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The Poisoned Chalice

A Human Rights Watch Briefing Paper on the Decision of the Iraqi High Tribunal in the Dujail Case

I. Introduction

On December 30, 2006, the government of Iraq put former President Saddam Hussein to death by hanging, in an execution widely condemned for its sectarian overtones and disorderly implementation.[1]

The crimes for which the government executed Hussein relate to the aftermath of an attempt on his life during his visit to the town of Dujail on July 8, 1982. The prosecution claimed that, soon after the assassination attempt and in retaliation for it, Dujail was the object of a "widespread and systematic attack" in which security forces detained over 600 men, women, and children, and tortured an unspecified number. After a year of detention in Baghdad, the authorities transferred approximately 400 detainees to internal exile in a remote part of southern Iraq and referred 148 men and boys to trial before the Revolutionary Court. The court convicted and sentenced them to death in 1984, after a summary trial. Of these 148, as many as 46 died in detention between 1982 and 1984. The government executed most of those who survived detention in 1985. The authorities seized large swathes of agricultural property in Dujail and bulldozed homes.

Saddam Hussein was executed pursuant to a death sentence imposed by the First Trial Chamber of the Iraqi High Tribunal (IHT) on November 5, 2006, after it found him guilty of crimes against humanity against the population of Dujail.[2] The IHT's Appeals Chamber upheld the conviction and sentence on December 26, 2006.[3]

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[1] The ratification of the death sentence was also attended by legal irregularities. Article 72(h) of the constitution of Iraq requires that the president ratify death sentences before they are implemented. The government of Iraq proceeded with the execution of Saddam Hussein without obtaining the ratification of the president. Instead, the death warrants were signed by Prime Minister Nouri al-Maliki, who has no constitutional authority to do so.

[2] For an overview of the structure and jurisdiction of the Iraqi High Tribunal, and background on its creation, see Human Rights Watch, *The Former Iraqi Government on Trial: A Human Rights Watch Briefing Paper*, October 16, 2005, http://hrw.org/backgrounder/mena/iraq1005/iraq1005.pdf, pp. 2-6.

[3] When the First Trial Chamber announced its verdict on November 5, 2006, the written reasons for judgment were not made available to the defendants or the public. The written reasons would not be made available until November 22, 17 days after the verdict was announced and thus only 13 days before the expiry of the 30-day time limit for the lodging of appeals under Iraqi law (Iraqi Code of Criminal Procedure, Law No. 23 of 1971, art. 252). The court never explained the over two-week delay in the provision of the judgment, but it appears to have been due to the fact that the written judgment was not completed at the time the verdict was announced.

Also convicted and sentenced to death in the same case were Saddam Hussein's half brother Barzan al-Tikriti and former Chief Judge of the Revolutionary Court 'Awwad al-Bandar.[4] Their convictions and sentences were similarly upheld by the Appeals Chamber. Former Vice-President Taha Yassin Ramadan was initially sentenced to life imprisonment, but was later sentenced to death after the Appeals Chamber remitted his sentence to the trial chamber for more severe punishment; the trial chamber complied and imposed the death sentence, without giving further reasons.[5] Al-Tikriti and al-Bandar were executed on January 15, 2007, in a procedure that was marred by the apparently inadvertent decapitation of al-Tikriti, and Ramadan was executed on March 19. Three lower-level defendants[6] were convicted of aiding and abetting crimes against humanity and sentenced to 15 years' imprisonment each. One defendant, Muhammad 'Azzawi, was acquitted at the request of the prosecution.

The executions, and the controversy surrounding them, marked the conclusion of a criminal proceeding that failed to ensure the essential fair trial guarantees provided for in international human rights law. In a lengthy report issued in November 2006,[7] Human Rights Watch documented deep institutional dysfunction at the IHT and fundamental procedural flaws in the Dujail trial, including:

When the judgment was released on November 22, 2006, it ran to approximately 300 pages in Arabic. The Appeals Chamber decision released on December 26, 2006, was 17 pages in length.

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

[5] The Appeals Chamber's decision to demand the death penalty against Taha Yassin Ramadan was not justified by reasons of any kind, and the reconstituted trial chamber that subsequently imposed the death penalty against Ramadan similarly did not provide reasons. The reconstituted trial chamber imposed the death penalty after a brief hearing on February 12, 2007, and addressed neither submissions made by the defense nor an *amicus curiae* submission against the death penalty filed by the United Nations High Commissioner for Human Rights.

[6] 'Abdullah Kadhim Ruwayid, Mizher 'Abdullah Kadhim Ruwayid and 'Ali Dayeh 'Ali al-Zubaidi.

[7] Human Rights Watch, *Judging Dujail: The First Trial Before the Iraqi High Tribunal*, vol. 18, no.9 (E), November 2006, http://hrw.org/reports/2006/iraq1106/. The report was based on extensive observation of trial proceedings by two Human Rights Watch researchers and two researchers from the International Center for Transitional Justice (ICTJ). Human Rights Watch researchers also conducted over three dozen interviews with key actors in the tribunal, including prosecutors, judges, defense lawyers, and administrators. Human Rights Watch researchers reviewed the dossier of evidence submitted by the investigative judge to the trial chamber, and examined the statements given by the defendants to the investigative judge.

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

In addition, Human Rights Watch concluded that the substantive case presented by the prosecution and investigative judges suffered from gaps that indicated an inadequate understanding of the elements of proof required to establish individual criminal responsibility under international criminal law.

Human Rights Watch's interest in the fairness of the proceedings stems from its commitment to justice for the victims of grave human rights violations under the former Ba'thist government. Human Rights Watch has long demanded the prosecution of senior figures in the former government, including Saddam Hussein, and has documented some of the worst atrocities committed under the former government.[8] The first trial was an unprecedented opportunity to begin the process of creating a historical record concerning some of the worst cases of human rights violations, and to initiate a methodical accounting of the policies and decisions that gave rise to these crimes. But in order for this record to be credible, and to be able to refute the arguments of those who in the future might deny the crimes or individual responsibility of former officials, the IHT had to ensure the fairness and impartiality of its proceedings and judgments. Trials that meet international human rights standards of fairness will be more likely to ventilate and verify the historical facts at issue, contribute to public recognition of the experiences of victims of different religious groups and ethnicities, and set a more stable foundation for democratic

[8] See, for example, Middle East Watch (now Human Rights Watch/Middle East), *Genocide in Iraq: The Anfal Campaign Against the Kurds* (New York: Human Rights Watch, 1993); Middle East Watch, *Endless Torment: The 1991 Uprising in Iraq and its Aftermath* (New York: Human Rights Watch, 1992); Human Rights Watch/Middle East, *Iraq's Crime of Genocide: The Anfal Campaign Against the Kurds* (New Haven: Yale University Press, 1994).

accountability after periods of conflict or repression. The necessity of fairness and credibility in the proceedings and judgment was made all the more pressing by the intensifying polarization and sectarianism of Iraqi politics, after the beginning of the trial in October 2005.

Regrettably, the proceedings in the Dujail case failed to meet this legal and historical test. The serious procedural flaws that Human Rights Watch documented in the Dujail trial cast doubt on the soundness on the trial chamber's verdict. Moreover, the implementation of death sentences after such an unfair trial is indefensible, as well as a violation of the right to life guaranteed by article 6 of the International Covenant on Civil and Political Rights.[9] The hope that the trial might have served as a model of impartial justice for a "new Iraq," by upholding international human rights law and enforcing international criminal law, remains unfulfilled.

This briefing paper completes Human Rights Watch's scrutiny of the Dujail proceedings. The paper reviews the written judgments of both the First Trial Chamber and the Appeals Chamber, with a view to evaluating the application of and compliance with the international criminal legal standards it was mandated to enforce. While the IHT is constituted as an Iraqi court, its statute mandates it to interpret offenses defined in contemporary international criminal law—such as crimes against humanity, war crimes, and genocide.[10] The defendants in the Dujail case were uniformly charged with crimes against humanity rather than offenses drawn from domestic Iraqi law. Thus, whether the international criminal legal principles were appropriately understood and applied, and whether the requisite evidentiary standard required under international law was met, are crucial to the soundness of the court's verdict. On this depends the ultimate determination of whether the court can be a vehicle for a true testament to the appalling crimes that occurred, or rather, in the long run will fail to do the victims justice.

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[9] International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, art. 6. Iraq ratified the ICCPR on January 25, 1971. See also UN Human Rights Committee, Reid v. Jamaica, CCPR/C/39/D/250/1987, July 20, 1990, http://www1.umn.edu/humanrts/undocs/session39/250-1987.html (accessed May 22, 2007), para. 11.5.

[10] Law of the Iraqi High Tribunal (IHT Statute), *Official Gazette of the Republic of Iraq*, No. 4006, October 18, 2005, English translation by the International Center for Transitional Justice, http://www.ictj.org/static/MENA/Iraq/iraq.statute.engtrans.pdf, arts. 1(2), 11-13. The IHT Statute adopts the definitions of these crimes from the Rome Statute of the International Criminal Court. See Rome Statute of the International Criminal Court (Rome Statute), U.N. Doc. A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, arts. 6-8.

