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SYMPOSIUM: “LESSONS FROM THE SADDAM TRIAL”*

TRANSCRIPT: ANALYSIS OF THE DUJAIL TRIAL

Marieke Wierda[†] & *Miranda Sissons*[‡]

MS. WIERDA: Our task here today is to look beyond the antics of the Dujail trial—which are well known and described in the title of this panel—and to ask ourselves some detailed questions about the trial. We must scrutinize the justice delivered by the Iraqi High Tribunal and ask whether Iraqi people are receiving the quality of justice they deserve. The challenge is to examine the trial in a way that looks at these issues objectively and from a technical rather than purely political viewpoint.

The involvement of the International Center for Transitional Justice in monitoring the trial has been extensive. My colleague, Miranda Sissons, attended numerous sessions on four separate missions to Iraq, and our Iraqi consultant attended most of the remainder. We were present for eighty-five percent of all the sessions and monitored the trial in its original language, Arabic. Prior

* 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 contribution is submitted on behalf of Miranda Sissons and Marieke Wierda, both Senior Associates at the International Center for Transitional Justice.

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‡ Miranda Sissons, an Australian, is a specialist in human rights and international humanitarian law (IHL) in the Middle East. Before joining the ICTJ, Ms. Sissons worked as a researcher and consultant at Human Rights Watch; helped develop Arab civil society networks on the International Criminal Court; and served in the Australian diplomatic service. She has authored numerous publications on human rights and IHL issues in the Middle East and elsewhere. Ms. Sissons holds a BA from Melbourne University and an MA in international relations from Yale University, where she was a Fulbright Scholar.

to the trial, in 2003 we had conducted a population survey in Iraq of public expectations in regard to justice for past crimes.¹ Furthermore, an important part of our work has been to dialogue directly with the Iraqi participants in the trial. The issues that we are raising at this conference have been discussed directly and repeatedly with the Iraqi High Tribunal. Nothing that we say here would surprise them. We are grateful for the ability to have frank exchanges with them, and indeed we admire the courage of those involved in the trials.

In examining this enormously significant trial of a former head of state and his senior officials at the domestic level, we need to ask four questions. Firstly, has the trial succeeded in affirming the centrality of the rule of law in the new political order of Iraq? Secondly, has it been successful in uncovering the full extent of the system crimes that were perpetrated during the era of Saddam Hussein? Thirdly, is it demonstrating and preserving international standards of fairness, even for these unpopular defendants? I will be brief on this point since other speakers at this conference are going to address it in detail. Finally, is the trial restoring the dignity of victims or having a broader societal impact?

First, on whether the trial is reaffirming the centrality of the rule of law, I will not deal here with the issue of the legality of the tribunal's establishment.² That topic will surface throughout the day and is in part political, in part legal. Politically, I think the question of perception of legitimacy is not just a national issue but also a regional one. In the region, there has been a widespread (but not uniform) perception that the trial is not legitimate. For instance, I was in Khartoum a few weeks ago, where the perception of the process is that it is totally illegitimate and staged by America. This affects its ability to serve as a regional precedent.

Another factor inhibiting the ability of the trial to reaffirm centrality of the rule of law is the level of political inference. Here, one of the most negative developments has been the removal of judges serving at the Iraqi High Tribunal, or their resignation due to indirect political interference. In the Dujail trial, the five judges that started the trial were not the five judges that finished it: only two of the original bench remained. This impinges the ability of the court to hear and evaluate the totality of the evidence.

¹ INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE/HUMAN RIGHTS CENTER, *IRAQI VOICES: ATTITUDES TOWARDS TRANSITIONAL JUSTICE AND SOCIAL RECONSTRUCTION* (May 2004), <http://www.ictj.org/images/content/1/0/108.pdf>.

² See, e.g., Briefing Paper, ICTJ, *Creation and First Trials of the Supreme Iraqi Criminal Tribunal*, Oct. 2005, <http://www.ictj.org/images/content/1/2/123.pdf>.

