Lessons Learned from the Dujail Trial, a Crossfire Panel

Cross-Fire Panel

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The Frederick K. Cox International Law Center sponsored the symposium, "Lessons from the Saddam Trial," a conference drawing renowned international law scholars and practitioners to Case Western Reserve University School of Law in Cleveland, Ohio on October 6, 2006 to share their expert analysis of the historic first case before the Iraqi High Tribunal. The speakers' remarks have been edited for length.

MODERATOR:
Michael P. Scharf, Professor and Director, Frederick K. Cox International Law Center, Case Western Reserve University School of Law

PANELISTS:
M. Cherif Bassiouni, Distinguished Research Professor, DePaul University College of Law
Nehal Bhuta, Arthur Helton Fellow, Human Rights Watch
David M. Crane, Distinguished Visiting Professor, Syracuse University College of Law
Mark Drumbl, Professor and Ethan Allen Faculty Fellow Director, Transnational Law Institute, Washington & Lee University School of Law
Mark Ellis, Executive Director, International Bar Association
Sandy Hodgkinson, Deputy, Office of War Crimes Issues, U.S. State Department
Christopher P. Reid, Regime Crimes Liaison, U.S. Embassy in Iraq
William A. Schabas, Director, Irish Centre for Human Rights, National University of Ireland, Galway
Marieke Wierda, Senior Associate, International Center for Transitional Justice

TRANSCRIPT:

PROF. SCHARF: The issue is: should a foreign judge have been added to the Iraq High Tribunal bench? As you all in the audience know, the statute of the Iraq High Tribunal, which you have in your books, says that a foreign judge or judges can be added. And many people today have suggested that that would have been a solution to many of the problems. I leave it to our experts today to comment. Professor Crane?
PROF. CRANE: Yes, absolutely. It would have assisted unfortunately in the burden of legitimacy. I think it would have assisted in washing away some of the real challenges and legitimacy, that if you had a distinguished international jurist or two, I think it would have helped greatly.

PROF. BASSIOUNI: No, absolutely. Just to be a little controversial, . . . my answer would be: if I were in Iraq, I would say you have tampered enough with our legal system. Let us run our tribunal. This is our business. These are our crimes and quit meddling with our laws and our legal systems and our procedures.

PROF. SCHARF: Mark Drumbl?

PROF. DRUMBL: International lawyers reflexively consider international judges to be neutral, credible, and legitimate. Populations on the ground, including victim populations, do not invariably feel the same way. Disconnects especially arise when local populations feel justice is being meted out to them instead of for them.

One of the problems with the ICTY and the ICTR is that these international institutions are not perceived on the ground as neutral. After all, the member-states from which many judges are nationals are not viewed as being neutral. These states failed to prevent the conflict that actually occurred in those two jurisdictions. Internationalization is no proxy for legitimacy.

Similarly, I would say that, for Iraqis, just because something is internationalized does not mean it is ipso facto more legitimate. There is much to be said for institutions under local control proceeding through local methodologies of accountability. There is also much to be said in terms of skepticism towards national institutions, as well. In the end, I think we need to be mindful of the ambiguities.

MR. ELLIS: No, as well . . . but for the reason that international law is moving in the direction of requiring states to undertake these trials. We need to accent this new reality, and we need to provide assistance to act for domestic trials stated they meet international standards. That's where we failed here.
Ms. Hodgkinson: And I would add a qualifying no in the sense that it obviously is an Iraqi decision, and they put that provision in there [to leave open] the possibility, wondering if there would be qualified candidates who would offer themselves up for the challenge.

One of the challenges you do face when you start accepting international judges includes issues like translation. If there were not an Arab-speaking judge, understanding the tradition, throwing one judge into a panel, for example, may actually pose some of those challenges they are facing in Cambodia right now [because] the mixed tribunal judges do not speak a common language. But obviously, it is an Iraqi decision. They chose to use international advisors, and international advisors have played that role in trying to build the legitimacy, and they should have more of them.

Prof. Scharf: David, do you want to try to rehabilitate your position?

Prof. Crane: Well, I actually do not really disagree with what we are saying. I mean, certainly, at the end of the day, it is for and about the victims and the country, and so having been through that in Sierra Leone, I implicitly agree with that. But again, the tragedy... is not that it is not working... it is just that there is this little word called legitimacy... The question was, "Could it have?" And the answer is, "Yes, it may have." And I am not backing off on yes. It is just that certainly all these points are correct, and I guess you want to get this thing going.

Prof. Bassiouni: You are talking like a lawyer now. It occurred to me there was a nice biblical story about how if you could find one righteous man, you would save David, and you would save Sodom and Gomorrah, and my question is: how many righteous judges in the various international tribunals that you know would you set up to the high standards that you want to offer to the Iraqi tribunal?
PROF. CRANE: Oh, see, that is not fair, Cherif. You know my feeling. We were chatting about this over dinner last night. The Achilles' heel of any tribunal—whether it is an international-ized domestic court or a hybrid international war crimes tribunal or an ad hoc war crimes tribunal—let us be honest, it is the judges.

