

Fatal Errors

The Trial and Appeal Judgments in the *Dujail* Case

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Abstract

This commentary reviews the written judgments of both the First Trial Chamber and the Appeals Chamber of the Iraqi High Tribunal (IHT) in the Dujail case. The article considers the key substantive and procedural findings by the Trial Chamber and Appeals Chamber and evaluates the decisions' consistency with international criminal law. It concludes that the decisions made serious errors in their application of international criminal law principles governing the knowledge and intent of the defendants, and also in respect of findings of fact concerning the knowledge and intent of the defendants. These errors appear closely connected to the failure of the investigative judge and prosecution to present evidence which was essential to establish knowledge and intent in the manner required by international criminal law. The article concludes that many aspects of the convictions were unsustainable as a matter of fact and law. It ends by reflecting on some of the factors which contributed to the failure of the IHT to produce a credible verdict.

1. Introduction

On 30 December 2006, former Iraqi President Saddam Hussein was put to death by hanging, in an execution widely condemned for its sectarian overtones and disorderly implementation.¹ He was executed pursuant to a death sentence imposed by the First Trial Chamber of the Iraqi High Tribunal (IHT)²

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1 The ratification of the death sentence was also attended by legal irregularities. Art. 72(h) of the Constitution of Iraq provides that the President is required to 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 IHT, and the background to its creation, see: Human Rights Watch Briefing Paper, 'The Former Iraqi Government on Trial: A Human Rights Watch Briefing Paper', 16 October 2005, available online at <http://hrw.org/backgrounder/mena/iraq1005/iraq1005.pdf> (visited 15 September 2007) at 2–3, and also N. Bhuta, 'Between Liberal Legal Didactics and Political Manicheism: The Politics and Law of the Iraqi Special Tribunal', 6 *Melbourne Journal of International Law* (2005) 245–272.

on 5 November 2006, when it found Saddam Hussein guilty of crimes against humanity against the population of Dujail.³ The conviction and sentence were upheld by the IHT's Appeals Chamber on 26 December 2006.⁴ Also convicted and sentenced to death in the same case⁵ were Hussein's half brother Barzan al-Tikriti and former chief judge of the Revolutionary Court 'Awwad al-Bandar. 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.⁶ Al-Tikriti and al-Bandar were executed on 15 January 2006 in a procedure that was marred by the decapitation of al-Tikriti, and Ramadan was executed on 19 March. Three lower-level defendants⁷ 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.

- 3 On 8 July 1982, then-President Saddam Hussein was the subject of an assassination attempt during his visit to Dujail. 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 over 600 men, women and children were detained, and an unspecified number tortured. After a year of detention in Baghdad, approximately 400 detainees were transferred to internal exile in a remote part of southern Iraq. 148 males were referred to trial before the Revolutionary Court, and were convicted and sentenced to death in 1984 after a summary trial. Of these, as many as 46 died in detention sometime between 1982 and 1984, while most of those who survived detention were executed in 1985. Large swathes of agricultural property and some residences in Dujail were confiscated by the government and bulldozed.
- 4 When the verdict of the Trial Chamber was announced on 5 November 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 22 November, 17 days after the verdict was announced and only 13 days before the expiry of the 30-day time limit for the lodging of appeals under Iraqi law (see Art. 252 Iraqi Code of Criminal Procedure, Law No. 23 of 1971). The over two-week delay in the provision of the judgment was never explained by the court, but appears to have been due to the fact that the written judgment was not completed at the time the verdict was announced.
- 5 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.
- 6 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 which subsequently imposed the death penalty against Ramadan similarly did not provide reasons. This reconstituted Trial Chamber imposed the death penalty after a brief hearing on 12 February 2007, and addressed neither submissions made by the defence nor an *amicus curiae* submission against the death penalty filed by the United Nations High Commissioner for Human Rights.
- 7 'Abdullah Kadhim Ruwayid, Mizher 'Abdullah Kadhim Ruwayid and 'Ali Dayeh 'Ali al-Zubaidi.

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. The most comprehensive and carefully documented account of the trial, based on first-hand observation, review of the trial dossier, and dozens of interviews with court personnel and other key actors, was Human Rights Watch's November 2006 report.⁸ The report, of which the present writer was the principal author, documented deep dysfunction in the IHT as a judicial institution.⁹ This dysfunction, combined with several other factors, resulted in a number of fundamental procedural defects in the trial. These included:

- (i) Iraqi government actions that undermined the independence and perceived impartiality of the court;¹⁰
- (ii) a failure to ensure adequately detailed notice of the charges against the defendants;¹¹
- (iii) numerous shortcomings in the timely disclosure of incriminating evidence, exculpatory evidence and important court documents;¹²
- (iv) violations of the defendants' basic fair trial right to confront witnesses against them¹³ and
- (v) lapses of judicial demeanour that undermined the apparent impartiality of the presiding judge.¹⁴

The serious procedural flaws in the *Dujail* trial undermined the credibility of the Trial Chamber's verdict and sentence, and the implementation of death sentences after an unfair trial is a violation of the right to life.¹⁵ The hope that the trial might have served as a model of impartial justice for the 'new Iraq' by upholding international human rights law and enforcing international criminal law, was unfulfilled.

In this commentary, I review the written judgments of both the First Trial Chamber¹⁶ and the Appeals Chamber, with a view to evaluating their

8 Human Rights Watch, *Iraq: Judging Dujail – The First Trial Before the Iraqi High Tribunal* (Vol. 18, No. 9(E), 2006) (henceforth: 'Judging Dujail').

9 *Ibid.*, at 12–28.

10 *Ibid.*, at 37–43.

11 *Ibid.*, at 44–47.

12 *Ibid.*, at 48–57.

13 *Ibid.*, at 60–62.

14 *Ibid.*, at 64–65.

15 Human Rights Committee, *Reid v. Jamaica*, Communication No. 250/1987, views adopted on 20 July 1990, at § 11.5.

16 The translation of the Trial Chamber judgment made available by the US Embassy's Regime Crimes Liaison Office (RCLo) was of such poor quality that Human Rights Watch commissioned a translation by a qualified legal translator. That translation is publicly available at: <http://hrw.org/pub/2007/ij/dujailjudgement.web.pdf> (last visited 15 September 2007). References to page numbers of the judgment in this article are references to the Human Rights Watch translation. The judgment is hereinafter referred to as Judgment, *Dujail Case* (1/C1/2005), First Trial Chamber, undated [22 November 2006].

consistency with international criminal law¹⁷ and to assessing the cogency of their legal reasoning. The article considers the key substantive and procedural findings by the Trial Chamber and Appeals Chamber. It does not address every legal and factual issue in the reasons, but focuses instead on the most serious errors — those that severely weaken the convictions of the defendants. In relation to substantive issues, these errors arise in respect of the 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 the knowledge and intent of the defendants. As discussed subsequently, these errors appear closely connected to the failure of the investigative judge and prosecution to present evidence which was essential to establish knowledge and intent in the manner required by international criminal law.

