
Volume 39
Issue 1 2006-2007

2007

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Recommended Citation

Sandra Hodgkinson, *Preparing for the Mother of All Trials and Lessons Learned from Dujayl*, 39 Case W. Res. J. Int'l L. 195 (2007)
Available at: <http://scholarlycommons.law.case.edu/jil/vol39/iss1/7>

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SYMPOSIUM: “LESSONS FROM THE SADDAM TRIAL”*

TRANSCRIPT: PREPARING FOR THE MOTHER OF ALL TRIALS
AND LESSONS LEARNED FROM DUJAYL

Sandra Hodgkinson[†]

MS. HODGKINSON: Good morning and welcome. I am currently the Deputy to the Ambassador-at-Large for War Crimes Issues at the U.S. State Department, the Honorable John Clint Williamson. From 2003 to 2004, during the Coalition Provisional Authority (CPA), I was the Senior Advisor for Human Rights and I also served as Director of the Office of Human Rights and Transitional Justice in Baghdad, which supported Iraq’s efforts to establish the Iraqi Special Tribunal, now known as the Iraqi High Tribunal (IHT).

In the summer and fall of 2003, Ambassador Paul Bremer, then head of the CPA, delegated the authority to draft the statute of the Iraqi Special Tribunal to the Iraqi Governing Council (IGC) in CPA Order Number 48. The statute provides for the prosecution and accountability of senior-level former Iraqi regime officials. The offenses include a select few offenses under Iraqi criminal law as well those under international criminal law including genocide, war crimes, and crimes against humanity. Several members of my office—including representatives from the United Kingdom, Spain, Australia, and the Czech Republic—supported Iraqi efforts to draft the statute by providing appropriate technical and practical expertise. On December 10, 2003, days prior to Saddam Hussein’s capture, the statute became law and the tribunal was born. Two years later, in late 2005, the newly formed Iraqi National Assembly endorsed the court’s statute with only a few revisions and renamed it the Iraqi High Tribunal. Throughout the process, the Iraqis were

* The Frederick K. Cox International Law Center sponsored the symposium, “Lessons from the Saddam Trial.” On October 6, 2006, the conference drew renowned international law scholars and practitioners to Case Western Reserve University School of Law to share their expert analysis of the historic first case before the Iraqi High Tribunal. This transcript is adopted from a presentation given at the symposium.

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unified in wanting the court to be seated in Iraq and for trials to be conducted in Arabic by Iraqi judges. They requested international support in undertaking this process but made it clear that they did not want their court to be run by international actors outside the country. They sought control of the process from start to finish. It is U.S. policy to support domestic war crimes tribunals when the local government is willing and able to carry out justice. In Iraq's case, the Iraqis were clearly willing and, with some additional legal assistance and support, we believed that the Iraqi judges were fully capable to conduct such trials. After all, Iraq is where the Hammurabi Code was written, the University of Baghdad Law School is a well-recognized legal institute, and throughout its history Iraq has boasted strong legal values and developed a qualified cadre of legal professionals. It is unfortunate, however, that during the reign of Saddam Hussein, many of these qualified legal professional were manipulated by the government.

Localized justice often sends a powerful message to local populations and to the broader international community that impunity for mass atrocities will not be tolerated by civilized societies. It also can assist in deterring would-be dictators. In Iraq, the development of the IHT is one of the ways in which the Iraqi people are demonstrating that rule of law is returning to Iraq and its people.

There are also cost factors to consider. A decision by the Iraqis to hold trials outside of Iraq would have increased the tribunal's costs exponentially, which is a factor for the Iraqi government and donor nations to consider. I would like to applaud the hard work and dedication of so many brave Iraqis in pushing the IHT to succeed, especially when so many faced personal, familial, and national suffering under Saddam's brutal regime.