Based on its review of the decision,[11] and deep familiarity with the dossier of evidence and the conduct of the case, Human Rights Watch concludes that the trial judgment made substantial factual and legal errors that open the basis of the convictions to serious question in all but one case.[12] Moreover, in the judgment the evidentiary basis of certain key factual findings is so weak that the decision cannot be regarded as a credible historical record of either individual criminal responsibility or the bureaucracy of repression of the Ba'th government. The cursory and inadequate review conducted by the Appeals Chamber failed to correct these errors and, in fact, compounded them by misstating several essential legal principles.

This briefing paper, in considering key substantive and procedural findings by the trial chamber and Appeals Chamber, does not address every legal and factual issue, but rather focuses on the most serious errors—those that serve to undercut the soundness of the judgment. These errors arise from a misunderstanding and misapplication of international criminal law principles governing the knowledge and intent of the defendants, and also in respect of findings of fact concerning their knowledge and intent. The paper sets forth some discussion of relevant legal principles to put the evidentiary shortcomings into the proper context. As discussed below, these errors appear closely connected to the failure of the investigative judge and prosecution to present evidence that was essential to establish knowledge and intent in the manner required by international criminal law.

The judgments in the Dujail case represent a lamentable landmark in a process where the warning signals of problems were there from the beginning, but largely ignored. The Iraqi government and its United States backers have squandered a unique chance to deal fairly and credibly with the most senior leadership of the former Iraqi government, and have put in jeopardy the likelihood that the process or the outcome will stand the test of time. In an often-quoted speech, Nuremberg Chief Prosecutor Robert Jackson warned, "We must never forget that the record on which we judge these defendants today is the record on which history will judge us

[11] Due to the poor quality of the publicly available translation of the trial judgment, Human Rights Watch commissioned its own translation by an expert in Arabic-English legal translation. This is referred to in the course of this briefing paper as "HRW Translation of Trial Chamber Decision."

[12] Muhammad 'Azzawi was acquitted at the request of the prosecution. See HRW Translation of Trial Chamber Decision, pp. 269-70.

tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well."[13] Sadly, both the government of Iraq and the IHT seem to have proved unable or unwilling to heed this warning.

II. Judgment of the Trial Chamber

Substantive Issues

Evidentiary gaps have had serious consequences for the accuracy of many of the trial judgment's factual findings, in particular concerning the knowledge and intent of the defendants. The trial chamber reached critical factual conclusions either in the absence of evidence, or by going far beyond the evidence that was before the court.

As a result, many aspects of the judgment are unsustainable as a matter of fact and law. (The absence of any credible review during the appeal process ensured that these errors went uncorrected. Indeed, the Appeals Chamber's cursory review of the case compounded the errors—see below.) In the result, the IHT imposed death sentences on the basis of convictions that were substantively unsound. Another three men remain imprisoned despite the absence of appropriate evidence to support their convictions.

While the notoriety of those executed may mean that there is little public sympathy for their fate, execution after an unfair trial and unsound judgment recalls the practices of the former government. Moreover, the judgment itself fails utterly to provide an adequate record of the functioning of the former government, and thus constitutes a poor resource for future generations who seek to understand the bureaucracy of repression in Ba'thist Iraq.

In its review of the evidence presented in court and in the trial dossier, Human Rights Watch found that the investigative judge and the prosecution did not produce the full range of evidence necessary to prove intent, knowledge, and criminal responsibility on the part of the defendants. International criminal law sets out

[13] Robert H. Jackson, "Opening Address for the United States," November 21, 1945, reproduced in part in Michael R. Marrus, *The Nuremberg War Crimes Trial 1945-6: A Documentary History* (Boston: Bedford Books, 1997), p. 81.

specific requirements that must be met to establish the individual criminal responsibility of each defendant in a case such as this. In the Dujail case there were notable gaps in the evidence,[14] including the striking absence of evidence establishing:

- the legal and practical authority of the numerous security organizations and political institutions implicated in the events at Dujail;
- structures of command and internal organization of these security organizations and political institutions;[15]
- the internal reporting lines and flows of information within these organizations, and how information could be expected to flow to individual defendants;
- the general context of human rights practices (such as the systematic use of torture) and violence by security organizations;
- the historical relationship between the political institutions (such as the Office of the President and the Revolutionary Command Council) and the legal institution (the Revolutionary Court) implicated in the crime.

Senior Defendants—Saddam Hussein, 'Awwad al-Bandar, Barzan al-Tikriti and Taha Yassin Ramadan

Saddam Hussein, Barzan al-Tikriti, and Taha Yassin Ramadan were each charged with committing murder, torture, forced displacement, unlawful imprisonment, enforced disappearance, and "other inhumane acts" as crimes against humanity

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[14] This is explored more fully in Human Rights Watch, *Judging Dujail*, pp. 73-83.

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

under article 12 of the IHT Statute.[16] 'Awwad al-Bandar was charged with committing murder as a crime against humanity.

The IHT Statute defines a crime against humanity as "any of the following acts [in this case, murder, torture, forced displacement, and unlawful imprisonment] when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." A person has the necessary intention to commit a crime against humanity when he or she intends to commit the underlying act (for example, murder), knowing that there is an attack on the civilian population and that his or her acts form part of that attack.[17]

The notice of charges left it unclear what basis of liability was alleged against each of the defendants.[18] Based on the prosecution's in-court statements, it appeared that the four senior defendants—Saddam Hussein, Barzan al-Tikriti, Taha Yassin Ramadan, and 'Awwad al-Bandar—were accused of having committed crimes against humanity by participating in a "joint criminal enterprise," and of having command responsibility for the same crimes. The trial chamber judgment appears to have

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[16] The crimes initially charged were murder, torture, forced displacement, and unlawful imprisonment. Enforced disappearance and other inhumane acts intentionally causing great suffering were added without notice after the close of the prosecution case.

[17] See *Prosecutor v. Kordic and Cerkez*, International Criminal Tribunal for the former Yugoslavia (ICTY), Case No. IT-95-14/2, Judgment (Appeals Chamber), December 17, 2004, para. 99. The elements of each underlying offense must also be proved. Thus, a person charged with murder as a crime against humanity must have had the necessary intention and engaged in the necessary acts constituting the offense of murder, namely: an act or omission by the accused (or person for whom the accused has criminal responsibility) causing the death of the victim, and done with the intention to kill or cause serious injury. *Prosecutor v. Blagojevic and Jokic*, ICTY, Case No. IT-02-60, Judgment (Trial Chamber), January 17, 2005, para. 556; *Prosecutor v. Brdjanin*, ICTY, Case No. IT-99-36, Judgment (Trial Chamber), September 1, 2004, paras. 381-382.

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

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

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

[18] See Human Rights Watch, *Judging Dujail*, pp. 44-48. Article 15(2) of the IHT Statute sets six modes of responsibility: direct commission; ordering, soliciting or inducing; facilitation, assistance, or aiding and abetting; joint criminal enterprise; incitement (for genocide only); and attempt.

convicted Saddam Hussein, Barzan al-Tikriti and Taha Yassin Ramadan on the basis of *both* joint criminal enterprise *and* command responsibility, for the same acts. 'Awwad al-Bandar appears to have been convicted on the basis of participation in a joint criminal enterprise.

Relevant Legal Principles—Joint Criminal Enterprise

A "joint criminal enterprise" is a form of individual criminal responsibility recognized in the IHT Statute and in customary international law.[19] It is a "theory of liability" whereby several individual perpetrators act pursuant to a common criminal purpose. To prove guilt as a member of a joint criminal enterprise, it must be established that: a plurality of persons was involved; there was a common design or purpose involving the commission of a prosecutable crime; and the accused actually participated in this common design or purpose.[20] In addition, each member of the joint criminal enterprise must possess the knowledge and intent necessary to further the common criminal plan or purpose.

The "common design or purpose" to commit the crime (in this case, a crime against humanity) need not be express, but can be an unspoken understanding inferred from the fact that a plurality of persons *acted in unison* to effect the criminal purpose.[21] However, an unspoken understanding among the members of the joint criminal enterprise should only be inferred if it is the *only reasonable inference* from the evidence.[22] "Participation" in the common plan or purpose does not require physical perpetration of any of the underlying acts of the crime (such as murder or torture), but may take the form of assistance or contribution.[23]

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[19] IHT Statute, art. 15(2)(D); *Prosecutor v. Vasiljevic*, ICTY, Case No. IT-98-32, Judgment (Appeals Chamber), February 25, 2004, para. 95; *Prosecutor v. Tadic*, ICTY, Case No. IT-94-1, Judgment (Appeals Chamber), July 15, 1999, para. 220.

[20] *Prosecutor v. Kvocka*, ICTY, Case No. IT-98-30/1, Judgment (Appeals Chamber), February 28, 2005, para. 96.

[21] *Vasiljevic*, Judgment (Appeals Chamber), paras. 108-109.

[22] *Brdjanin*, Judgment (Trial Chamber), para. 353.