The judgment of the IHT in the *Dujail* case makes such basic errors of law, and 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'ath regime. The cursory and inadequate review conducted by the Appeals Chamber not only failed to correct these errors, but compounded them by misstating several essential legal principles. The judgments in the *Dujail* case represent a desultory bookend to a process that faltered almost as soon as it began. A unique chance to deal fairly and credibly with the most senior leadership of the former Iraqi government has been squandered and neither the process nor the outcome is likely to stand the test of time.

2. Judgment of the Trial Chamber

A. Substantive Issues

Based on a review of the trial dossier and the evidence presented in court, it became apparent that the investigative judge and the prosecution appeared to have failed to gather the kinds of evidence necessary to prove intent, knowledge and criminal responsibility on the part of the defendants. When preparing the case, it seems that neither the prosecution nor the investigative judge paid sufficient attention to the requirements of what must be proved under

¹⁷ While the IHT is constituted as an Iraqi court, its statute mandates it to interpret and apply offences defined in contemporary international criminal law — such as crimes against humanity, war crimes and genocide — and the defendants in the *Dujail* case were uniformly charged with crimes against humanity rather than domestic Iraqi offences. Thus, international criminal law is the body of law against which the validity and coherence of the legal reasoning supporting the convictions must be assessed. Conformity with international law is also the necessary touchstone for the credibility of the judgment because crimes such as crimes against humanity achieved recognition *qua* crimes only through international law and the actions of the international community. See Arts 11–13, Law of the Supreme Iraqi Criminal Tribunal (Law No. 10 of 2005) Official Gazette of the Republic of Iraq (18 October 2005) (hereinafter: IHT Statute). An English translation of the statute is available online at: <http://www.ictj.org/static/MENA/Iraq/iraq.statute.engtrans.pdf> (last visited 15 September 2007).

international criminal law in order to establish the individual criminal responsibility of each defendant for the abuses that were committed against the people of Dujail.¹⁸ Notable gaps in the evidence included the absence of evidence establishing:

- (i) the legal and practical authority of the numerous security organizations and political institutions implicated in the events at Dujail;
- (ii) structures of command and internal organization of these security organizations and political institutions;¹⁹
- (iii) the internal reporting lines and flows of information within these organizations, and how information could be expected to flow to individual defendants;
- (iv) the general context of human rights practices (such as the systematic use of torture) and violence by security organizations;
- (v) the nature of the historical relationship between the political institutions (such as the Office of the President and the Revolutionary Command Council) and the legal institution (the Revolutionary Court) implicated in the crime.

These evidentiary gaps had serious consequences for the tenability of many of the trial judgment's factual findings, in particular concerning the knowledge and intent of the defendants. The gaps raised the very real prospect that defendants could be wrongfully convicted, an extraordinary outcome given the wealth of evidence available concerning the grave human rights crimes committed under the former regime.

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

(a) Findings concerning knowledge and intent

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

¹⁸ *Judging Dujail*, *supra* note 8, at 73–83.

¹⁹ It might have been permissible for the IHT Trial Chamber to take judicial notice of Iraqi laws establishing the legal authority and structure of some political institutions and security organizations implicated in the events at Dujail. However, the practical functioning and exercise of authority by these organizations and institutions would still have to be established by evidence. Judicial notice cannot be taken of a fact that would amount to an essential element of a crime, such as the *mens rea* of the accused. The prosecution did not invite the court to take judicial notice of any facts not in evidence. See Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, *Semanza* (ICTR-97-20), Trial Chamber, 3 November 2000; Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, *Karemera* (ICTR-97-24), Trial Chamber, 16 June 2006, § 47; Judgment, *Semanza*, (ICTR-97-20-A), Appeals Chamber, 20 May 2005, § 192; Decision on Appeal Against 'Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence', *Fofana* (SCSL-04-14-T-398), Appeals Chamber, 16 May 2005, §§ 28–31 and separate concurring opinion of Justice Robertson, § 16.

against humanity under Article 12 of the IHT Statute.²⁰ ‘Awwad al-Bandar was charged with committing murder as a crime against humanity.

Because of the vagueness of the notice of charges,²¹ it is unclear what ‘mode of responsibility’ was alleged against each of the defendants.²² However, 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 a crime against humanity by participation in a ‘JCE’ (JCE), and as having command responsibility for the same crimes. The Trial Chamber judgment appears to have convicted Saddam Hussein, Barzan al-Tikriti and Taha Yassin Ramadan on the basis of *both* JCE *and* command responsibility, for the same acts. ‘Awwad al-Bandar appears to have been convicted on the basis of participation in a JCE.

In convicting Saddam Hussein, Barzan al-Tikriti and Taha Yassin Ramadan of committing murder, torture, forced displacement and ‘other inhumane acts’²³ 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 indeed all been participants in a JCE. However, in reaching this conclusion, the Trial Chamber made a basic error of law by misinterpreting and misapplying the relevant legal test for knowledge and intent. It was led to this error because it applied the wrong category of JCE to the factual circumstances of the *Dujail* case.

As is well known, there are three kinds of JCE in international criminal law:²⁴ ‘basic’,²⁵ ‘systemic’²⁶ and ‘extended’.²⁷ Briefly, a JCE is established where the participants act pursuant to common criminal purpose, and contribute to the carrying out of the underlying criminal acts with criminal intent. The participants in a JCE can also be held liable for crimes falling outside the common criminal purpose, if these crimes are a natural and

20 The definition of crimes against humanity in the IHT Statute is identical to that in the Rome Statute: compare Art. 12 IHT Statute with Art. 7 ICCSt. The underlying 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.

21 See *Judging Dujail*, *supra* note 8, at 44.

22 Art. 15(2) IHT Statute sets out six modes of responsibility: direct commission; ordering, soliciting or inducing; facilitation, assistance or aiding and abetting; JCE; incitement (for genocide only); and attempting.

23 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 this.

24 This mode of liability was first systematically formulated and explicated by the ICTY Appeals Chamber in *Tadić*, in a sweeping review and synthesis of a range of precedents from an earlier generation of military courts and tribunals: Judgment, *Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999, §§ 185–229. More recently, it has been reviewed and upheld as a mode of liability in: Judgment, *Vasiljević* (IT-98-32-A), Appeals Chamber, 25 February 2004, § 96; Judgment, *Kvočka* (IT-98-30/1-A), Appeals Chamber, 28 February 2005, § 82.

25 *Vasiljević*, *supra* note 24, § 97.

26 *Ibid.*, § 98.