As I mentioned, my office in the CPA supported Iraqi efforts to deal with the broader issues of human rights and transitional justice in Iraq. This meant that the IHT was only one part, albeit a major part, of a much larger transitional justice system. The need for a holistic approach encompassing many truth-revealing mechanisms was discussed early on by the Iraqi people and ultimately holds the path forward. The IHT, however, was envisioned to prosecute roughly twenty of the most serious regime offenders. The remaining accused, typically lower-level officials, could be tried in local courts. The issue of how many individuals should be prosecuted in the IHT continues to provoke debate as some Iraqis would prefer that more lower-level officials be tried before the IHT. Others may prefer truth and reconciliation. However the Iraqis choose to move forward, it will be important to sift out these lower-level

offenders so as to not bog down the IHT, further delaying justice to the people.

Lower-level actors could instead be part of a broader truth and reconciliation, or truth-revealing process. While the Iraqis have not yet established a broader truth and reconciliation committee or begun any lower-level prosecutions of regime supporters, they have made tremendous progress towards establishing a number of documentation projects throughout the country. The current documentation projects are working to build a formal, accessible, and historical record for the victims and their successors. Formal documentation is unlike a truth and reconciliation committee because it builds a record yet postpones sensitive issues of forgiveness which some Iraqi people may not yet be ready to address. Both civil society and the Ministry of Human Rights have begun to examine such mechanisms in Iraq and are balancing these needs with other priorities, such as exhuming mass graves and working on current human rights issues in Iraq. Some Iraqis have also expressed a desire for financial compensation for past atrocities. While this may be one way to heal the past, it will likely impose significant financial burdens on the current and future Iraqi governments.

As the Iraqis continue to explore all these options, they must consider how far prosecutorial justice should go given the IHT's limited resources and its need to focus on high-level perpetrators in order to be effective, timely, and produce the necessary justice. They should look to balance these high-level prosecutions in the IHT with potential lower-level prosecutions in local courts, documentation, truth-revealing, and reconciliation programs as they move forward.

From both a political and legal standpoint, the IHT had to make a determination as to which case to prosecute first. The simple question is: do you begin with an easy, prosecutable case to build the court's credibility and experience, or do you begin with a case of significant national importance due to the scope and heinous nature of the crimes? Clearly, in either instance, the investigative file would need to be completed on whichever case is going first. As so many atrocities of significance were committed, the answer was not straightforward—reasonable minds differed among Iraqis themselves as well as international observers providing advice. Prosecution cases under the IHT are event-based, so if you started with the *Anfal* campaign or the crushing of the 1991 Shia uprising, you would begin with a key, high-profile case that would likely have Saddam as a defendant. This could raise the stakes if a mistake was made. On the other hand, starting with a lower-profile case,

such as *Dujayl*, might allow the court to work out the kinks outside of the spotlight and without the risk of compromising a pivotal case.

Initially, it was not necessarily certain that Saddam would be a defendant in the *Dujayl* trial; however, this is what came out of the investigative process. With the IHT's decision to bring charges against Saddam Hussein for his role in *Dujayl*, the case was put more into the international spotlight and the level of scrutiny grew considerably higher. Some Iraqis may have preferred for Saddam Hussein to receive his first conviction for a more significant case. If, for example, Saddam is convicted for *Dujayl*, executed, and never stands trial in any subsequent cases, would this serve justice? It is important to remember that no matter what trials Saddam Hussein ultimately stands justice for, there does remain a large cadre of defendants, such as Ali Hassan al-Majid (Chemical Ali), who are accused of major atrocities against the Iraqi people. Justice for Iraq does not only depend on convicting one man but on addressing alleged atrocities committed by all senior regime leaders.

In May 2004, the U.S. established the Regime Crimes Liaison's Office (RCLO) to provide U.S. support to Iraqi-led investigations and prosecutions for the IHT. By this time, I was back in Washington, DC working at the National Security Council, providing support for our RCLO staff in the field. From this angle, two crucial themes emerged regarding the tribunal's operations. First, it was absolutely critical that the Iraqis be as transparent as possible when describing the court and its activities, when explaining its procedures, and in the steps it was taking to keep the Iraqi people and the international community fully informed—an issue that was particularly challenging given the increase in security threats. Full transparency would serve as a model for future rule of law in Iraq and would ensure a lasting judicial and social legacy for Iraqis in future generations.