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

There are three kinds of joint criminal enterprise in international criminal law: "basic," "systemic," and "extended."[24] In convicting Saddam Hussein, Barzan al-Tikriti, and Taha Yassin Ramadan of murder, torture, forced displacement, and "other inhumane acts" as crimes against humanity, and in convicting 'Awwad al-Bandar of murder as a crime against humanity, the trial chamber concluded first that they had all been participants in a joint criminal enterprise. [25] It also concluded that they had the requisite knowledge and intention based on the standards for a "systemic" joint criminal enterprise, rather than a "basic" or "extended" joint criminal enterprise.[26]

A systemic joint criminal enterprise is applied to "an organized system of ill-treatment. An example is extermination or concentration camps, in which the prisoners are killed or mistreated pursuant to the joint criminal enterprise [of running the camp]."[27] International courts have noted that the category of a systemic joint criminal enterprise is not limited to concentration camps, but to any organized system set in place to achieve a common criminal purpose. However, in practice, it has only ever applied to circumstances akin to organized detention camps.[28] The application of systemic joint criminal enterprise by the IHT to a context far removed from a "detention camp" scenario—crimes that began in Dujail in 1982, but which were completed over a span of several years and in several different locations across Iraq—is very questionable. Such an application required the IHT to ensure that there was evidence before it to establish that "an organized system of ill-treatment" existed that underpinned all the crimes during the requisite period.

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[24] *Vasiljevic*, Judgment (Appeals Chamber), para. 96; *Kvocka*, Judgment (Appeals Chamber), para. 82. A "basic" joint criminal enterprise exists where all co-perpetrators, acting pursuant to a common criminal purpose, possess the same criminal intention (*Vasiljevic*, Judgment (Appeals Chamber), para. 97); an "extended" joint criminal enterprise entails a situation where there is a common criminal purpose, but additional crimes outside the common criminal purpose are a natural and foreseeable consequence of carrying out the common purpose (Ibid., para. 98).

[25] The trial chamber concluded that there was not enough evidence to convict any defendant of enforced disappearance, and that the internal exile of over 400 people from Dujail in southern Iraq did not amount to joint criminal enterprise. HRW Translation of Trial Chamber Decision, pp. 113, 272.

[26] The IHT trial chamber cites two cases relating to joint criminal enterprise: *Krnojelac,* and *Prosecutor v. Aleksovski*, ICTY, Case No. IT-95-14/1, Judgment (Appeals Chamber), March 24, 2000. Both of these cases are "systemic" joint criminal enterprise cases.

[27] *Vasiljevic*, Judgment (Appeals Chamber) , para. 98.

[28] *Kvocka*, Judgment (Appeals Chamber), para. 183; *Krnojelac*, Judgment (Appeals Chamber), para. 89. In practice, the category has only applied to situations analogous to camps, detention centers, or other organized systems of ill-treatment that are spatially localized.

The evidentiary base establishing the "organized system of ill-treatment" is all the more essential as systemic joint criminal enterprise requires a less stringent test for knowledge and intent. Inferring knowledge and intent, based on the accused's position, is peculiar to the category of systemic joint criminal enterprise; the other forms of joint criminal enterprise do not permit an inference of intent based solely or principally on the accused's position of authority. It is considered permissible in the category of systemic joint criminal enterprise because of the "systemic" means in which the crimes are perpetrated, as best exemplified by concentration or detention camps. Thus, in the setting of a detention camp, the accused's physical presence in the camp, and his or her spatial proximity to the ill-treatment occurring there, makes an inference of knowledge and intent permissible.[29] Therefore, in Dujail evidence establishing the existence of a system on the basis of which intent could lawfully be inferred should have been crucial.

Relevant Legal Principles—Command Responsibility

Command responsibility is a form of liability by which military or other superiors can be held criminally responsible for the crimes of their subordinates.[30] It is an established principle of customary international law and is provided for in the IHT Statute.[31] A superior is responsible for the crimes of his or her subordinates where the prosecution proves that:

(i) There existed a superior-subordinate relationship between those committing the crimes and the accused.
(ii) The superior knew or had reason to know that the criminal acts were about to be or had been committed.
(iii) The superior failed to take necessary and reasonable measures to prevent the commission of the offense or punish the perpetrators. [32]

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[29] See, for example, *Prosecutor v. Limaj et al.*, ICTY, Case No. IT-03-66, Judgment (Trial Chamber), Nov. 30, 2005, para. 511.

[30] *Prosecutor v. Delalic et. al.*, ICTY, Case No. IT-96-21, Judgment (Appeals Chamber), February 20, 2001, para. 195.

[31] IHT Statute, art. 15(4).

[32] *Kordic and Cerkez*, Judgment (Appeals Chamber), para. 839.

A superior-subordinate relationship is generally established by showing the de facto or de jure power of the superior to prevent or punish the acts of the subordinates who committed the crimes.[33] A position of command does not create a presumption of knowledge. The superior must either have actual knowledge of the criminal acts, or have information actually available to him or her that would put him or her on notice of the facts. [34] The superior is under no duty to acquire such knowledge, and neglect to do so is not a basis for liability,[35] although a superior cannot willfully ignore information available to him or her.[36] The duty to prevent or punish arises as soon as the superior acquires the knowledge that his or her subordinates are about to commit crimes, or have committed crimes.

Erroneous Holdings in the Trial Chamber Decision—Knowledge and Intent

The trial chamber failed to cite evidence demonstrating that Saddam Hussein, Barzan al-Tikriti, Taha Yassin Ramadan, and 'Awwad al-Bandar possessed the knowledge and intent necessary to support a finding that they were co-participants in a joint criminal enterprise. Instead, the chamber relied on the defendants' positions of authority to infer that they each knew of the joint criminal enterprise, without pointing to evidence that would show actual knowledge, or alternatively, that such a finding was the only reasonable inference from the evidence.

In its conclusions concerning 'Awwad al-Bandar, the IHT trial chamber stated al-Bandar had knowledge of the joint criminal enterprise to commit murder as a crime against humanity against the people of Dujail, simply because he was chief judge in the Revolutionary Court and a senior member of the Ba'th Party. According to the trial chamber, he was "cognizant of the nature of that regime and intended to support it as a member of the disbanded Ba'th Party."[37]

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[33] *Delalic*, Judgment (Appeals Chamber), paras. 192-93.

[34] *Prosecutor v. Blaskic*, ICTY, Case No. IT-95-14, Judgment (Appeals Chamber), July 29, 2004, paras. 56-57, 62.

[35] *Delalic*, Judgment (Appeals Chamber), para. 226.

[36] *Blaskic*, Judgment (Appeals Chamber), para. 406.

[37] HRW Translation of Trial Chamber Decision, p. 67. In its discussion of Barzan al-Tikriti's *mens rea*, the trial chamber purports to reject the idea that official position is a sufficient basis for finding knowledge, but it proceeds to do so throughout its reasoning. Ibid., p. 169.

Similarly, with respect to defendant Saddam Hussein, the IHT found knowledge of and intent to participate in the joint criminal enterprise because, "He was the head of that regime, and of the ruling establishment and party, [and therefore] he is the first one to know about the intent of the regime, the ruling establishment and party to commit a deliberate murder as a crime against humanity."[38] Knowledge and intent is inferred wholly on the basis of the defendant's status as the head of the government. Of course, if the functioning of the regime, party, and "ruling establishment" had been established by evidence, then this conclusion might have been warranted: for example, if the habitual or consistent practice of the security agencies, Revolutionary Court, and Ba'th Party institutions had been reconstructed through expert or other evidence, the leadership position of defendant Saddam Hussein may well have been a persuasive indicator of knowledge concerning the crimes committed against the people of Dujail. [39] In the absence of this evidence—which was not in the case file or presented in court—the imputation of knowledge and intent based on the defendant's official position is erroneous.

In relation to former Vice-President Taha Yassin Ramadan, the IHT also established his knowledge of the joint criminal enterprise on the basis of his official position. The IHT trial chamber asserted that Ramadan knew and intended agents of the state to be committing murder, torture, forced displacement, and "other inhumane acts" against the people of Dujail because

> [a]s a member of the (dismantled) Revolutionary Command Council, as Deputy Prime Minister, as a ranking member of the Ba'th Party Regional Command, as a popular army supreme commander, and as the head of the committee that was formed by order of defendant Saddam Hussein hours after the meeting, which committee convened at the National Council under his chair,[40] he must have known. These

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[38] Ibid., p. 106.

[39] An example of the meticulous reconstruction of the systematic and regular functioning of state apparatuses, as a basis for inferring knowledge and intent on the part of the defendants, can be found in the famous "Justices Case" before the US Military Tribunal in Nuremberg. See *The Trial of Josef Alstoetter and Others*, United States Military Tribunal at Nuremberg, February 17 to December 4, 1947, reported in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1946-1949)* (Washington, DC: U.S. Govt Printing Office, 1949-53), vol. 3.

[40] The committee to which the trial chamber refers appears to have been an ad hoc committee of different agencies, tasked with investigating the assassination attempt against Saddam Hussein. The evidence clearly establishes that the committee

> very senior positions that defendant Taha Yassin held enabled him to quite easily know about all that was taking place in Dujail. This can be the only logical and reasonable conclusion.[41]

Once again, if there had been some evidence about the functioning of these various institutions, and about the ways in which knowledge and information flowed through them to individuals at the top, then this conclusion might have been legally correct. But as it stands, the inference of knowledge was far from the "only logical and reasonable one."