27 *Kvočka*, *supra* note 24, § 83.

foreseeable consequence of carrying out the common purpose.²⁸ The common purpose need not be expressed, but can be an unspoken understanding inferred from the fact that a plurality of persons *acted in unison* to effect the criminal purpose, provided this inference is the only reasonable one available on the evidence.²⁹

A key difference between the three categories of JCE is in the interpretation of the *mens rea* required by each category.³⁰ The *mens rea* that must be proved for a basic or extended JCE is an intention to perpetrate a certain crime (basic), or to further the common criminal purpose of a group (extended). The *mens rea* for a 'systemic' JCE is somewhat tailored to the factual scenario to which this category is most commonly applied: an organized system of ill-treatment, such as a detention camp.³¹ Thus, it must be shown that the accused had *personal knowledge of the system of ill-treatment*, and intent to further this system of ill-treatment.³² The ways in which intent can be proved also vary as between the categories: in the case of basic and extended JCE, intent can be proved by manifest evidence or by inference, where the inference is the only reasonable one available on the evidence.³³ In the case of systemic JCE, an accused's position of authority can be *one factor* supporting an inference that he or she had personal knowledge of the system of ill-treatment. It is considered permissible in the category of 'systemic' JCE because of the kinds of factual situations to which the 'systemic' category is applied: concentration or detention camps, where the accused was the commander or held a similar position of authority. An 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 based on position more plausible.³⁴

The facts of the *Dujail* case, in which the crimes unfolded between 1982 and 1986, in several different parts of Iraq and with the involvement of numerous different actors, lend themselves to the application of the 'extended' concept of JCE. Instead, the IHT Trial Chamber applied the legal tests for knowledge and intention in a 'systemic' JCE.³⁵ The IHT Trial Chamber took this less stringent test for knowledge and applied it to a context far removed from a 'detention camp' scenario. The Trial Chamber cites the ICTY Appeals Chamber's decision

28 *Ibid.*

29 *Vasiljević*, *supra* note 24, §§ 108–109; Judgment, *Brđjanin* (IT-99-36-T), Trial Chamber, 1 September 2004, § 353.

30 Judgment, *Krnojelac* (IT-97-25-A), Appeals Chamber, 17 September 2003, § 32.

31 While international courts have noted that the category of a 'systemic' JCE is not limited to concentration camps, they appear to contemplate applying the category to situations analogous to camps or other organized systems of ill-treatment which are spatially localized: *Kvočka*, *supra* note 24, § 183; *Krnojelac*, *supra* note 30, § 89.

32 *Vasiljević*, *supra* note 24, § 101.

33 Judgment, *Blaškić* (IT-95-14-A), Appeals Chamber, 29 July 2004, § 62.

34 See for example Judgment, *Limaj, Bala and Musliu* (IT-03-66-T), Trial Chamber, 30 November 2005, § 511.

35 The IHT Trial Chamber cites two cases relating to JCE: *Krnojelac*, *supra* note 24 and *Aleksovski* (IT-95-14/1-A), Appeals Chamber, 20 March 2000. Both of these cases are 'systemic' JCE cases.

in *Krnolejac*³⁶ as authority for the proposition that a defendant's knowledge of and intention to further a criminal enterprise can be inferred from the defendant's position of authority.³⁷ This is an erroneous application of the principles governing a 'systemic' JCE to factual circumstances appropriately dealt with under the category of 'basic' or 'extended' JCE. Moreover, the IHT's application of the principles represents a basic misreading of the actual reasoning in 'systemic joint enterprise' cases, which do not rely *solely* on the defendant's position of authority to infer knowledge. For example, in *Krnolejac*, evidence established, *inter alia*, that the defendant had direct knowledge of the inhumane treatment of detainees in the camp that he commanded, by virtue of his having made himself aware of certain facts.³⁸ Similarly in *Kvočka*, the ICTY Trial Chamber referred to the defendant's position in the camp as *one* indicator among others such as the defendant's movement through the camp, his contact with detainees and staff and his proximity to evidence of abuse that could be observed through his senses (sight, sound and smell).³⁹

In its misapplication of principles from the 'systemic' category of JCE, the IHT Trial Chamber effectively adopted a 'presumption of knowledge' approach to establishing the *mens rea* of the senior defendants, whereby their official position gave rise to an imputation of knowledge of the alleged JCE. Thus, in its conclusions concerning defendant 'Awwad al-Bandar, the IHT Trial Chamber stated al-Bandar had knowledge of the JCE to commit murder as a crime against humanity against the people of Dujail, simply *because* he was chief judge in the Revolutionary Court and was a senior member of the Ba'ath Party. Therefore, 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'ath Party'.⁴⁰

Similarly, in respect of defendant Saddam Hussein, the IHT found knowledge of and intention to participate in the JCE 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'.⁴¹ 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, this conclusion could have been warranted.

36 *Krnolejac*, *supra* note 30. The IHT Trial Chamber misstates both the date and the paragraph references for this decision.

37 See, Judgment, *Dujail Case* (1/C1/2005), First Trial Chamber, *supra* note 16, at 65 (relating to 'Awwad al-Bandar) and 107 (relating to Saddam Hussein and citing the *Krnolejac* decision).

38 *Krnolejac*, *supra* note 30, § 47.

39 Judgment, *Kvočka* (IT-98-30-T), Trial Chamber, 2 November 2001, § 324.

40 See, Judgment, *Dujail Case* (1/C1/2005), First Trial Chamber, *supra* note 16, at 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 (at 169).

41 *Ibid.*, at 106.

For example, if the habitual or consistent practice of the security agencies, Revolutionary Court and Ba'ath Party institutions had been reconstructed through expert or other evidence,⁴² 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. However, 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 a basic error of law.

In relation to former Vice-President Taha Yassin Ramadan, the IHT also established his knowledge of the JCE on the basis of his official position. The IHT Trial Chamber asserted that Ramadan knew and intended that murder, torture, forced displacement and 'other inhumane acts' were to be committed against the people of Dujail because:

As a member of the (dismantled) Revolutionary Command Council, as Deputy Prime Minister, as a ranking member of the Baath 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,⁴³ he must have known. These 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.⁴⁴

Once again, if there had been some evidence about the functioning of these various institutions, the ways in which knowledge and information flowed

42 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: *U.S. v. Alstotter and Ors*, (1946–1949), *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* (Buffalo, NY: Hein, 1997).

43 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 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 were 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 *Mudiriyyat 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 23 October 2005, at the US military hospital at Abu Ghraib, where he was dying of cancer. His evidence was not cross-examined because defence lawyers had refused to attend the deposition after one of them was murdered in Baghdad on 20 October 2005. The RCLO had provided the defence lawyers with assurances of safe transport to and from the hospital, but the defence 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 defence counsel, see *Judging Dujail*, *supra* note 8, at 20–24.

