview-with-judge-rizgar.html> (stating that Judge Rizgar resigned mainly because of the "unprecedented harsh criticism" levied against him by various Shiite politicians and Shiite media outlets).

²²⁸ See HRW Report, *supra* note 8, at 41.

²²⁹ Muqtada al-Sadr is a young Shiite cleric who controls one of the largest and most violent militias in Iraq—Jaysh al-Mahdi. See International Crisis Group, *Iraq's Muqtada Al-Sadr: Spoiler Stabiliser?*, Middle East Report N°55, Jul. 11, 2006, at i; see also John F. Burns & Sabrina Tavernise, *In Baghdad, Bush Policy Is Met with Resentment*, N.Y. TIMES, Jan. 12, 2007, at A1 (describing Jaysh al-Mahdi as the "most powerful of the Shiite militias"). In April of 2003, he allegedly ordered the murder of a respected Shiite cleric, Abdul Majid al-Khoei, who had returned to Iraq to assist with reconstruction. See Robert F. Worth & Edward Wong, *Younger Clerics Showing Power in Iraq's Unrest*, N.Y. TIMES, Feb. 26, 2006, at A1, A10. In response, an Iraqi judge issued a warrant for Muqtada al-Sadr's arrest but the warrant was never executed. See *id.*; see also John F. Burns, *U.S. Seeks Arrest of Shiite Cleric*, N.Y. TIMES, Apr. 6, 2004, at A1. In April of 2004, fighting broke out between Coalition Forces and followers of Muqtada al-Sadr shortly after Ambassador L. Paul Bremer shut down a newspaper that loyalists of Sadr published. See Jeffrey Gettleman, *At Word of U.S. Foray, a Baghdad Militia Erupts*, N.Y. TIMES, Apr. 7, 2004, at A1; see International Crisis Group, *supra* note 229, at 11. The newspaper was accused of inciting violence. See Jeffrey Gettleman, *A Young Radical's Anti-U.S. Wrath is Unleashed*, N.Y. TIMES, Apr. 5, 2006, at A1, A8 ("Last week, the American authorities shut down Mr. Sadr's newspaper, Al Hawza, after they accused it of inciting violence."). After a brief truce, fighting again broke out between Coalition Forces and Muqtada al-Sadr in August of 2004. See John F. Burns, *Iraq Chief Gives 'Final Warning' to Rebel Cleric*, N.Y. TIMES, Aug. 20, 2004, at A1 (describing two weeks of battles between Coalition Forces and forces loyal to Muqtada al-Sadr). After intense combat, primarily centered in Najaf, Muqtada al-Sadr signed a ceasefire and joined Iraq's political process. See International Crisis Group, *supra* note 229, at 14.

²³⁰ See *Iraq Tries to Convince Saddam Judge to Stay*, Reuters, Jan. 15, 2006 (stating the Judge Rizgar Amin was reluctant to remain on the IHT because Shiite leaders had criticized him for being "soft" on Saddam in court and that "the last straw . . . was a letter criticizing his handling of the trial from radical Shiite leader Muqtada al-Sadr").

²³¹ See HRW Report, *supra* note 8, at 41.

Rizgar's actions or, more generally, to issue any public rebuke to the Iraqi government for attempting to influence Judge Rizgar's judicial demeanor.

Equally correct is HRW's criticism that senior government officials ran "the risk of appearing to or actually seeking to influence the outcome of trial" by issuing public statements that derided the defendants themselves.²³² The catalogue of public statements listed in the HRW Report is both accurate and unsettling.²³³ Whether statements from high ranking government officials to the effect that "Saddam Hussein is a war criminal and he deserves to be executed 20 times a day for his crimes against humanity" or that Saddam Hussein "kill[ed] 64 members of my family [and] deserves 64 executions"²³⁴ directly impacted the judicial process is difficult to gauge. At a minimum, however, it certainly contributed to an environment in which the appearance of a fair trial and the defendants' guarantee of the right to be presumed innocent were compromised. The Iraqi government should refrain from making such pronouncements about the guilt or innocence of a particular defendant or the demeanor of members of the IHT's judiciary during the course of trials so that judges are free to accord each defendant the full panoply of rights given to someone presumed innocent until proven guilty and so that the fairness of trials before the IHT is better protected.

IV. SUBSTANTIVE CONCERNS WITH THE IHT

HRW asserts that the IHT failed to provide any clear evidence "concerning the structure, internal organization, and past practice of the Ba'athist government security and political apparatuses . . . to fill the gaps and show the links between the 'crime-base' and the leadership" of the former regime.²³⁵ HRW's concern that the IHT could not adequately determine each defendant's liability without introducing evidence about the legal and practical authority of the various security organizations and political institutions implicated in the events at Ad-Dujayl, the structures of command and internal organizations of these institutions, their internal reporting lines, general context of human rights practices and use of violence, and the nature of the relationship between the former regime's political institutions (such as the Office of the President and the Revolutionary Command Council) and legal institutions (such as the Revolutionary Command Council Court)²³⁶ is not entirely correct.

Included in the investigative dossier and introduced at trial were several statements from various witnesses such as the former head of the

²³² *See id.* at 42.

²³³ *Id.* at 42-43.

²³⁴ *Id.* at 42, n.159.

²³⁵ *Id.* at 78.

²³⁶ *See id.* at 80-81.