The evidence against Barzan al-Tikriti clearly indicated that he had some personal knowledge of the mass arrests and forced displacement in the aftermath of the failed assassination attempt, and three witnesses claimed that al-Tikriti personally participated in their torture at the headquarters of the *Mukhabarat* (General Intelligence Directorate).[42] The documentary evidence indicated that the Mukhabarat played the central role in the mass arrests, interrogation, and subsequent transfer of detainees to internal exile. Documents from 1987 also stated that perhaps as many as 46 detainees had died during interrogation by the Mukhabarat.[43] Thus, despite the absence of any evidence that set out the internal functioning and organization of

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met at least once on the day of the assassination attempt and that Taha Yassin Ramadan attended the first meeting. But there was no evidence as to what transpired at that meeting, its powers, or the kind of information that was made available to its members. According to the uncross-examined hearsay statement of witness Wadah Al-Shaikh, Taha Yassin Ramadan had no role in the beginning, but a month later formed a separate committee concerned with the razing of orchards in Dujail.

Al-Shaikh was a former director of investigations in the *Mudiriyat al-Mukhabarat*, and the documentary evidence indicated that he played an important role in the *Mukhabarat's* response to the assassination attempt in Dujail. However, he was not a member of the committee to which the trial chamber refers and had no direct knowledge of its proceedings, and he was never asked how he knew what transpired. Al-Shaikh gave evidence to the trial chamber on October 23, 2005, at the US military hospital at Abu Ghraib, where he was dying of cancer. His evidence was not cross-examined because defense lawyers had refused to attend the deposition after one of their colleagues was murdered in Baghdad on October 20, 2005. The U.S. Embassy's Regime Crimes Liaison Office (RCLO) had provided the defense lawyers with assurances of safe transport to and from the hospital, but the defense lawyers had declined to attend until a comprehensive security arrangement was reached with the court. For further background on the failure of the IHT to adequately provide for security of defense counsel, see Human Rights Watch, *Judging Dujail*, pp. 20-24.

[41] HRW Translation of Trial Chamber Decision, p. 209.

[42] Several witnesses stated that al-Tikriti was present in Dujail as the wave of arrests began. There were also documents signed by al-Tikriti as head of the Mukhabarat, in which he authorized the transfer of several hundred individuals from Abu Ghraib to internal exile, indicating that he must have known that hundreds were detained under his control.

[43] A document dated July 5, 1987, and addressed by Saddam Hussein's son-in-law, Hussein Kamel, to Saddam Hussein states that 46 of the 148 accused had already died in detention by the time they were referred to trial. Another document produced in court in the Dujail trial was an extract of a court verdict from 1986 against an interrogator who had worked on the Dujail case and who had been convicted of misconduct. This document also stated that 46 persons died during interrogation, and that the interrogators sought to conceal the deaths for fear of reprimand.

the Mukhabarat, it could be established that al-Tikriti knew of or could reasonably have foreseen widespread torture of detainees and possible deaths under interrogation, because of evidence of personal involvement. He also knew of widespread arbitrary detention of hundreds of people from Dujail.

However, the IHT trial chamber goes further than this in its conclusions. It holds al-Tikriti responsible not only for torture, some murders, and forced displacement as a crime against humanity, but for *all* crimes against the people of Dujail, including the execution of over 100 individuals in 1985, almost two years after al-Tikriti had ceased to have a position in the national government and had been posted to Geneva as Iraq's representative to the United Nations Commission on Human Rights. The trial chamber reached this conclusion on the basis of its finding that al-Tikriti knew of and intended to contribute to a joint criminal enterprise that included, or had as a reasonably foreseeable outcome, the execution of the persons convicted by the Revolutionary Court.

The absence of any evidence about al-Tikriti's state of knowledge concerning the functioning of the Revolutionary Court or the likely fate of those referred to the court raises questions about how the trial chamber reached this finding concerning al-Tikriti's *mens rea*. Because the investigative judge and prosecution did not gather any evidence about how the former government habitually or customarily dealt with suspects of this nature, inferences that al-Tikriti knew that detainees who survived interrogation would be executed are hard to sustain on the basis of the record before the court. The trial chamber concludes that he did know this because he was "one of the leading figures of that regime and the head of one of its most important bodies, and from the fact that he was very close to the main decision-making person in that regime, whether in terms of family or position."[44]

The IHT trial chamber committed the same category of error in its application of the principles of command responsibility. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) stipulated that, in order to convict

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[44] HRW Translation of Trial Chamber Decision, p. 167. The trial chamber also claims that "defendant Barzan was aware of said criminal intent because he personally received orders from defendant Saddam Hussein to commit such crimes." But this contradicts a finding earlier in the decision in which the trial chamber accepts that Saddam Hussein did not directly order torture (Ibid., p. 120).

a commander for the crimes of his or her subordinates, the evidence must prove that the commander had *actual* knowledge that these crimes were about to be or had been committed, or at least that specific information that would have provided notice of the crimes was made available to the commander.[45] A position of command does not give rise to a presumption of knowledge, though it may be one indicator of the defendant's knowledge when combined with other factors.

The IHT trial chamber did not apply this standard, but instead asserted that the senior defendants had the requisite knowledge due to their position in the government or because of their kinship with one another.[46] For example, the IHT trial chamber asserts that Saddam Hussein knew of the crimes committed by his subordinate Barzan al-Tikriti because al-Tikriti was his "maternal brother" and thus al-Tikriti's knowledge could be considered "the supreme leader's cognizance, or at least akin to a cause for cognizance." But the means by which al-Tikriti's commission of crimes such as torture might have become Saddam Hussein's knowledge was never the subject of evidence, and indeed the trial chamber cited no evidence. Rather, it imputes knowledge to Saddam Hussein based on al-Tikriti's position as someone who was "very close and has direct access to" Hussein as his brother.[47]

Similarly, the IHT trial chamber found that Taha Yassin Ramadan had *de jure* command authority over the Popular Army, based on a law of which the court appears to have taken judicial notice.[48] It then contended that as *de jure* commander of the Popular Army, and because of his senior position in the government, Ramadan "must have known the names and the number of those implicated in these crimes, with the most prominent one being Ahmad Ibrahim al-Samarra'i, the leader of the

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[45] *Blaskic*, Judgment (Appeals Chamber), para. 62.

[46] The trial chamber also made a number of inferences of knowledge supposedly from evidence in the file but which are not supported by that evidence. This is discussed below.

[47] The trial chamber refers to a variety of correspondence that, had it been seen by Saddam Hussein, might have formed the basis of inferring actual knowledge. However, because there was no evidence concerning the flows of information between various organs such as the Revolutionary Command Council, the Office of the Presidency and the Mukhabarat, no inference could be drawn that these documents actually came to defendant Saddam Hussein's attention.

[48] No evidence about the defendants' de jure or de facto authority was presented during the trial, and the law that the trial chamber cited was not in the trial dossier. A law of this kind might properly be the subject of judicial notice, but the IHT trial chamber never gave the defendants the opportunity to comment on the law because the court never notified them that it was going to take judicial notice of this or any other state of affairs. As a result, the defendants were denied an opportunity to confront evidence used against them, which is a basic fair trial guarantee.

party apparatus in Dujail."[49] Yet there was no evidence about how information concerning the activities of the local commander of the Popular Army—who was widely reported by witnesses as leading the Popular Army's raids in Dujail—would have been known by Taha Yassin Ramadan. While the IHT trial chamber established the *de jure* powers of Ramadan (relevant to command and control), there was no evidence before it that could have established the lines of operational control and reporting (relevant to knowledge).

The IHT trial chamber's findings may have been further affected by one other matter: the reliability of most of the witness evidence given at trial was complicated by the fact that almost all witnesses were effectively anonymous. Their names were disclosed to the defense only on the morning they were to testify, and most were shielded from the sight of the defense lawyers. These two practices—very late disclosure of witness identities and protective measures that prevented confrontation between defense counsel and the witness—made it difficult to test the witness evidence. The trial chamber's judgment does not provide any indication that the court considered these difficulties when determining the credibility of witnesses.

Factual Holdings

The IHT trial chamber's failure to cite evidence supporting its findings of knowledge and intent was compounded by numerous factual findings that either went far beyond the evidence before it, or were made in the absence of evidence. These highly questionable factual findings reflect once again the failure of the prosecution to present to the court the evidence necessary to satisfy what international criminal law requires to be proved to hold someone individually responsible for a crime against humanity.