44 Judgment, *Dujail Case* (1/C1/2005), First Trial Chamber, *supra* note 16, at 209.

through them to individuals at the top, this conclusion might have been legally correct. But as it stands, the inference of knowledge was far from the 'only logical and reasonable one' and appears to flow from the incorrect application of the legal principles governing knowledge and intent for a JCE.

The evidence⁴⁵ against Barzan al-Tikriti clearly indicated that he had some personal knowledge of the mass arrests and forced displacement⁴⁶ 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). The documentary evidence indicated that *Mukhabarat* played the central role in the mass arrests, interrogation and subsequent transfer of detainees to internal exile. Documents from 1987⁴⁷ also stated that perhaps as many as 46 detainees had died during interrogation by the *Mukhabarat*. Thus, despite the absence of any evidence which set out the internal functioning and organization of 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 2 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 UN Commission on Human Rights). The Trial Chamber reaches this conclusion on the basis of its finding that al-Tikriti knew of and intended to contribute to a JCE which 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

45 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 defence only on the morning they were to testify, and most were shielded from the sight of the defence lawyers. These two practices — very late disclosure of witness identities and protective measures that prevented confrontation between defence counsel and the witness — made it difficult to test the witness evidence. The Trial Chamber did not consider these difficulties when determining the credibility of witnesses.

46 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.

47 A document dated 5 July 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 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 record before the court. Nevertheless, 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'.⁴⁸

The IHT Trial Chamber commits the same category of error in its application of the principles of command responsibility. The Appeals Chamber of the ICTY has stipulated that, in order to convict 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 which would have provided notice of the crimes was made available to the commander.⁴⁹ A position of command does not give rise to a presumption of knowledge, but may be one indicator of the defendant's knowledge when combined with other factors.

The IHT Trial Chamber does not apply this standard, but instead asserts that the senior defendants had the requisite knowledge due to their position in the government or because of their kinship with one another.⁵⁰ 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'.⁵¹ 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 cites 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.⁵²

48 Judgment, *Dujail Case* (1/C1/2005), First Trial Chamber, *supra* note 16, at 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 (at 120).

49 *Blaškić*, *supra* note 33, § 62.

50 The Trial Chamber also makes a number of inferences of knowledge from evidence in the file which are not supported by that evidence. This is discussed further below.

51 Judgment, *Dujail Case* (1/C1/2005), First Trial Chamber, *supra* note 16, at 110.

52 The Trial Chamber refers to a variety of correspondence which, 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 *Muhkabarāt*, there was no evidence from inferences could be drawn that these documents actually came to defendant Saddam Hussein's attention.

Similarly, the IHT Trial Chamber finds 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.⁵³ It then contends 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 Ahmed Ibrahim al-Samara’ee, the leader of the party apparatus in Dujail’.⁵⁴ Yet there was no evidence about how information concerning the activities of the local commander of the Popular Army — who was widely cited 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 which could have established the lines of operational control and reporting (relevant to knowledge).

(b) Factual findings

The IHT Trial Chamber’s application of the wrong legal standards for knowledge and intent were 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 investigative judge and prosecution to gather the evidence necessary to satisfy what international criminal law requires to be proved to hold someone individually responsible for a crime against humanity.

The judgment of the Trial Chamber is replete with questionable findings. Its findings concerning the knowledge and intention of defendant Saddam Hussein are representative of the kinds of errors that pervade the decision. At one point in the judgment, the Trial Chamber concludes that Hussein’s knowledge of and intention to participate in a JCE to commit the crimes listed in the charging sheet are ‘obvious because Saddam Hussein has issued the orders to arrest, detain, torture and then execute people’.⁵⁵ One page later, the Trial Chamber concedes that there was no evidence presented by the prosecution that Hussein directly ordered torture and killings.⁵⁶

53 As noted above, no evidence about the defendants’ *de jure* or *de facto* authority was presented during the trial, and the law which the Trial Chamber cites 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.

54 Judgment, *Dujail Case* (I/C1/2005), First Trial Chamber, *supra* note 16, at 216.

55 *Ibid.*, at 103.

56 *Ibid.*, at 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 14 October 1982, the Revolutionary Command Council issued an order, signed by Saddam Hussein, authorizing the

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 causal and logical inferences and deductions, entails the killing of those detainees or at least the killing of many of them'.⁵⁷ 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), or 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 is not based on evidence but on assertion.

One piece of evidence clearly grounds a conclusion that, in 1987, Saddam Hussein was informed 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.⁵⁸ However, this cannot be used to support the conclusion that in 1982–1983, Hussein had the necessary knowledge and was thus liable as a commander for failure to prevent the crimes. Rather, it is evident that Hussein failed to punish crimes that he became aware of in 1987. The Trial Chamber's reliance on the 1987 document to conclude that Hussein failed to *prevent* the crimes in Dujail is thus wholly illogical.⁵⁹

A second major factual problem lies in the Trial Chamber's finding of the existence of a JCE to commit murder, torture, displacement and other inhumane acts as a crime against humanity, against the people of Dujail. As set out above, the Trial Chamber applied the wrong category of JCE to the facts in the case. Nevertheless, it went on to find that there was an unspoken criminal plan

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 27 May 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 14 June 1984, and on 16 June 1984, Saddam Hussein signed an order ratifying the death sentences. The death sentences appear to have been implemented in March 1985. The haste with which the accused persons were tried and convicted, and with which the death sentences were ratified, clearly raises real suspicions that the process was no more than part of a *de facto* plan to carry out extrajudicial executions.

⁵⁷ Judgment, *Dujail Case* (1/C1/2005), First Trial Chamber, *supra* note 16, at 102. See also 119–120 for similar assertions.

⁵⁸ This is the report by Hussein Kamel to Saddam Hussein described in note 47. There are marginal notes on this document which appear to have been made by Saddam Hussein, indicating that he saw it. However, this document was not authenticated by the 'hand-writing experts' appointed by the court, who stated that they did not have the equipment and expertise necessary to validate the document.

⁵⁹ Judgment, *Dujail Case* (1/C1/2005), First Trial Chamber, *supra* note 16, at 119.

formed between the defendants to commit all the crimes charged (except enforced disappearance).⁶⁰ In the absence of any evidence of an express agreement, an ‘unspoken’ joint criminal plan may be inferred where a plurality of persons act in unison to put into effect the plan that is alleged.⁶¹ However, an unspoken understanding among the members of the JCE should only be inferred if it is the *only reasonable inference* from the evidence.⁶²

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 travelled to Dujail to supervise the investigation, but defendant ‘Awwad al-Bandar did not act in relation to Dujail until 2 years after the incident.⁶³ 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 3 months and 2 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 chaos and lack of coordination in the regime’s response.