Indeed, the tribunal's very existence has been put in jeopardy on at least two occasions, when political actors sought to remove judges through the process of de-Ba'athification, or most recently, the well-known incident in the Anfal trial, where the presiding judge said to Saddam Hussein, "You are not a dictator." While some have suggested the IHT requested his removal, our information suggests otherwise.³ These examples of direct political interference have been accompanied by a constant catalogue of critical, political commentary designed to affect the conduct of the judges.⁴ We think that political interference, and its deleterious effect on the independence and impartiality of the tribunal, remains perhaps the most significant concern of the Iraqi High Tribunal.

Other factors have also contributed to the perception that the trial is politicized. The judicial process itself is lacking robustness, and there has been insufficient emphasis on regularizing the process and anchoring it in legal provisions found in the rules of criminal procedure. There were also irregularities in the process, some of which I will address later. Of particular concern was the lack of responsiveness to defense motions. There is also a lack of solid administrative capacity at the court. The role of the former president of the tribunal was an inhibiting factor in developing sound administrative practices.

The trial has also been marked by lapses in judicial demeanor of various degrees of seriousness. For example, during a session on July 24, 2006, Presiding Judge Rauf said to Barzan al-Tikriti, former chief of intelligence, "Ever since you were a child, you have been drowned in blood." To Awad al-Bandar, the former judge of the Revolutionary Court, he said on the May 31, "I will not try people in a few hours like you did" (implying that he considers him guilty of extra-judicial killing). These are lapses that may affect the perception of impartiality of the judges.

The role of the defense counsel too can be criticized for lack of professionalism. The defense often resorted to obstructionist tactics such as staging walkouts.⁵ These tactics were not in the in-

³ See HUMAN RIGHTS WATCH, *JUDGING DUJAIL: THE FIRST TRIAL BEFORE THE IRAQI HIGH TRIBUNAL* 40 (Nov. 2006), <http://hrw.org/reports/2006/iraq1106/> (indicating the IHT request for Judge al-Amiri's transfer occurred after severe public criticism and a visit to the IHT chambers by a representative of the Prime Minister).

⁴ See, e.g., *al-Sabah al-Jadid*, Dec. 6, 2005 (comments by the Minister of Justice in which he publicly called for the resignation of the presiding judge).

⁵ The issue of the behavior and professionalism of some privately-retained defense counsel is complex and deserves in-depth treatment. Investigations are reportedly proceeding against several counsel for obtaining false testimony. These are related to testimony given by

terest of their clients. On the other hand, some of this behavior may have been a consequence of the fact that their legal avenues were constantly blocked. As mentioned, many of their important motions did not receive any response by the court, including a motion to recall prosecution witnesses, and a motion asking for assistance in recovering potentially exculpatory evidence, such as the trial dossier of the Revolutionary Court. These issues cannot just be cured in the judgment.

As for the role of the defendants themselves, Iraqi law allows for their participation in the trial, but there can be no doubt that in dealing with high-profile political defendants, self-representation has introduced a political element into the trial. However, we should ask ourselves what impact silencing Saddam Hussein or the other defendants would have had, considering the difficulties with defense counsel. The result may not have been any more favorable, and we do not ultimately consider the disruptive behavior of the defendants to have damaged the trial from a legal perspective.

On our second point, whether the trial succeeded in uncovering the full extent of the system crimes. This is a technical issue. On the one hand, the tribunal has attempted to apply certain international law concepts such as crimes against humanity, and the doctrine of command responsibility for high-level defendants. In principle, we all know that these concepts lend themselves well to demonstrating system crimes. However, we are concerned that these concepts were not used to their full potential in this case. For instance, the prosecution's case did not fully reveal the functioning of the regime of Saddam Hussein, including the responsibilities of its various components that were on trial (the Secret Intelligence Service, the Popular Army, the General Security Service, the Revolutionary Court, and the Ba'ath party). Instead, the presentation of evidence concentrated on so-called crime-base evidence (i.e., evidence on the acts of murder, torture, etc.) but without fully demonstrating the responsibility of those senior defendants who were not present at the scene of the crimes or linking those defendants to the crimes.