In the trial chamber's finding of the existence of "joint criminal enterprise" to commit murder, torture, displacement and other inhumane acts as a crime against humanity, against the people of Dujail, it found that there was an unspoken criminal plan formed between the defendants to commit all the crimes charged (except enforced

[49] HRW Translation of Trial Chamber Decision, p. 216.

disappearance).[50] In the absence of any evidence of an express agreement, an "unspoken" joint criminal plan may be inferred where a plurality of persons acts in unison to put into effect the plan that is alleged.[51] However, an unspoken understanding among the members of the joint criminal enterprise should only be inferred if it is the *only reasonable inference* from the evidence.[52]

The trial chamber concluded that an unspoken joint criminal plan came into existence to commit the crimes charged against the people of Dujail, but never established *when* or *how* this plan materialized. It simply asserted the existence of the plan as self-evident. In fact, the evidence indicated that the senior defendants did not "act in unison": defendant Barzan al-Tikriti immediately traveled to Dujail to supervise the investigation, but defendant 'Awwad al-Bandar did not act in relation to Dujail until two years after the incident.[53] Evidence relied upon by the IHT trial chamber indicated defendant Taha Yassin Ramadan did not appear to take any relevant decisions until a month after the assassination attempt. Defendant Saddam Hussein's actions of ordering the confiscation of farm land, referring the suspects to the Revolutionary Court, and ratifying the subsequent death sentences, were committed between three months and two years after the events in Dujail. It is difficult to understand how the existence of an unspoken joint criminal plan can be the *only* reasonable inference from this set of facts. Indeed, the facts seemed to point to considerable lack of coordination in the government's response.

It would not be impossible to prove that there was a common criminal plan or purpose that came into existence between the senior defendants, but the evidence before the trial chamber fell far short of establishing this, leaving the trial chamber to make findings of fact that are without sufficient evidentiary foundation. Rather than

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[50] Ibid., pp. 70, 112, 118, 221. Strictly speaking, where the "systemic" category of joint criminal enterprise is applied, evidence of an agreement or plan is not required, only evidence of a common purpose: see *Krnojelac*, Judgment (Appeals Chamber), para. 96; *Kvocka*, Judgment (Appeals Chamber), paras 118-119.

[51] *Vasilijevic*, Judgment (Appeals Chamber), paras. 108-109.

[52] *Brdjanin*, Judgment (Trial Chamber), para. 353.

[53] The evidence before the IHT trial chamber clearly showed that 'Awwad al-Bandar had conducted a summary trial that did not respect basic fair trial requirements. However, he was not charged with murder *simpliciter*. He was accused of murder as a crime against humanity, as a participant in a joint criminal enterprise. Hence, it was necessary to show not just that he conducted a summary or sham trial, but that he did so pursuant to a criminal plan or policy. As the court in *Alstoetter* pointed out, showing arbitrary behavior by the judge in the courtroom is not sufficient; rather it must be proved that the arbitrary behavior amounted to participation in a criminal policy or plan. See *US v. Alstoetter*, pp. 1046, 1063, 1093, 1155.

relying on the strained concept of an "unspoken agreement," evidence of the functioning of the "criminal system" of state action under the Ba'thist government should have been required to support the charges. It is here that expert or "insider witness" evidence concerning the structure, internal organization, and past practice of the Ba'thist government security and political apparatuses could have been used to fill in the gaps and show the links between the "crime base" and the leadership. One means of providing "linkage" evidence is through experts in the politics, history, or military affairs of the country concerned, who can provide detailed contextual information to ground inferences concerning the decision making processes and chain of responsibility of senior officials. No evidence of this kind was ever presented.

The judgment of the trial chamber is replete with other questionable findings. At one point in the judgment, the trial chamber concludes that defendant Saddam Hussein's knowledge of and intention to participate in a joint criminal enterprise to commit the crimes listed in the charging sheet are "obvious because defendant Saddam Hussein has issued the orders to arrest, detain, torture and then execute people."[54] One page later, the trial chamber concedes that there was no evidence presented by the prosecution that Saddam Hussein directly ordered torture and killings.[55]

In a similar vein, the trial chamber found that, by ordering an investigation and by referring accused persons to the Revolutionary Court, Saddam Hussein knew that suspects would be executed because "this was a very predictable outcome under a totalitarian and extremely harsh regime whose nature was known in the first place to Saddam. This very probable outcome, which is practically natural according to

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[54] HRW Translation of Trial Chamber Decision, p. 103.

[55] Ibid., p. 104. The evidence collected by the investigative judge established that, in the immediate aftermath of the assassination attempt, Saddam Hussein ordered an investigation. The precise parameters of the order were never established by the evidence. On October 14, 1982, the Revolutionary Command Council issued an order, signed by Saddam Hussein, authorizing the expropriation of lands in Dujail for the purposes of an "agricultural redevelopment" project and requiring compensation to be paid to the expropriated (except for certain persons detained in relation to the assassination attempt). On May 27, 1984, Saddam Hussein signed a document referring the cases of 148 individuals accused of involvement in the assassination attempt to trial before the Revolutionary Court; the referral was based upon the recommendation of legal advisors who reviewed a 361-page dossier of evidence compiled against the 148 individuals. The decision of the Revolutionary Court, convicting all 148 individuals and sentencing them to death by hanging, was issued on June 14, 1984, and on June 16, 1984, Saddam Hussein signed an order ratifying the death sentences. The death sentences appear to have been implemented in March 1985.

causal and logical inferences and deductions, entails the killing of those detainees or at least the killing of many of them."[56] Yet because of the absence of evidence about the systematic use of torture by security agencies, and how that might have become known to higher officials, as well as about the relationship between the Revolutionary Court and the Office of the Presidency and the nature of the Revolutionary Court as an institution, the conclusion that these deaths were a predictable outcome constituted an assertion not based on evidence presented at trial.

One piece of evidence clearly supported a conclusion that, in 1987, a report informed Saddam Hussein that as many as 46 persons detained in connection with the 1982 assassination attempt died under interrogation, and that the remaining suspects were condemned to death after a cursory trial.[57] However, this does not support the conclusion that in 1982-83, Saddam Hussein had the necessary knowledge and was thus liable as a commander for failure to prevent the crimes. Rather, it is evidence that Saddam Hussein failed to punish crimes that he became aware of in 1987. The trial chamber's reliance on the 1987 document to conclude that Saddam Hussein failed to *prevent* the crimes in Dujail is thus without foundation.[58]

Conviction of Senior Defendants for "Other Inhumane Acts"

The evidence before the IHT established that several weeks after the assassination attempt the Iraqi government expropriated and razed a large amount of agricultural land in Dujail under the auspices of a redevelopment program. The evidence did not establish the exact amount of land, its financial value, or the impact on victims' income. The Iraqi government sealed an unspecified number of houses and removed their contents. The expropriation was undertaken in such a way as to include land owned by persons arrested in connection with the assassination attempts, *and* Ba'th Party members (including two of the lower-level defendants).

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[56] HRW Translation of Trial Chamber Decision, p. 102. See also pp. 119-120 for similar assertions.

[57] This is the report by Hussein Kamel to Saddam Hussein described in note 43. There are margin notes on this document that appear to have been made by Saddam Hussein, indicating that he saw it. However, this document was not authenticated by the handwriting experts appointed by the court, who stated that they did not have the equipment and expertise necessary to validate the document.

[58] HRW Translation of Trial Chamber Decision, p. 119.

The IHT trial chamber concluded that this property destruction took place as part of the widespread and systematic attack on the population of Dujail. There was evidence that the property destruction was personally supervised by Taha Yassin Ramadan. Saddam Hussein, as Chairman of the Revolutionary Command Council, had signed an order authorizing the expropriations, subject to compensation being paid to those who were not found to have committed any crimes connected with the assassination attempt. There was evidence that compensation was in fact paid, but it was not established to whom or how much. There was also evidence indicating that the Mukhabarat participated in the process of designating land for expropriation.

Wanton destruction of property is not recognized in the IHT Statute as one of the underlying crimes of a crime against humanity, only as a war crime. International tribunals have dealt with wanton or punitive property destruction under the rubric of "persecution."[59] However, persecution was not charged against any of the defendants in the Dujail case. Instead, Saddam Hussein, Taha Yassin Ramadan, and Barzan al-Tikriti were charged with committing "other inhumane acts of a similar character [to the other crimes listed in article 12] intentionally causing great suffering, or serious injury to the body or to mental or physical health."[60] The IHT's Elements of Crimes sets out that an inhumane act should also be "of a similar character in terms of the nature and gravity of the act to the other offences in Article 12(a)".[61] The IHT trial chamber concluded that the razing of agricultural lands owned by the people of Dujail amounted to an "other inhumane act," on the grounds that the razing of the land would have caused great suffering to its owners by depriving them of a principal source of income.[62]

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[59] See, for example, *Blaskic*, Judgment (Appeals Chamber), paras. 147-8; *Kordic and Cerkez*, Judgment (Appeals Chamber), paras. 108-9.

[60] IHT Statute, art. 12(1)(j), reflecting Rome Statute, art. 7(k), and Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute), S.C. Res. 827, U.N. Doc. S/RES/827 (1993), as amended, http://www.un.org/icty/legaldoc-e/index.htm, art. 5(i). The crimes set out in IHT Statute, art. 12(1), are: willful murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty; torture; rape, sexual slavery, forcible prostitution, forced pregnancy, or any other form of sexual violence of comparable gravity; persecution; and enforced disappearance of persons.

[61] Iraqi Special Tribunal: Elements of Crimes, translation available at http://www.law.case.edu/saddamtrial/documents/IST_Elements.pdf.