The problem here is not that it would be impossible to prove that there was a common criminal plan or purpose that came into existence between the senior defendants, but that evidence before the Trial Chamber fell far short of establishing it and thus the Trial Chamber was left to make findings of fact which are without evidentiary foundation. Rather than relying on the strained concept of an ‘unspoken agreement’, there was a need for evidence which adequately reconstructed the functioning of the ‘criminal system’ of state action under the Ba’thist government. 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 was necessary to fill in the gaps and show the links between the ‘crime-base’ and the leadership. ‘Linkage’ evidence can be provided by experts in the politics, history or military

60 *Ibid.*, at 70, 112, 118, 221. Strictly speaking, where the systemic category of JCE is applied, evidence of an agreement or plan is not required, only evidence of a common purpose: see Krnojelac, *supra* note 30, § 96.

61 Vasiljević, *supra* note 24, §§ 108–109.

62 Brđjanin, *supra* note 29, § 353.

63 The evidence before the IHT Trial Chamber clearly showed that Bandar had conducted a summary trial which 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 JCE. 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 *Alstotter* pointed out, showing arbitrary behaviour by the judge in the courtroom is not sufficient; rather it must be proved that the arbitrary behaviour amounted to participation in a criminal policy or plan. See *US v. Alstotter*, *supra* note 42, at 1046, 1063, 1093, 1155.

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.

(c) 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 exact amount of land, its financial value and the impact on victims' income was not established by evidence. An unspecified number of houses were also sealed and their contents removed. The expropriation was undertaken in 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.)

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. International tribunals have dealt with wanton or punitive property destruction under the rubric of 'persecution'.⁶⁴ 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'.⁶⁵ 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.⁶⁶

In the course of categorizing the razing of the lands as an 'other inhumane act', the IHT Trial Chamber does not consider the international decisions that have interpreted an applied this crime. The ICTY Appeals Chamber has noted

64 See, for example, *Blaškić*, *supra* note 33, §§ 147–148; Judgment, *Kordić and Čerkez* (IT-95-14/2-A), Appeals Chamber, 17 December 2004, §§ 108–109.

65 Art. 12(1)(j) IHT Statute, reflecting Art. 7(k) ICCSt.

66 No evidence as to the financial or other effects of the razing of the land was presented.

that while the category of ‘other inhumane acts’ cannot be exhaustively enumerated,⁶⁷ it must be interpreted cautiously because it is so broad that it could violate the principle of *nullum crimen sine lege*.⁶⁸ That is, it could be applied to acts which were not, in fact, violations of international criminal law at the time they were committed. Significantly, the ICTY Appeals Chamber has only applied the category of ‘other inhumane acts’ to situations where the victim has suffered ‘serious bodily or mental harm.’⁶⁹ In no case has the category been 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 extensions 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.

2. 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’ JCE to commit murder, torture, forced displacement and unlawful imprisonment as crimes against humanity. The evidence against Abdullah Ruwayid and ‘Ali Dayeh ‘Ali was that they participated in the arrest of several individuals from Dujail in the aftermath of the assassination attempt,⁷⁰ and wrote a ‘dob-in’ letter to then-Minister of Interior Sadoun Shaker identifying certain individuals as sympathizers with the Da’wa Party.⁷¹ Some of these individuals were arrested, and later 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

67 Kordić and Čerkez, *supra* note 64, § 117.

68 *Ibid.*

69 *Ibid.*, § 117; Vasilijević, *supra* note 24, § 165.

70 The witness evidence against them was largely hearsay and somewhat contradictory.

71 The letters were authenticated by the hand-writing experts appointed by the court as being in the handwriting of Abdullah Khadim 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 hand-writing 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.

before the investigative judge, which were never cross-examined either during the investigation or at trial.⁷²

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 was necessary to prove that they knew that the acts they were committing would assist in the commission of the specific crime by the principals;⁷³ that they were aware of the essential elements of each of the crimes including the principal's intention to commit the crimes⁷⁴ 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.⁷⁵

With the exception of one hearsay statement attributed to one defendant,⁷⁶ no evidence was led 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.

In the absence of this evidence, the IHT Trial Chamber imputes knowledge to the lower-level defendants on two bases. First that because they were all Ba'ath Party members in varying degrees,⁷⁷ they were 'familiar with the nature of [the Ba'ath] Party, especially as regards matters concerning its survival and rule under its leader, defendant Saddam Hussein'.⁷⁸ Second that 'no Iraqi had any doubt' that arrests would lead to unlawful imprisonment, torture, execution and displacement.⁷⁹

The IHT Trial Chamber thus relies on the defendants' status as Ba'ath 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,⁸⁰ the IHT

72 The right to question witnesses is often exercised at the investigative phase in civil law systems. However, defence 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.

73 *Blaškić*, *supra* note 33, § 45.

74 *Aleksovski*, *supra* note 35, § 162.

75 *Blaškić*, *supra* note 33, § 50.

76 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, defendant 'Ali Dayeh 'Ali al-Zubaidi 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 Hassoun al-Samarra'i'. The basis upon which defendant 'Ali Dayeh 'Ali knew this was never established, and there was no evidence indicating that he witnessed any torture himself.

77 The evidence was that the lower-level defendants ranged from 'supporters' to full 'members' of the Ba'ath Party. They did not hold positions of command and did not occupy political posts.

78 Judgment, *Dujail Case* (1/C1/2005), First Trial Chamber, *supra* note 16, at 239, 253, 265.

79 *Ibid.*, at 236

80 See *supra* note 19, for a discussion of the doctrine.

Trial Chamber does not in fact set out the evidence which leads it to this finding and never notified the parties that it intended to take judicial notice of facts nor gave them an 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 which was not before the court, and which appears 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 has not been given notice. 'Common knowledge' or 'what every Iraqi knew' might form the basis for findings concerning 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 regime — 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. In the absence such evidence, the conviction of the lower-level defendants (who are serving lengthy prison sentences) is unsustainable.

B. Procedural Issues

The conduct of the Dujail proceedings suffered serious defects, which vitiated its fairness.⁸¹ 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 defence, 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 fails to address most of these issues, or addresses them in a manner that disregards or misrepresents essential facts.

1. Trial Chamber's Finding on Disclosure of Evidence

The Trial Chamber asserts that all evidence against the defendants was disclosed to them with the initial transfer of the case file in August 2005.⁸² However, the judgment fails to consider or even acknowledge the numerous instances of late or same-day disclosure of incriminating evidence that occurred during the trial⁸³ — instances of which the Trial Chamber was fully aware, because the defence objected in court. Similarly, the Trial Chamber ignores or appears unaware of the late disclosure of 300 pages of documents on 22 January 2006, even though these documents were transmitted to

81 See *Judging Dujail*, *supra* note 8, at 36–72.

82 Judgment, *Dujail Case (1/C1/2005)*, First Trial Chamber, *supra* note 16, at 19.

83 See *Judging Dujail*, *supra* note 8, at 48–52.

defence 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 relies without qualification or discussion on evidence that was not disclosed in a timely way to certain defendants.⁸⁴

Another flaw in the disclosure process 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.⁸⁵ 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.⁸⁶ 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.⁸⁷ The Revolutionary Court file was only located and disclosed in late June 2006, due to the efforts of a representative of the RCLO. It was handed over to the defence after the close of the defence case.