Second, it was also crucial that the tribunal properly balance efficiency and fairness concerns, allowing trials to move swiftly enough toward more significant cases while simultaneously allowing for a full and fair defense of each defendant. The ultimate goals of the tribunal are to ensure that justice is done, and to serve as a symbol that the rule of law has finally returned to Iraq. To accomplish this, trials must move forward, while allowing a full and fair defense for each defendant.

One of the harsher lessons learned from the *Dujayl* trial was the direct effect of international support, or lack thereof, on a tribunal's domestic success. Following the gruesome 1988 photos of the chemical attack on Halabja, and throughout much of the 1990s, NGOs and United Nations member-states broadly acknowledged

the need for accountability of atrocities committed under Saddam Hussein's regime. While an ad hoc tribunal for Iraq was never erected through the UN Security Council, governments openly supported the establishment of other programs, such as INDICT, the Iraq Foundation, and the highly successful Documentation Project, all of which focused international attention on Iraq's brutal past.

However, when the time for international engagement came in 2003 to 2004, there were very few in the international community who were prepared to assist with post-conflict accountability mechanisms in Iraq. My office had representatives in Iraq from the US, UK, Australia, Spain, and the Czech Republic, but most countries, as well as the United Nations, refused to provide any support to the Iraqis. Some NGOs such as the International Bar Association, ILAC, and the United States Institute of Peace provided legal training and assistance early on, but there was little assistance beyond this unless directly funded by the U.S. government. To date, the USG has contributed approximately \$130 million, with significant additional funding planned for the future. This tribunal and the IHT judges, prosecutors, defense attorneys, and administrative personnel could all benefit from increased international financial and expertise support.

Since the Iraqi justice system is based more closely on a civil law system imported from Egypt and influenced by France, broader international support is especially critical to ensure proper civil law expertise, particularly in matters related to the investigative chamber and in the rules of procedure. The failure of countries with similar experiences to come to the assistance of the Iraqis made the loss of international support to the IHT particularly acute. It is not enough to stand on the sidelines and lob criticisms at the process. Countries should work to support the tribunal in building its crucial legacy, not just for the Iraqi people but as a shining example of justice and deterrence for possible future atrocities. Ultimately, international support will be crucial for the IHT in ensuring that it meets international standards in an effective and efficient manner.

Most tribunals only appoint counsel for indigent defendants. However, at the IHT, the unexpected but constant boycotts throughout the entire proceedings placed court appointed lawyers in perpetual demand. This made hiring and training court defense personnel extremely important to the continued success of the tribunal. During all sessions of this trial, these standby defense counsels were always available and ready to stand in when privately retained defense counsel did not appear. Also, when defense counsel boycotted closing arguments for their defendants, the IHT defense counsel

provided an invaluable service. They stepped in with superb closing arguments to ensure fairness to the defendants and guarantee that the process would continue to move forward efficiently.

Clearly, the current security environment in Iraq poses challenges for the tribunal's success, and requires careful attention by the IHT. As I indicated earlier, the broader principle of complementarity supports the notion that when there is a local competent court, and its citizens are willing and able to conduct the proceedings there, this will be favored over removing justice from the population and exporting it to a foreign location. The Iraqi people decided they were willing and able to conduct their own trials if they received international assistance, and despite the existing security challenges, are succeeding in this.

While the safety and protection of defense counsel is paramount to a fair and efficient judicial process, there is some responsibility for the defense counsel to avail themselves of reasonable protections being offered to them by the IHT. The current climate in Iraq does not leave many options other than those previously offered to defense counsel by the IHT. Defense counsel were provided the opportunity to recommend security solutions, which they did, and court procedures were modified to give defense counsel additional time in taking protective measures. The IHT also provided defense counsel with several options to choose from, including [traveling with] private security guards or moving into the International Zone, where the IHT built a safe housing complex with office space for defense counsel. They declined to move into this safe housing complex in the International Zone near the courthouse, and then boycotted proceedings instead.