[62] No evidence as to the financial or other effects of the razing of the land was presented.

In the course of categorizing the razing of the lands as an "other inhumane act," the IHT trial chamber did not consider the international decisions that have interpreted and applied this crime. The ICTY Appeals Chamber has noted that while the category of "other inhumane acts" cannot be exhaustively enumerated,[63] it must be interpreted cautiously because it is so broad that it could violate the principle that no crime can be committed without previously being proscribed by law (*nullum crimen sine lege*).[64] That is, it could be applied to acts that were not, in fact, violations of international criminal law at the time they were committed. Significantly, the ICTY Appeals Chamber only applied the category of "other inhumane acts" to situations where the victim suffered "serious bodily or mental harm."[65] In no case was the category applied to property damage such as the confiscation of land and possessions.

The IHT trial chamber disregarded international tribunal decisions concerning this category of crime, and did not provide an international legal basis to justify its extending the concept of "other inhumane acts" to property destruction. While it is not inconceivable that the notion of "other inhumane acts" could be applied to the razing of agricultural lands—for example, where it was calculated to induce and does induce famine and starvation—there was little or no evidence showing that the property destruction resulted in "serious bodily or mental harm." In the absence of either a reasoned international legal analysis or compelling evidence, it appears that the IHT may have violated the principle of *nullum crimen* by convicting some defendants of "other inhumane acts" for the razing of lands in Dujail.

Lower-level defendants—'Abdullah Kadhim Ruwayid, Mizher 'Abdullah Kadhim Ruwayid and 'Ali Dayeh 'Ali al-Zubaidi

'Abdullah Kadhim Ruwayid, his son Mizher, and 'Ali Dayeh 'Ali al-Zubaidi, were each convicted of aiding and abetting the senior defendants' joint criminal enterprise to commit murder, torture, forced displacement, and unlawful imprisonment as crimes against humanity. The evidence against 'Abdullah Ruwayid and 'Ali Dayeh 'Ali was

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[63] *Kordic and Cerkez*, Judgment (Appeals Chamber), para. 117.

[64] Ibid.

[65] Ibid.; *Vasiljevic*, Judgment (Appeals Chamber), para. 165.

that they participated in the arrest of several individuals from Dujail in the aftermath of the assassination attempt, and wrote an informant letter to then-Minister of Interior Sa'doun Shaker identifying certain individuals as sympathizers with the Da'wa Party.[66] Authorities later arrested some of these individuals, and they were tried by the Revolutionary Court and executed. The evidence against Mizher Kadhim Ruwayid was that he participated in the arrest of some individuals after the assassination attempt, although much of the evidence that the trial chamber relied upon in his case consisted of witness statements before the investigative judge, which were never cross-examined either during the investigation or at trial.[67]

This evidence establishes that the defendants contributed to arrests. However, in order to convict them of aiding and abetting not just arrests but murder, torture, forced displacement, and unlawful imprisonment, it is necessary to prove that they knew that the acts they were committing would assist in the commission of the specific crime by the principals;[68] that they were aware of the essential elements of each of the crimes, including the principals' intention to commit the crimes;[69] and that they were aware that one of a number of crimes would probably be committed, and one of those crimes was in fact committed.[70] Thus, the prosecution had to show that lower-level defendants in the Dujail case knew that their acts would assist in the commission of murder, torture, forced displacement, and unlawful imprisonment, were aware of the principals' intention to commit these crimes, and were aware that one of the crimes would probably be committed.

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[66] The witness evidence against them was largely hearsay and somewhat contradictory. The letters were authenticated by the handwriting experts appointed by the court as being in the handwriting of Abdullah Kadhim Ruwayid and 'Ali Dayeh 'Ali al-Zubaidi. (A third letter, said by the prosecution to have been written by Mizher Kadhim Ruwayid, was found by the handwriting experts not to be in his handwriting). The defendants were not permitted to call their own expert to contest the adverse findings of the court-appointed experts.

[67] The right to question witnesses is often exercised at the investigative phase in civil law systems. However, defense lawyers in the Dujail trial had not been invited to attend the investigative sessions at which witnesses were deposed, and thus had had no opportunity to question those witnesses. Hence, the witnesses whose statements were read into the record were never, at any stage of the proceedings, questioned on behalf of the defendants.

[68] *Blaskic*, Judgment (Appeals Chamber), para. 45.

[69] *Aleksovski*, Judgment (Appeals Chamber), para. 162. The essential elements of each of the crimes are contained in the Iraqi Special Tribunal: Elements of Crimes.

[70] *Blaskic*, Judgment (Appeals Chamber), para. 50.

With the exception of one hearsay statement attributed to one defendant, no evidence was presented that would have established the knowledge of the lower-level defendants concerning the intention of the principals, or what the lower-level defendants would have known concerning the likely consequences of their assistance with the arrests. [71]

In the absence of this evidence, the IHT trial chamber imputed knowledge to the lower-level defendants on two bases. First, the chamber held that because they were all Ba'th Party members in varying degrees, they were "familiar with the nature of [the Ba'th] Party, especially as regards matters concerning its survival and rule under its leader, defendant Saddam Hussein."[72] Second, the chamber held that "no Iraqi had any doubt" that arrests would lead to unlawful imprisonment, torture, execution and displacement.[73]

The IHT trial chamber thus relied on the defendants' status as Ba'th Party members as the principal indicator of knowledge, along with a finding of "common knowledge" concerning the nature of the regime. While some aspects of the nature of the regime might be the subject of judicial notice, the IHT trial chamber did not in fact set out the evidence that led it to this finding, never notified the parties that it intended to take judicial notice of facts, and gave them no opportunity to comment on material that was to be the subject of judicial notice. The IHT's findings cannot therefore be regarded as falling within the concept of judicial notice. Instead, they are properly described as findings of fact based on information that was not before the court, and which appeared to derive from the judges' personal knowledge. This cannot be the basis of a criminal conviction because the defendant cannot confront or challenge evidence of which he or she has not been given notice. "Common knowledge" or "what every Iraqi knew" might form the basis for findings concerning

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[71] In one of his sessions before an investigative judge, defendant 'Ali Dayeh 'Ali al-Zubaidi stated that he heard that someone was tortured in the Party Headquarters at Dujail. This statement was given without counsel being present. In a subsequent statement before the investigative judge, the same defendant stated that "a group of individuals were tortured inside the [Party Headquarters in Dujail] and specifically inside the room that was occupied by defendant Barzan Ibrahim and the defendant Ahmad Ibrahim Hassun al-Samarra'i." The basis upon which defendant 'Ali Dayah 'Ali knew this was never established, and there was no evidence indicating that he witnessed any torture himself.

[72] HRW Translation of Trial Chamber Decision, pp. 239, 253, 265. The evidence was that the lower-level defendants ranged from "supporters" to full "members" of the Ba'th Party. They did not hold positions of command and did not occupy political posts.

[73] Ibid., p. 236.

background facts, but cannot form the sole basis of determining a defendant's individual criminal intent.

In fact, the nature of the Ba'th Party and the nature of the government—including the systematic use of torture in interrogation and the notorious use of special courts to dispatch political enemies—could easily have been the subject of evidence. Such evidence would not only have made the decision a genuine historical record, but would have ensured the credibility of the trial chamber's findings. Absent such evidence, the conviction of the lower-level defendants (who are now serving lengthy prison sentences) is unsound.

Procedural Issues

In its November 2006 report, Human Rights Watch documented numerous serious procedural defects in the conduct of the trial that vitiated its fairness.[74] These included continuous non-disclosure of incriminating evidence, a repeated failure to disclose potentially exculpatory evidence in a timely way, non-responsiveness to procedural motions by the defense, widespread use of anonymous (or effectively anonymous) witnesses, and the reading of 29 witness statements into the record without examination. The trial chamber's decision failed to address most of these issues, or addressed them in a manner that disregarded or misrepresented essential facts.

Trial Chamber's Finding on Disclosure of Evidence

The trial chamber asserted that all evidence against the defendants was disclosed to them with the initial transfer of the case file in August 2005.[75] However, the judgment failed to consider or even acknowledge the numerous instances of late or same-day disclosure of incriminating evidence that occurred during the trial—instances of which the trial chamber was fully aware because the defense objected in court.[76] Similarly, the trial chamber's judgment makes no reference to the late disclosure of 300 pages of documents on January 22, 2006, even though these documents were

[74] See Human Rights Watch, *Judging Dujail*, pp. 36-72.

[75] HRW Translation of Trial Chamber Decision, p. 19.

[76] See Human Rights Watch, *Judging Dujail*, pp. 48-52.

transmitted to defense lawyers bearing the seal of the court. The account of evidentiary disclosure found in the trial chamber's judgment is thus incomplete and misleading. Furthermore, in its substantive findings of fact on the charges, the trial chamber relied without qualification or discussion on evidence that was not disclosed in a timely way to certain defendants.[77]

Another flaw in the disclosure process identified by Human Rights Watch was the prosecution and investigative judge's failure to locate and disclose potentially exculpatory evidence among the millions of pages of documents held by the IHT.[78] The defendant 'Awwad al-Bandar, the former chief judge of the Revolutionary Court who presided over the 1984 trial and sentencing of men and boys from Dujail, repeatedly claimed that the soundness of the legal procedures he employed could be verified by having regard to the full file of the Revolutionary Court proceedings. Documents in the Dujail trial dossier clearly indicated that the Revolutionary Court file consisted of 361 pages, but only four of these pages were extracted in the Dujail trial dossier.