2. Trial Chamber's Finding on Security for Defence Counsel

Similarly misleading is the Trial Chamber's response to the security concerns of private defence counsel. Three private defence counsel were murdered in the course of the proceedings, and a security arrangement negotiated between the Iraqi government and the defence counsel was not effectively implemented by the government or supervised by the court.⁸⁸

The Trial Chamber claims that, as at the beginning of the trial, private defence counsel and court-funded Defence Office lawyers had access to the same security arrangements as judges and prosecutors.⁸⁹ The conclusion contradicts all the information available to the present author, including

84 Judgment, *Dujail Case* (1/C1/2005), First Trial Chamber, *supra* note 16, at 94–95, where the IHT relies on a CD of a phone 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 defence before being used in court, and which were never authenticated. All of this evidence was relied upon by the Trial Chamber without qualification.

85 *Judging Dujail*, *supra* note 8, at 52–53.

86 Judgment, *Dujail Case* (1/C1/2005), First Trial Chamber, *supra* note 16, at 79.

87 Trial observation notes, 6 April 2006. The judge made a similar statement on 5 June 2006.

88 *Judging Dujail*, *supra* note 8, at 22–24.

89 Judgment, *Dujail Case* (1/C1/2005), First Trial Chamber, *supra* note 16, at 21.

interviews in which *both* court-appointed *and* private defence counsel deny that any security arrangements were made available to them before the beginning of the trial.⁹⁰ The Trial Chamber cites no evidence for its assertion and does not explain how it came to this view. The Trial Chamber's reasoning shows no evidence of any objective inquiry into the existence, nature and sufficiency of the security arrangements developed for defence lawyers over the course of the trial.⁹¹ The Trial Chamber also fails to respond to or in any way address a detailed motion requesting certain security measures that was filed in court by private defence lawyers on 7 December 2005.

Instead, the Trial Chamber blames defence lawyers for failing to accept the security arrangements purportedly offered by the court and places responsibility for the deaths on them. The Trial Chamber contends that defence counsel failed to comply with relevant security procedures, but cites no evidence for this claim and no particular details of instances of non-compliance. It also does not examine whether alleged non-compliance with security procedures was causally related to the deaths of individual defence lawyers.

3. Response to Defence Motions

The Trial Chamber consistently failed to issue public written decisions on key procedural issues, such as on its decision to close the defence case, its decision to read 29 witness statements into the record or in response to defence motions accusing the presiding judge of bias. During sessions observed by the present author, at least six written motions — addressing issues such as the time needed for the defence to prepare, security for defence counsel, recall of witnesses, scheduling of trial sessions and the legality of the court — were submitted by private defence lawyers. No public written response on these issues was provided by the court during the proceedings.⁹²

Most of the motions relating to trial procedure, such as for the recall of witnesses and scheduling of trial sessions, remain unaddressed by the Trial Chamber. This perhaps reflects the fact that it is essentially futile to respond to such motions after the trial has concluded, but the Trial Chamber does 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 does observe that it declined to respond to certain motions because they were written in intemperate language,⁹³ but does not specify which ones fall within this category and did not notify defence lawyers that their motions were being disregarded on that ground.

The failure to provide any written reasons in respect of the majority of trial procedure-related motions further diminishes the transparency and credibility

90 *Judging Dujail*, *supra* note 8, at 20–24, 28–35.

91 The Trial Chamber also makes a basic error of fact in asserting that two out of the three murdered lawyers were *court-appointed* lawyers; they were in fact private defence counsel.

92 *Judging Dujail*, *supra* note 8, at 63.

93 Judgment, *Dujail Case* (1/C1/2005), First Trial Chamber, *supra* note 16, at 10.

of the decision. In a trial which was highly politicized, and in which many aspects of the trial process were unfamiliar to the Iraqi public, the non-responsiveness created an appearance of arbitrariness. Ignoring procedural motions over the course of the trial also runs the serious risk that the defendants' rights will be irreversibly prejudiced because of the lack of a timely response by the court.

The judgment does provide a written response to three motions submitted by defence in the course of the trial:

- (i) A motion that presiding judge Ra'uf Abdel Rahman recuse himself due to bias, on the grounds that he was imprisoned and tortured under a Ba'ath 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 praevia*).

The responses to the motions on bias and legality will be considered below.⁹⁴

(a) Motion on bias

The motion was filed in court shortly after Judge Ra'uf Abdel Rahman replaced Rizgar Amin as presiding judge, due to the latter's resignation.⁹⁵ 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'ath government, and because he was a native of Halabja, a Kurdish town in which at least 3,200 civilians were killed by chemical weapons deployed by the Iraqi military in March 1988.⁹⁶

94 The way in which the IHT Trial Chamber dealt with the question of retroactivity cannot be considered due to reasons of space, but it is suggested that the reasoning on this issue is also very unsatisfactory. In a nutshell, I submit that in its consideration of the *nullum crimen* issue, the IHT Trial Chamber principally concerned itself with whether crimes against humanity per se were recognized as crimes in international law in 1982, rather than whether the *definition contained in the IHT Statute* constituted customary international law at that time. The IHT Statute replicated the definition of crimes against humanity found in the Rome Statute, which represented a codification of the definition of crimes against humanity as at 1998. As Yuval Shany points out, applying this definition to acts that occurred before 1990 raises the question of exactly when the 'armed nexus' requirement of crimes against humanity ceased to form part of the crimes customary international definition [see Y. Shany, 'Does One Size Fit All? Reading the Jurisdictional Provisions of the Iraqi Special Tribunal in Light of the Statutes of the International Criminal Tribunals', 2 *Journal of International Criminal Justice* (2004) 338, at 344–345]. The IHT fails to really examine the critical legal issue in light of an adequate sampling of international law and practice.

95 For the cause of Judge Rizgar Amin's resignation, see *Judging Dujail*, *supra* note 8, at 41.

96 Middle East Watch/Human Rights Watch Report, *Genocide in Iraq: The Anfal Campaign against the Kurds* (New York: Human Rights Watch, 1993), at 102–108.