Presidential Diwan, Ahmed Hussein Samarra'i,²³⁷ who provided detailed information about the relationship between the Presidential Diwan and the Revolutionary Command Council Court and Hassan Al-Obeidi, a former administrative head of the Mukhabarrat,²³⁸ who described the investigative powers of the intelligence head and the nature of the intelligence agency's relationship with Iraq's judicial and legal departments. This testimony, although helpful in providing some information about the workings of the former regime, was also supplemented by statements of the defendants themselves in which they acknowledged having directly ordered subordinates to engage in mass arrests or the destruction of Ad-Dujayl's orchards. In addition, the IHT relied upon legal texts (cited in trial chamber and appellate chamber opinions) which set forth the authorities of various agencies in order to discern internal reporting lines and to impose liability on various defendants for their actions.²³⁹

The reality, however, is that the Ad-Dujayl trial did not exhaustively examine the overall bureaucracy of the former regime or explain how the specific components of the regime (or the defendants therein) carried out the widespread and systematic attack against the civilian population of Ad-Dujayl. Indeed, a substantive criticism of the Ad-Dujayl trial judgment can be found in the manner in which the trial chamber imposed liability on three local residents from Ad-Dujayl for the crimes against humanity of murder and torture despite any evidence indicating that they directly engaged in these activities.

For example, during the course of trial, it became clear that Mizhir Roweed had actively identified individuals to the Mukhabarrat for interrogation, arrest, and imprisonment after the failed assassination attempt against Saddam Hussein.²⁴⁰ This alone would have been enough to convict Mizhir Roweed for direct participation in the crime against humanity of imprisonment provided that he knew that his actions in pointing out indi-

²³⁷ See Worth, *supra* note 205.

²³⁸ See *id.*

²³⁹ See, e.g., al-Hay'a al-Tamyiziya, al-Mahkama al-Jina'iya al-'Iraqiya al-'Uliya [Cassation Panel, Iraqi High Criminal Court], al-Dujail Final Opinion, *available at* <http://www.iraq-ihc.org/ar/doc/ihcdf.pdf>, *translated in* Grotian Moment: The Saddam Hussein Trial Blog, Unofficial English Translation of the Dujail Trial IHT Appellate Chamber Opinion, 16 (Dec. 26, 2006), http://www.law.case.edu/saddamtrial/documents/20070103_dujail_appellate_chamber_opinion.pdf (citing, in part, Revolutionary Command Council Decision No. 1563, which outlined the legal authorities of the Popular Army, the Popular Army's chain of command, and the authorities of its head, to justify increasing the sentence that the trial chamber originally issued against Taha Yaseen Ramadan).

²⁴⁰ See Al-Mahkama al-Jina'iya al-'Iraqiya al-'Uliya [The Iraqi High Criminal Court], al-Dujail Opinion, *available at* <http://www.iraq-ihc.org/ar/doc/finalcour.pdf>, *translated in* Grotian Moment: The Saddam Hussein Trial Blog, English Translation of the Dujail Judgment, Dec. 2006, pt. 6, 42-44, <http://www.law.case.edu/saddamtrial/dujail/opinion.asp>.

viduals for arrest were part of the regime's deliberate attack against the town of Ad-Dujayl.

But Trial Chamber 1 went further. It convicted Mizhir Roweed and two other similarly situated defendants, in part, for crimes against humanity of murder and torture even though their actions had not directly harmed anyone from Ad-Dujayl.²⁴¹ In imposing liability, the trial chamber opined simply that it must have been foreseeable to Mizhir Roweed (as a result of his witnessing the attacks on the town immediately after the failed assassination attempt and "in light of the control of the former Ba'ath regime of the authority in Iraq, and especially if the accusation is attempting to kill the head of the party") that the regime would torture and kill those whom he helped arrest.²⁴² This may have been true but the facts needed to infer such a *mens rea* on the part of Mizhir Roweed could have been supplied with significant expert testimony and other data that described how the former regime's security apparatus functioned (including the regime's widespread use of murder and torture as a tool to maintain security) and the role of informants in that regime. Absent such testimony and its detailed analysis by Trial Chamber 1, the conviction of Mizhir Roweed and similarly situated defendants for the crime against humanity of murder and torture remains legally tenuous.

Whether the IHT introduces more evidence of this type in the Anfal trial is speculative, but the referral file does contain significant information with regard to command and control of various units responsible for the atrocities there. And the IHT would do much in terms of increasing the merit of its cases if it devotes more resources towards the development of such evidence.

V. CONCLUSION

The purpose of this article is to correct multiple factual and legal inaccuracies in HRW's Report so that it can improve, like the IHT, in its critically important work. Without independent monitors holding the Iraqi government and IHT to the standards applicable to any functioning judiciary, a vital aspect of the IHT process would be lost. Moreover, the fact that HRW's Report contains multiple factual and legal errors does not necessarily undermine the Report's overall conclusions with regard to changes that should be made to the IHT process or with regard to whether the IHT process met international standards. In fact, the author agrees with many of HRW's criticisms and, where this has been the case, has noted in the text of the article.

²⁴¹ See *id.* at 51–52.

²⁴² See *id.* at 43.

As to whether the IHT process ultimately comported with international standards, several important and highly troubling developments have arisen since the Report's issuance that may further undermine any claim that the IHT process was fair—(1) the appellate chamber's rapid affirmation of the trial chamber decision; (2) the appellate chamber's decision to increase the sentence of Taha Yaseen Ramadan from life to death; (3) the Iraqi government's equally rapid decision to implement the death sentence against Saddam Hussein, Barzan al-Tikriti, Awad al-Bandar, and Taha Yaseen Ramadan; and (4) the grossly sectarian manner in which Saddam Hussein's execution was implemented. Whether these events overshadow the difficult work of all who hoped and sacrificed for a fair and transparent Ad-Dujayl trial is a difficult question to ask. It is also a question that is unlikely to be answered fully until a more complete record of all that transpired before the IHT is open for historical examination.