The strength of the documentary evidence, in our estimation, has been exaggerated by some commentators and do not necessarily fill these gaps. We have examined in detail the dossier in this case, and the documents give the impression of being hastily

four witnesses in late May 2006. The tribunal did not have sufficient tools at its disposal to appropriately discipline unprofessional behavior by the defense.

assembled in an ad hoc manner. There is no “smoking gun” document in terms of ordering the crimes. There are many missing pieces of evidence, including documents to show that Saddam Hussein was aware of the crimes at the time they were being committed. In short, the prosecutions should have called expert evidence to establish the chain of command, therefore linking the defendants to the crimes.

Finally, the prosecutor did not fully demonstrate how the alleged facts constituted crimes against humanity or violations of international law. Instead, confusion permeated the courtroom during the presentation of the case, for instance on the applicability of Iraqi law.⁶ Lengthy arguments were held on whether minors were included in those executed in violation of Iraqi law. Similarly, much effort was expended on whether the Revolutionary Court proceedings were conducted in keeping with Iraqi law. This was confusing to all participants, including the prosecutor himself, and was distracting to the defendants, who concentrated too much of their valuable time on issues that were not crucial to proving their innocence. In general, the lack of clarity in terms of presenting the case against the accused severely hampered their ability to prepare a defense.

The third question pertains to the fairness of the trial. While I will be brief, suffice it to say that we have major concerns and think the trial fell short in several crucial areas.⁷ First, we think that hearing the defendants themselves was treated by the judges as giving them their “day in court” and often served as a substitute for allowing them to mount an effective legal defense. The defense was often treated as a nuisance rather than a necessity. Untimely disclosure of documents—at least forty of which were introduced in court without having been included in the dossier—amounted to trial by ambush.⁸ Neither were all the statements or identities of the complainants or witnesses disclosed to the defense within any meaningful timeframe, sometimes a mere hour in advance of the testimony. The statements of numerous complainants were read straight into the record. This deprived them from the opportunity to prepare for confronting complainants (neither was there any opportunity to confront during the investigative phase). During the testimony of Tariq

⁶ This was particularly pronounced in relation to the case against ‘Awad Hamad al-Bandar, for example in the session of March 13, 2006.

⁷ See Briefing Paper, ICTJ, Dujail: Trial and Error? (Nov. 2006), <http://www.ictj.org/images/content/5/9/597.pdf> (containing a fuller ICTJ discussion of fairness issues).

⁸ These statements are made based on exhaustive examination of the Dujail dossier and three subsequent supplements.

Aziz, the defense was denied the opportunity to confront the witness altogether, as the judge did not allow any cross-examination.

Many of these issues relate to equality of arms. For instance, the presiding judge was much stricter with defense on sticking to their pre-prepared witness list and finishing their case, as opposed to leeway granted to the prosecutor in terms of presentation of evidence. It is also unclear whether defense counsel were able to conduct their own investigations. This was all the more crucial because the investigative judge had not fulfilled his duty in terms of gathering exculpatory evidence. We appreciate that security was a major obstacle, but defense counsel were not even able to visit Dujail. Needless to say, this severely hampered their ability to mount an effective defense by casting doubt on the credibility of prosecution witnesses, most of which came from Dujail. Finally, we think that the minor defendants were greatly disadvantaged in being joined with the high-level defendants, in terms of attention and resources allocated to their individual cases.

Fourth, on whether the trial succeeded in restoring the dignity of victims or whether it had broader social impact. Some victim testimony in this trial has been very powerful, and we should not be dismissive of that. However, conducting the trials in the "Green Zone" in Baghdad is virtually the equivalent of conducting them outside Iraq, in terms of accessibility for ordinary Iraqis. What would have ameliorated this is a robust outreach program, but to our regret the Iraqi High Tribunal has not implemented one to date.

In conclusion, we continue to withhold our final judgment on the Dujail trial, since we are still awaiting the tribunal's judgment, and since this is but the first in a series of trials. But it is time to ask ourselves some serious questions about the adequacy of the Dujail trial. This requires intellectual honesty. Many of us have had a degree of involvement in our various institutional capacities and may feel vested in various ways. But honest scrutiny of the trial requires us to set aside our egos, and learn some very hard lessons, so that we do not contribute to denying Iraqis their quest for adequate justice.