In its response to this claim, in the judgment the trial chamber contended that the court had "acted speedily" to locate the Revolutionary Court dossier and disclose it to the defendant.[79] In fact, the defendant had made in-court requests repeatedly since April 2006, and the presiding judge of the trial chamber consistently denied that the court had the dossier and also denied that the court or the prosecution had any responsibility to review its files to find the documents.[80] The Revolutionary Court

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[77] HRW Translation of Trial Chamber Decision, p. 234, where the Tribunal relies on a CD of a telephone conversation purporting to be between Saddam Hussein and Taha Yassin Ramadan concerning the razing of Dujail's orchards. This CD was among several not disclosed to the defense before being used in court, and which were never authenticated. The trial chamber relied upon all of this evidence without qualification.

The court always retained discretion to permit evidence that had not been disclosed in a timely manner to the defense, where the evidence was clearly probative. However, the exercise of this discretion requires a reasoned process of weighing the value of the evidence against the potential prejudice to the defendant due to late disclosure, and consideration of steps that might mitigate that prejudice (such as granting an adjournment or a delay to permit review of the new evidence): See, for example, *Prosecutor v. Bagosora*, ICTR, Case No. ICTR-96-7-T, Decision on the Motion by the Defense Counsel for Disclosure, November 27, 1997; *Prosecutor v. Brima et al.*, SCSL, Case No. SCSL-04-16-PT, Decision on Application for Leave to File an Interlocutory Appeal Against Decision on Motions for Exclusion of Prosecution Witness Statements and Stay on Filing of Prosecution Statements, February 4, 2005. No discussion or consideration of these issues is found in the IHT trial chamber judgment.

[78] Human Rights Watch, *Judging Dujail*, pp. 52-53

[79] HRW Translation of Trial Chamber Decision, p. 58.

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

file was only located and disclosed in late June 2006, due to the efforts of a representative of the U.S. Embassy's Regime Crimes Liaison Office (RCLO).[81] It was handed over to the defense after the close of the defense case.

Trial Chamber's Finding on Security for Defense Counsel

Similarly misleading was the trial chamber's response to the security concerns of private defense counsel. Three private defense counsel were murdered in the course of the proceedings. The government did not effectively implement the security arrangement negotiated between the Iraqi government and the defense counsel, nor did the court effectively supervise it.[82]

The trial chamber claimed that, from the beginning of the trial, private defense counsel and court-funded Defense Office lawyers had access to the same security arrangements as judges and prosecutors.[83] The conclusion contradicts all the information available to Human Rights Watch, including interviews in which both court-appointed and private defense counsel deny that any security arrangements were made available to them before the beginning of the trial and during its first weeks.[84] The trial chamber cited no evidence for its assertion and did not explain how it came to this view. The trial chamber's reasoning showed no evidence of any objective inquiry into the existence, nature, and sufficiency of the security arrangements developed for defense lawyers over the course of the trial.[85] The trial chamber also failed to respond to or in any way address a detailed motion requesting certain security measures that private defense lawyers filed in court on December 7, 2005.

Instead, the trial chamber blamed defense lawyers for failing to accept the security arrangements purportedly offered by the court and placed responsibility for the deaths on them. The trial chamber contended that defense counsel failed to comply

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[81] Human Rights Watch interview with RCLO representative, Baghdad, October 2006.

[82] Human Rights Watch, *Judging Dujail*, pp. 22-24.

[83] HRW Translation of Trial Chamber Decision, p. 21.

[84] Human Rights Watch, *Judging Dujail*, pp. 20-24, 28-35.

[85] The trial chamber also made a basic error of fact in asserting that two of the three murdered lawyers were *court-appointed* lawyers; they were in fact private defense counsel.

with relevant security procedures, but cited no evidence for this claim and no particular details of instances of non-compliance. It also did not examine whether alleged non-compliance with security procedures was causally related to the deaths of individual defense lawyers.

Response to Defense Motions

In *Judging Dujail*, Human Rights Watch noted the consistent failure of the trial chamber to issue publicly written decisions on key procedural issues, such as on its decision to close the defense case, its decision to read 29 witness statements into the record, or its response to defense motions accusing the presiding judge of bias. During sessions observed by Human Rights Watch, private defense lawyers submitted at least six written motions—addressing issues such as the time needed for the defense to prepare, security for defense counsel, recall of witnesses, scheduling of trial sessions, and the legality of the court. The court provided no public written response on these issues during the proceedings.[86]

Most of the motions relating to trial procedure, such as for the recall of witnesses and scheduling of trial sessions, remained unaddressed by the trial chamber. This perhaps reflected the fact that it was essentially futile to respond to such motions after the trial had concluded, but the trial chamber did not explain why it was non-responsive to motions during the course of the trial that would have had a direct bearing on the conduct of proceedings. The trial chamber did observe that it declined to respond to certain motions because they were written in intemperate language, but did not specify which ones fall within this category, and did not notify defense lawyers that their motions were being disregarded on that ground. [87]

The failure to provide any written reasons with respect to the majority of trial procedure-related motions further diminished the transparency and credibility of the decision. In a trial that was highly politicized, and in which many aspects of the trial

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[86] Human Rights Watch, *Judging Dujail*, p. 63. While some of the motions, such as the motion concerning the legality of the IHT, could be addressed in a final judgment, most of the motions concerned procedural concerns with bearing on the defendants' fair trial rights. Ignoring them over the course of the trial creates a serious risk that the defendants' rights will be irreversibly prejudiced because of the lack of a timely response by the court.

[87] HRW Translation of Trial Chamber judgment, p. 10.

process were unfamiliar to the Iraqi public, this non-responsiveness created an appearance of arbitrariness.

The judgment responded to three motions submitted by the defense in the course of the trial:

(i) A motion that Presiding Judge Ra'uf Abd al-Rahman recuse himself due to bias, on the grounds that he had been imprisoned and tortured under a Ba'th government;
(ii) A motion challenging the international legality of the statute creating the IHT and claiming immunity for Saddam Hussein; and
(iii) A motion contending that the charges of crimes against humanity violated the principle of legality and non-retroactivity (*nullum crimen sine lege*).

Human Rights Watch finds serious legal errors in the trial chamber's responses to the first two motions, in particular, as follows:

Motion on Bias. The defense filed a motion on bias in court shortly after Judge Ra'uf Abd al-Rahman replaced Rizgar Amin as presiding judge, due to the latter's resignation.[88] The motion alleged bias on the part of the new presiding judge on the grounds that he was formerly a political prisoner under a Ba'th government, and because he was a native of Halabja, a Kurdish town in which chemical weapons deployed by the Iraqi military killed at least 3,200 civilians in March 1988.[89] The trial chamber rejected the motion, without reasons, in a court session on February 28, 2006.[90]

In its written judgment of November 2006 the trial chamber explained its rejection of the bias motion on three grounds. First, it contended that Judge Ra'uf Abd al-Rahman's Halabja origins did not undermine his impartiality because "he is under oath [and] if he feels uneasy in this regard he would request to be removed."[91]

[88] For the cause of Judge Rizgar Amin's resignation, see Human Rights Watch, *Judging Dujail*, p. 41.

[89] See Middle East Watch, *Genocide in Iraq: The Anfal Campaign against the Kurds*, pp. 102-108.

[90] Human Rights Watch-ICTJ trial observation notes, February 28, 2006.

[91] HRW Translation of Trial Chamber judgment, p. 7.

Second, the trial chamber noted that Ra'uf Abd al-Rahman had been imprisoned under the presidency of 'Abdel Salam 'Arif "in 1963-4, at a time when Saddam Hussein and a group of Ba'th members were under arrest."[92] Third, the trial chamber argued that because all Iraqis had "relatives, friends, and people in their regions that had to endure hardships during the era of Saddam Hussein" this would mean that all judges would have to remove themselves from trials concerning the former regime. It implied that this is an absurd outcome, and instead contended that the judges can be relied upon to remove themselves from any case in which they "feel uncomfortable."

The reasoning of the trial chamber thus focused on whether Ra'uf Abd al-Rahman had *subjective* feelings or attitudes of bias, and concluded that if he did, he could be relied upon to recuse himself. However, it is an established principle of most legal systems that impartiality implies not only freedom from actual or subjective bias, but also the freedom from a reasonable apprehension of bias.[93] The latter principle is also present in the IHT's Rules of Procedure and Evidence, which require a judge to withdraw from a case if his independence or impartiality "might *reasonably be in doubt*."[94] The trial chamber failed to address entirely the question of whether Ra'uf Abd al-Rahman's being from Halabja gives rise to a reasonable appearance of bias. Nor does it establish critical facts, such as whether any of the presiding judge's family were victims of the 1988 Iraqi attack on Halabja. While none of these facts compelled a finding of apprehended bias, the trial chamber failed to apply the IHT's own rules by overlooking the issue.