It is also significant to note that—although tragic—judges, defense counsel, and other court personnel in regular Iraqi courts, not just the IHT, have fallen victim to targeted or random violence as well. While it is often difficult to ascertain the specific motives behind any killing or attack, one cannot assume that any killing or attack is necessarily linked to the officials' role or relationship to the IHT.

The wisdom of charging Saddam Hussein in a relatively low-profile case such as *Dujayl*, rather than a higher profile case at a later date, remains to be evaluated. The strategy of using a first case of less significant national importance to work out any judicial kinks is novel and may be wise. However, some could argue that this strategy is problematic if, in this case, Saddam Hussein is convicted, given the death penalty, and executed—all before he is able to stand trial for other more significant offenses. Even if this occurs, it is important to remember that there are other key perpetrators still

to stand trial and their prosecutions will further provide Iraqi victims with their day in court. What is clear is that the choice to include Saddam Hussein as a defendant certainly drew more attention to an otherwise small case and the Iraqis must now conduct their first act of accountability on a far more scrutinized stage.

Hiring international advisors to advise the trial chamber and to advise defense counsel were important and essential steps to having the IHT process move forward. The international advisors who served during the Dujayl trial were well-respected by the Iraqis, provided invaluable assistance and brought additional credibility to the process. As you may be aware, the IHT Statute permits the Iraqis to include a foreign judge on the IHT panel if they choose, and some observers have criticized the tribunal for choosing not to do this. The original statute passed in December of 2003 actually required international advisors to the IHT for all court activity, however, when more than eighteen months had passed and no international advisors were sent to support the Iraqis, the Iraqi national assembly removed this requirement and seeking the involvement of international advisors became optional. It is unfortunate that the broader international community did not support the Iraqi government's desires to have international advisors from the beginning—however, fortunately, as the process moved forward, two advisors did come to support the judges in the Dujayl trial and the defense counsel, respectively.

As for the use of international judges instead of international advisors (who happen to be judges), there can be challenges as well, including translation of sessions during deliberations and understanding the local legal procedures and traditions. In this instance, the Iraqis drafted a statute which gave the Iraqis the power to determine their own judicial process and this was exactly what they did. This was not a hybrid tribunal, but a domestic one. In order to augment their capacities, they chose to include international advisors to advise their judicial panels, rather than international judges to sit on their panels. It is disappointing that the broader international community did not support this and undermines greater international efforts towards accountability.

The IHT is structured so that cases, not individuals, are charged. Given that many of the senior-regime officials indicted by the IHT were involved in multiple atrocities, they are likely to be indicted for multiple crimes across multiple prosecution cases. As a result, there are “defendants in common” for many cases, and fairness and due process concerns have discouraged the IHT from holding simultaneous trials for different offenses. This has slowed—and will continue to slow—the trial process. The IHT must confront this

unique challenge and strike the proper balance between fair justice and judicial expediency in their prosecutions.

Effective outreach is crucial in placing the IHT trials in the broader context of transitional justice in Iraq. As with other war crimes tribunals, the local population must feel connected and embedded in the judicial process if its effects are to bring long-term peace and stability. An active website and local media coverage have helped ensure that the Iraqi population is engaged in the judicial process. However, security issues in Iraq pose unique challenges to the IHT's outreach program. For the safety of the judges, lawyers, and the accused, the tribunal is located within the heavily-guarded International Zone, which minimizes its ability to be seen by the broader Iraqi public. This is why other modes of outreach are even more critical in giving the Iraqis a stake in these trials.

An efficient IHT requires strong leadership, and the IHT court administrator must have the proper authority to provide this. Following August 2005 revisions to the IHT Statute, the president of the Cassation Commission (i.e., the appeals chamber) oversees the IHT's administration and finances and is authorized to appoint an administrative director to service its daily administrative operations, rather than a routine administrator. The management structure must ensure a uniform collection of IHT policies while also providing the necessary administrative support and conflict resolution among court organs to facilitate effective court functioning. While the role of the court's president will continue to be defined, the IHT will benefit from observing the strong role that other tribunals' administrators and offices of the registrar have played in ensuring that trial dockets move forward in a fair, efficient, and cost-effective manner.