We have judges who are distinguished, very experienced all the way down to people who need help getting to the men's room and everything in between.

PROF. CRANE: And we had very much a problem where I was in West Africa... we have to standardize how we train and how we deal with international judges. So you are right. I mean, I said yes, but where we would find [such a judge] other than yourself. How do you like that for a plug?

PROF. BASSIOUNI: I like that.

PROF. DRUMBL: Talk about lawyer language.

PROF. SCHABAS: I just want to back up David, because David's point was that there is a problem of legitimacy with the judges, and I think that is a valid point. And the idea of international judges, of course, at the consent of Iraq because it is an Iraqi tribunal might have done something to resolve that.

I feel people like yourself Mike [Scharf] and Mike Newton and others who have done training with the judges, you describe your evolution and how you got more and more confident about them as you got to know them. And I am sure that that is true. I am sure among the judges, there are very devoted jurists who want to be fair and reasonable. My concern is not with the ones who were left on the bench; it is the ones who are gone. And I think that is the point Mark Ellis made this morning. The debate, frankly, fudged it, and people talking about the fairness of the trial have not tackled that one head-on. You look at this trial head-on, the part of it that smells the most is the fact you have had three judges leave for very mysterious reasons, and we could not even get clarity on this most recent case, and that is shocking. This is supposed to be the brains trust of the Iraqi justice system. We cannot even
agree on why that judge lost the job. When did you last have a trial in the United States where three judges departed in the course of a trial? That is what is so terrible about it, and that is where the problem is.

PROF. SCHARF: Bill says that is the biggest issue. Probably the biggest issue in the minds of most people was not the judges changing the guard but the assassination of the defense counsel. So the second issue is: what should the IHT do to better ensure the safety of trial participants, especially defense attorneys?

Before I open up [the question for the panel], a word of background. . . . Two defense counsel died during the very first week of the trial when they were assassinated. Before that happened, both of those defense counsel and all the defense counsel were approached by both the United States government and the Iraqi government and asked if they could provide them security. And also it was suggested that they do not show their faces on television. Now, the defense counsel wanted to show their faces on television, talked to the media, and they did not trust the U.S. government or the Iraqi government for security, so they turned it down. I think the U.S. government and the Iraqi government’s response was, metaphorically, well, that is your funeral. It turned out it was.

After the two of them were assassinated, Judge Amin brought all the defense counsel in, and he said, “Look, we have to solve this problem. We cannot have defense counsel dying any more.” They worked out a compromise, and under the compromise, money was given to the defense counsel to hire their own personal guards, personally selected, who were given the authority to carry weapons and protect them, like rock stars or football stars would have. That seemed to work pretty well. Nobody else died for the eight months of the trial until a week before the closing arguments when a third defense counsel was assassinated. Strangely, there were no security guards there at the time defense counsel was assassinated. I have heard twenty different stories about why that is so. The one I tend to believe is that he pocketed the money and did not hire security, but I am not sure exactly if that is the case either. It has just not been answered definitively in the press or anywhere. But clearly, there is a problem. You cannot have
trials when you have three of the twelve defense counsel being assassinated during the trials. Everybody agrees with that.

So the question is what should the IHT do in the future to better protect the defense counsel? Anybody? Mark?

PROF. DRUMBL: I think what I would like to do is take your question and unpack a broader point. We all place considerable transformative value in the Iraqi High Tribunal trials. We have placed so much hope, ambition, aspiration, and meaning in this set of prosecutions. Some are calling it the trial of the century. And I guess this is understandable because most of us in the room are lawyers or soon to be lawyers. However, one of the shortcomings to our faith is that it has led to a rush to trial in a context where there are security problems. Iraq is not stable. I do not think IHT convictions will promote stability. Much more is required. We are really very grandiose about this trial. We have taken this ambitious approach. We have internalized it. We have had a rush to trial. We are going to keep on trying. We are going to keep on moving forward, but I think at the end of the day, we need to be sensitive about and accept the facts that trials for international crimes... can only do so much. Had we had more modest understandings of the socially transformative role of war crimes trials at the beginning, perhaps we would not be faced with issues of how to prosecute during a situation of insurrection.

So I just want to throw that out. We have all this talk about [whether] this trial is on the side of due process or not—I wonder whether we might want to have a conversation, instead, on the relationship between the IHT and peace, justice, and political transition in Iraq. Just because the trial does or does not comport with often-technical questions of liberal legalism is no guarantor of the effectiveness of the judicial output.

MS. HODGKINSON: I am not sure there is much more you could do in the current environment. Counsel were brought in. They were asked what is it that could be possible solutions? They were provided a bunch of solutions, including housing in the Green Zone. I have been there. I walked through it. They choose not to live there. It is challenging. They come in the country and
meet with their clients, but they say they cannot come into court. So as far as what you could do short of stopping the trial or short of moving it outside the country, in this situation, they have got in Iraq the IHT, which has done the best that you could ask for, including the appointment of IHT standby defense counsel to ensure a full and fair defense for when the defense counsel choose not to come.