The motion was rejected, without reasons, by the Trial Chamber in a court session on 28 February 2006.⁹⁷

In its written judgment of November 2006, the Trial Chamber rejects the bias motion on three grounds. First, it contends that even though Judge Ra'uf Abdel Rahman is from Halabja, this does not undermine his impartiality because 'he is under oath [and] if he feels uneasy in this regard he would request to be removed'.⁹⁸ Second, the Trial Chamber notes that Ra'uf Abdel Rahman was 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'.⁹⁹ Third, the Trial Chamber argues 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 implies that this is an absurd outcome, and instead contends 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 focuses on whether Ra'uf Abdel Rahman has *subjective* feelings or attitudes of bias, and concludes that if he did, he can 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.¹⁰⁰ 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*'.¹⁰¹ The Trial Chamber fails to address entirely the question of whether Ra'uf Abdel Rahman's imprisonment under the Presidency of 'Abdel Salam 'Arif (whose government initially came to power in coalition with the Ba'th Party in 1963),¹⁰² or the fact that he is from Halabja, gives rise to a reasonable appearance of bias. Nor does it establish facts which would be critical to the latter question, such as whether any of the presiding judge's family was victim of the 1988 Iraqi attack on Halabja, or whether he was arrested before or after the Ba'th Party abandoned its partnership in the 'Arif government. While none of these facts compels a finding of apprehended bias, the Trial Chamber failed to apply the IHT's own rules by overlooking the issue.

97 Trial observation notes, 28 February 2006.

98 *Judging Dujail*, *supra* note 8, at 7

99 *Ibid.*

100 See, for example, Judgment, *Furundžija* (IT-95-17/1-A), Appeals Chamber, 21 July 2000, §§ 189–190; Judgment, *Piersack v. Belgium* (App. 8692/79), 1 October 1982; (1983) 5 EHRR 169, § 30.

101 Rule 7(4), Rules of Procedure and Gathering of Evidence with Regard to the Supreme Iraq Criminal Tribunal (2005), Rule 23(2) (emphasis added).

102 The Ba'th Party's Hassan al-Bakr, mentor and relative of Saddam Hussein, held the position of Prime Minister under the Presidency of 'Arif and was part of the Ba'th faction that remained in the government until the spring of 1964. Saddam Hussein appears to have been imprisoned by the 'Arif government in late 1964: M.F. Sluglett and P. Sluglett, *Iraq Since 1958: From Revolution to Dictatorship* (London: IB Tauris, 1987), at 110.

(b) Motion on the legality of the creation of 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).¹⁰³ At the time of its creation, some international humanitarian law experts questioned whether the occupying power was legally 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.¹⁰⁴ However, the Iraqi Transitional National Assembly (elected by general elections on 30 January 2005) re-established the Iraqi Special Tribunal as the IHT by re-passing (with amendments) its Statute into Iraqi law and the Statute was proclaimed on 18 October 2005 (1 day before the start of the *Dujail* trial).¹⁰⁵ Unlike the CPA and its creation, the Iraqi Governing Council (IGC),¹⁰⁶ 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 does not discuss the specific international humanitarian law principles governing the legislative competence of an occupying power, and makes the erroneous claim that the IGC exercised sovereign power¹⁰⁷ and was thus competent to create the Iraqi Special Tribunal.¹⁰⁸ However, the error is harmless because the Trial Chamber resolves 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 National Gazette.¹⁰⁹ It also notes that the IHT is recognized as an institution in the permanent Constitution of Iraq, which was ratified by referendum on 15 October 2005.¹¹⁰

3. Judgment of the Appeals Chamber

The written reasons of the Trial Chamber were not made available to the defence until 17 days after the reading of the verdict on 5 November 2006.

103 For further detail, see Human Rights Watch Briefing Paper, *The Former Iraqi Government on Trial*, *supra* note 2, at 2–4.

104 See, for example, M. Sassòli, 'Legislation and the Maintenance of Public Order and Civil Life by Occupying Powers', 16 *European Journal of International Law* (2005) 661, at 675.

105 For further details concerning the legislative history of the IHT Statute, see *Judging Dujail*, *supra* note 8, at 8.

106 The Iraqi Governing Council was created by a regulation of the CPA on 13 July 2003, and did not exercise sovereign power. Its decisions were subject to veto by the Provisional Administrator Paul Bremer, and it did not have recognized international legal personality in foreign relations. See generally, G. Fox, 'The Occupation of Iraq', 36 *Georgetown Journal of International Law* (2005) 195–296, 204–208.

107 The judgment does not discuss any international law principles concerning the criteria for determining whether an authority is 'sovereign'.

108 Judgment, *Dujail Case* (1/C1/2005), First Trial Chamber, *supra* note 16, at 23–27.

109 *Ibid.*, at 28.

110 Art. 130, Constitution of Iraq.

The IHT Appeals Chamber was constituted on 12 December 2006, and delivered its opinion upholding all convictions on 26 December 2006. The speed of the decision, the brevity of the opinion (20 pages) and the cursory nature of the reasoning all strongly suggest that the Appeals Chamber did not conduct a 'genuine review' as required by international fair trial principles.¹¹¹

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:

[a]s 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.¹¹²

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

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'.¹¹³ The first of these findings was not made by the Trial Chamber, and the second was made but acknowledged to be without evidentiary basis.¹¹⁴ Similarly, the Appeals Chamber asserted that 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'.¹¹⁵

Taha Yassin Ramadan is also found to have knowledge of the crimes of his subordinates, 'because [he] had actual authority over his subordinates by virtue of his position'.¹¹⁶ 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'.¹¹⁷ In fact, Bandar had made no such admission, stating that 'as for the considerations of the Dujail case [before the

111 Art. 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: M. Nowak, *UN Covenant on Civil and Political Rights – CCPR Commentary* (Kehl: NP Engel, 1993), at 266.

112 Judgment, *Dujail Case*, Appeals Chamber, 26 December 2006, at 14.

113 *Ibid.*, at 14.

114 See *supra* note 56.

115 Judgment, *Dujail Case*, Appeals Chamber, *supra* note 112, at 8.

116 *Ibid.*, at 17.

117 Judgment, *Dujail Case*, Appeals Chamber, *supra* note 112, at 16.

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'.¹¹⁸

The lower-level defendants' conviction is 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'.¹¹⁹ The Appeals Chamber also finds that the lower-level defends 'instigated' the crimes of which they were committed, 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 it failed to act impartially in the performance of its legal duties.

As a result, four men have been sent to the gallows on the basis of a conviction that was substantively unsound. Another three men remain imprisoned for crimes that were not the subject of sufficient evidence. The decisions themselves are also a wholly inadequate record of the functioning of the former regime and a poor resource for future generations who seek to understand the 'bureaucracy of repression' in Ba'hist Iraq.