Motion on the Legality of Creating the IHT. The IHT was initially created as the Iraqi Special Tribunal, by means of a regulation of the then-occupying power in Iraq, the Coalition Provisional Authority (CPA).[95] At the time of its creation, some international humanitarian law experts questioned whether the occupying power was legally

[92] Ibid.

[93] See, for example, *Prosecutor v. Furundzija*, ICTY, Case No. IT-95-17/1, Judgment (Appeals Chamber), July 21, 2000, paras. 189-190; European Court of Human Rights, *Piersack v. Belgium* (App. 8692/79), Judgment of 1 October 1982; (1983) 5 EHRR 169, para. 30.

[94] Rules of Procedure and Gathering of Evidence With Regard to the Iraqi High Tribunal (IHT Rules of Procedure and Evidence), *Official Gazette of the Republic of Iraq*, No. 4006, October 18, 2005, English translation by the International Center for Transitional Justice, http://www.ictj.org/static/MENA/Iraq/IraqTribRules.eng.pdf, rule 7(4) (emphasis added).

[95] For further detail, see Human Rights Watch, *The Former Iraqi Government on Trial*, pp. 2-4.

entitled under the law of belligerent occupation to create a new *Iraqi* court and amend *Iraqi* law to try war crimes, crimes against humanity, and genocide.[96] However, the Iraqi Transitional National Assembly (elected by general elections on January 30, 2005) re-established the Iraqi Special Tribunal as the Iraqi High Tribunal by passing (with amendments) its statute into Iraqi law. The statute was proclaimed on October 18, 2005 (one day before the start of the Dujail trial).[97] Unlike the CPA and its creation the Iraqi Governing Council (IGC),[98] the Transitional National Assembly exercised sovereign Iraqi legislative power and was thus competent to create a new Iraqi court and introduce new substantive crimes.

The trial chamber did not discuss the specific international humanitarian law principles governing the legislative competence of an occupying power, and made the erroneous claim that the IGC exercised sovereign power and was thus competent to create the Iraqi Special Tribunal.[99] However, the error was harmless because the trial chamber resolved the legality of the IHT Statute by reference to the fact that it was enacted into Iraqi law by the Transitional National Assembly, ratified by the presidency, and proclaimed in the *Official Gazette*.[100] It also noted that the permanent constitution of Iraq, which was ratified by referendum on October 15, 2005, recognizes the IHT as an institution.[101]

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[96] See, for example, Marco Sassòli, "Legislation and the Maintenance of Public Order and Civil Life by Occupying Powers," *European Journal of International Law,* vol. 16 (2005), p. 675. Sassòli notes that an "occupying power must … legislate to try persons having committed grave breaches [of the Geneva Conventions], if such legislation does not yet exist in the occupied territory. The Coalition Provisional Authority in Iraq, however, went one step further. It not only adopted (through the Governing Council for which it is responsible under Article 47 of Convention IV) legislation criminalizing international crimes committed by the former regime. This was certainly lawful. It could then have brought such crimes either before its own (military) courts, or before existing Iraqi courts, which it must 'let continue to function'. It chose neither of those two options, but preferred to create a new Iraqi court for that purpose, an option which is not offered by Convention IV and is certainly not necessary to respect IHL, as the other two kinds of tribunals could have done the job. Therefore, in my view the Iraqi Special Tribunal established on 10 December 2003 by the Interim Governing Council … violated IHL and, as it was not lawfully constituted, it could not today try Iraqis accused of international crimes unless the new Interim Government of Iraq were to establish it again." (p. 675).

[97] For further details concerning the legislative history of the IHT Statute, see Human Rights Watch, *The Former Iraqi Government on Trial*, p. 4, and *Judging Dujail*, p. 8.

[98] The Iraqi Governing Council was created by a regulation of the CPA on July 13, 2003, and did not exercise sovereign power. Its decisions were subject to veto by Provisional Administrator Paul Bremer, and it did not have recognized international legal personality in foreign relations. See generally, Gregory Fox, "The Occupation of Iraq," *Georgetown Journal of International Law,* vol. 36 (2005), pp. 204-208.

[99] HRW Translation of Trial Chamber Decision, pp. 23-27. The judgment does not discuss any international law principles concerning the criteria for determining whether an authority is "sovereign."

[100] Ibid., p. 26.

[101] Constitution of Iraq, art. 130.

III. Judgment of the Appeals Chamber

The written reasons of the trial chamber were not made available to the defense until November 22, 2006, 17 days after the reading of the verdict on November 5. The IHT Appeals Chamber was constituted on December 12, and delivered its opinion upholding all convictions on December 26. The speed of the decision, the brevity of the opinion (17 pages) and the cursory nature of the reasoning make it difficult to conclude that the Appeals Chamber conducted a genuine review as required by international fair trial principles.[102]

The Appeals Chamber dealt with the numerous procedural problems at trial in one paragraph, in which it did little more than assert the conclusion that the defendants had received a fair trial.

> As for other defenses, the defendants were given enough guarantees to have a fair trial. Each suspect was informed of the kind of accusations filed against him. [Each suspect] was given ample chance to defend himself and to choose his legal advisors and attorneys in person with the assistance of legal counselors. [Each suspect] was given the chance to interview the defense witnesses. [Each suspect] used his rights fully to defend himself. [Each suspect] was not forced to say what he did not want to say. Then the defense [each suspect] is using in this regard is rejected too.

The absence of any real review of the procedural flaws in the trial was compounded by the Appeals Chamber's failure to examine and review the trial chamber's application of law to the substantive offenses. In fact, the Appeals Chamber aggravated the errors of the trial chamber by drawing wholly erroneous legal conclusions, and by asserting factual propositions that went even further beyond the evidence than the trial chamber.

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[102] Article 14(5) of the ICCPR provides for the right to an appeal. An appeal can take a variety of forms, depending on the nature of the legal system but must amount to a genuine review. Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Arlington: N.P. Engel, 1993), p. 266.

For example, in its conclusions upholding the conviction of Saddam Hussein, the Appeals Chamber asserted he "actually supervised and conducted" interrogations of suspects from Dujail and "ordered his people to torture them." The first of these findings was not made by the trial chamber, and the second was made but acknowledged to be without evidentiary basis.[103] Similarly, the Appeals Chamber asserted that Saddam Hussein knew of crimes committed by his subordinates because he was "in authority as former president of the republic, and whereas he directed his crimes against the civilian population of Dujail with the purpose of killing, [therefore] the intent to kill is present."

Taha Yassin Ramadan was also found to have knowledge of the crimes of his subordinates, "because [he] had actual authority over his subordinates by virtue of his position." In relation to 'Awwad al-Bandar, the Appeals Chamber asserted that Bandar had "confessed that he was forced to perform as a judge for those trials." In fact, Bandar had made no such admission, stating that "as for the considerations of the Dujail case [before the Revolutionary Court], I am convinced by them professionally … Given the circumstances of the time and of the crime, the court had no other legal choice but that."[104]

The lower-level defendants' conviction was upheld because their participation in arrests led to the torture and deaths of those arrested, "regardless of whether [the defendants] intent was direct or indirect at the time of committing these acts." The Appeals Chamber also finds that the lower-level defendants "instigated" the crimes of which they were convicted, although this finding was not made by the trial chamber.

The IHT Appeals Chamber decision is so poorly and erroneously reasoned that it raises real suspicions that the chamber failed to act impartially in the performance of its legal duties.

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[103] See above note 55.

[104] 'Awwad al-Bandar, statement before investigative judge, February 27, 2005.

IV. Conclusion

At one point in its decision, the IHT trial chamber stated that "even if the judge is certain of what he heard or saw in terms of acts the defendants have been charged with, he cannot rule on the basis of his personal knowledge."[105] In fact, as this review has demonstrated, a great deal of the critical factual findings in the trial chamber decision were not based on the evidence before it and appear to derive from the judges' personal views about what "every Iraqi knew." The tragedy of the Dujail case was that it failed to establish a credible and reliable record of what "every Iraqi knew." Instead, it has left a decision riddled with such basic legal errors and doubtful factual findings that it cannot withstand scrutiny. Both the trial and the decision reflect the wholly inadequate international legal expertise of the IHT judges and lawyers, and a climate of intense political pressure created by the Iraqi government—which made it clear in numerous ways that acquittal or any form of leniency was not an option.[106]

The IHT's inability to try the Dujail case fairly and in accordance with the relevant international criminal legal standards calls into question its credibility as a judicial institution. There is a serious risk that all future trials will be marred by the same kinds of procedural and substantive flaws that this briefing paper and *Judging Dujail* document. Yet some of the most important cases remain to be concluded: the Anfal trial, concerning the Iraqi military campaign against the Kurdish population in northern Iraq, will conclude shortly, and another trial, concerning the brutal repression of the 1991 uprising in the south, is scheduled to commence later this year.

[105] HRW Translation of Trial Chamber Decision, p. 31.

[106] See Human Rights Watch, *Judging Dujail*, pp. 37-43.