4. Conclusion

The serious legal errors in the IHT's judgments in the *Dujail* case and the substantial evidentiary gaps in the case prepared by the IHT's investigative judges, in many ways reflect the shortcomings of the institutional design of the IHT. A judicial sector assessment by the CPA and a separate assessment by the UN both concluded in 2003 that the Iraqi judicial system did not have the technical capacity on its own to conduct trials of this magnitude,¹²⁰ implying that some form of external assistance would be required in order to meet human rights and evidentiary standards. But the US was committed at early stage, perhaps even before the occupation began, to the idea of an 'Iraqi-led' court and maintained strong opposition to proposals for a hybrid tribunal throughout 2003.¹²¹ The rhetoric of an 'Iraqi-led' process appears to have been used by the CPA and US officials in Washington to deflect demands for greater international involvement and oversight of trials. The resistance to significant UN involvement seems to have been in part an extension of the wider US desire to retain political control over transitional processes,¹²² and in part due to hostility to internationalized justice mechanisms in the mould of

118 'Awwad al-Bandar, statement before investigative judge, 27 February 2005.

119 Judgment, *Dujail Case*, Appeals Chamber, *supra* note 112, at 17.

120 Iraq Judicial Assessment Team, *Report of the Iraq Judicial Assessment Team* (June 2003) 6–7; World Bank–UNDG Legal Needs Assessment Mission to Iraq, *Sectoral Report* (August 2003) 17–18.

121 See e.g. T. Shanker and N. Lewis, 'US Wants Iraqis to Judge Hussein', *The New York Times* (New York, US), 1 August 2003, 1.

122 See e.g. T. Grant, 'The Security Council and Iraq: An Incremental Practice', 97 *American Journal of International Law* (2003) 823.

the International Criminal Court.¹²³ Proposals to create a joint Iraq–International Commission of Experts to engage in consultations and make recommendations were rejected.¹²⁴

Despite claims by US government advisors to the IHT — and some academic commentators — that the judges of the IHT had received sufficient training to conduct trials that complied with substantive international criminal law principles and fair trial guarantees, both the conduct and the outcome of the *Dujail* case strongly indicate the contrary. More international assistance might have ameliorated some of the underlying capacity problems, but the institutional structure of the IHT meant that this assistance was at once scarcer and less effective¹²⁵ than it might have been if the court had been created as a genuinely hybrid or ‘internationalized’ court. UN personnel were prohibited from assisting the court because of its application of the death penalty, and also because of the considerable ill-will generated by the US refusal to partner with the UN in the creation of the court. International assistance on a bilateral basis was limited because most European Union states are abolitionist and would not actively participate in a process applying the death penalty. There were also concerns about participating in an institution widely perceived as American-dominated. Ironically, the lack of other sources of assistance meant that the perception of American domination became self-fulfilling. Almost the only source of foreign assistance came through the US Embassy’s Regime Crimes Liaison Office, which came to act as the *de facto* administration of the court in many critical areas: security, witness transportation and protection, investigations and logistics.¹²⁶ As the RCLO budget comes to an end in 2007 and it is wound down, the capacity of the IHT to conduct even these basic operations is thrown into question.

A second aspect of the IHT’s institutional design that contributed to its failures in the *Dujail* case was a lack of insulation from intense political pressures. Both publicly and privately, the Iraqi government created an environment of enormous pressure on the judges of the IHT.¹²⁷ This pressure was created through scathing attacks on the court for being too lenient on the defendants and too slow in reaching a (guilty) verdict, and by direct interference with the service of judges on the trial bench in both the *Dujail* and *Anfal* trials. This interference was effected in two ways: by intervention of the de-Ba’athification

123 E. Stover, H. Megally and H. Mufti, ‘Bremer’s ‘Gordian Knot’: Transitional Justice and the US Occupation of Iraq’, 27 *Human Rights Quarterly* (2005) 830, at 839.

124 This proposal was put by UN Special Representative Sergio Vieira de Mello: see UN News Centre, ‘Statements and Press Remarks: Briefing to the Security Council by Sergio Vieira de Mello’ (Press Release, 22 July 2003). Vieira de Mello was killed in the bombing of the UN compound in Baghdad on 19 August 2003: see UN News Centre, ‘Top UN Envoy Sergio Vieira de Mello Killed in Terrorist Blast in Baghdad’ (Press Release, 19 August 2003).

125 The IHT Statute envisages international ‘advisors’ rather than direct participation by internationals in the process.

126 See generally *Judging Dujail*, *supra* note 8, at 12–28, 84–87.

127 *Ibid.*, at 37–43; see also M. Sissons and A.S. Bassin, ‘Was the *Dujail* Trial Fair?’, 5 *Journal of International Criminal Justice* (2007) 272–286.

Commission to intimidate or remove sitting judges,¹²⁸ and by the Cabinet decision to remove the presiding judge of the *Anfal* trial because he was deemed to have made comments favourable to Saddam Hussein.¹²⁹ The end result was a climate in which judges were clearly concerned about the consequences of making decisions that would displease the Iraqi government.

The outcome of these institutional failures is a tribunal that is unable to realize the various goals that were proclaimed for it: conducting fair trials, establishing a credible historical record and building judicial capacity. While judges and others have received training to conduct IHT trials, the durability of any capacity is questionable. The severity of insecurity in Iraq has meant that several judges and many defence lawyers have had to leave the country for the near future, while the sustainability of the IHT as an institution is doubtful because of a lack of governmental support for fair trials and its heavy dependence on American assistance to conduct essential functions. Indeed, even the claim that, because of its 'Iraqi-led' nature, the IHT is more relevant and comprehensible to the Iraqi population, is open to serious question. The trials conducted by the IHT were far removed from the ordinary criminal trials that take place in domestic courts, such as the Central Criminal Court of Iraq. As such, there was little comprehension among the wider Iraqi public about the IHT and its procedure and the court was regularly attacked in the Iraqi press as being 'too lenient' with defendants and too slow in reaching a verdict. The IHT did little to respond to these sentiments, and never established a functioning Outreach and Communications department as originally envisaged.¹³⁰

As a model of post-conflict justice, it is difficult to see the IHT as other than a failure. No doubt, the collapse of security in Iraq after late 2004 and the emergence of a civil war and bitter sectarian divisions, contributed to this failure. However, the poor policy-choices of the US-led occupation administration and consequent deficiencies in institutional design are, in this author's view, among the major causes. In certain respects, the IHT became a battleground for social and political conflicts that its US sponsors could neither control, nor protect it from. But these conflicts could reasonably have been anticipated at an earlier stage, and should have been considered in policy judgments about whether an 'Iraqi-led' court could have fairly and successfully prosecuted the international crimes committed by the former government.

128 This possibility was created by Art. 33 of the IHT Statute, which enabled the de-Ba'athification Commission to suspend judges on a suspicion or allegation that the judge was once a member of the Ba'ath Party: for further explanation of how this article was used, see *Judging Dujail*, *supra* note 8, at 38–39.

129 Art. 4(4) IHT Statute gave this power to the Cabinet, and thus created the possibility that it might be used to remove a sitting judge. *Ibid.*, at 40–41.

130 *Ibid.*, at 24–27.