PROF. SCHARF: Should they have considered moving the trial outside of Iraq?

MS. HODGKINSON: I would say no, because again the decision was made by the Iraqis to have a trial in Iraq. International law favors that if there is a competent court and if they are willing and able to do it, then they try to do it there. Obviously, there have been significant security issues that have risen up. It has posed a challenge. They have tried to modify the procedures, give more time to defense to put these measures in place. I think they have taken the appropriate and reasonable steps in line with moving forward on trials that they are expecting to move forward on.

PROF. SCHARF: How different is the security situation and the challenges [facing the IHT from] trials of major terrorists in Europe or Latin America or elsewhere of major narcotics dealers in Latin America, of major mafioso in Italy or in New York City? [During these trials] witnesses disappear or die, defense counsel [and] prosecutors are executed, judges are bribed, and yet, they seem to soldier-on most of the time. Is this really a huge difference in Iraq?

PROF. BASSIOUNI: A few of us here—Sandy [Hodgkinson], Christopher [Reid], Mike [Scharf]—have been in Iraq. I continue to go there. And frankly, the situation outside the Green Zone is really quite dangerous, particularly for somebody who is going to be identified as a foreigner. This is not only a question of a conflict with different ethical religious groups. You have a common criminal element that is working the streets. I mean, Saddam released an extraordinarily large number of people—estimated at about eighty thousand people—three
weeks before the invasion. We do not know how many of these were hard core criminals. There could be twenty or thirty thousand. Unfortunately, the core coalition forces did not have time to deal with them as a common criminal element. They have had time to consolidate. They have all of the characteristics of organized crime units.

Now, if you had a tribunal, ideally outside the Green Zone somewhere, the problem is that in a tribunal like that you just do not have a few limited people who are coming in and out on a daily basis. You have got a very large number of people, whether it is people providing food or supplies or paper or whatever. It is in addition to the defense counsel, the judges, the prosecutors, the investigative judges, the support personnel. It is very difficult to be able to ensure protection even though you may want to create a sort of an island or fortress, like the Green Zone somewhere else. It would seem to me it would be almost impossible because you are dealing with so many different sources of danger that you cannot identify. I mean, if you are dealing with the mafia or la cosa nostra, you know who they are, where they are coming from. Here you have got too many people out here. You do not know where they are coming from.

**Prof. Crane:** Security is security. It is all about security, whether it be in America, Sierra Leone, Bosnia, or Rwanda. It is security, security, and security. I think security is going to consume this tribunal. It will come to the point where because of political events that are totally out of their control, it may totally absorb the hard work that is being done. And that is unfortunate, because . . . instead of soberly thinking about law and fact, people are looking over their shoulders, wondering whether [they are] going to live until the end of the day. That is not the point now, but certainly, security is going to be a huge problem.

**Mr. Ellis:** But will it taint the final conclusion on whether the trial met international standards? The sense is that have probably lowered the bar now. If the conclusion is yes, we got through this trial process and although it was not perfect, we have a verdict and by the way,
three defense attorneys were murdered, then I have a difficult
time understanding that a defendant has had a fair trial when
in that trial you have lost three defense attorneys. I do not
know if we have faced this issue yet in the international con-
text, but it will be interesting to see how history judges this,
and it will certainly be a different bar for future trials, good or
bad.

PROF. SCHARF: And as a follow up, I want to ask Bill Schabas this
question: if this were a case within the jurisdiction of the
ICC—for example, if Iraq had been a party to the ICC, as the
ambassador had said, he supported—and Iraq decided to
prosecute itself under these circumstances, would this be a
case that the ICC would likely find the country was actually
unable to prosecute under these circumstances?

PROF. SCHABAS: I think probably. I think that the ICC would not in-
tervene in such a case. I think we have had this discussion.
Many people have said, you know, we are not talking about a
sham trial. And we are also talking about a trial where inci-
dentally, in all likelihood, there is going to be a conviction and
the man is going to remain in jail for the rest of his life. So it
is not something where you are saying there is an impunity
problem exactly. So I think it is unlikely you would see any
intervention by the ICC. You know, this is not the worst trial
in history. I mentioned Pol Pot and Ieng Sary, and that was
really ugly business that they had. There were trials of the
Gang of Four in China. I am sure they were not models of
great justice. You know, it is not the Eichmann trial either.
That is not the point. This is not one of the great trials of his-
tory. It is somewhere in between. It is deeply flawed, but I do
not think we have to dismiss it as being a sham and travesty of
justice, but I would not put it on a pedestal either.

MR. REID: Somebody mentioned the word negligence. The death of
the defense counsel have really hit everybody working on this
case very hard, and we all took it very personally, and I can
tell you the first five or six times [defense counsel] refused
what they were being offered in terms of security, we did not
say, "well, that is your funeral." I sat in a room with transla-
tors and with other prominent Iraqis who I thought could help convince them, and we called every single one of them personally and begged them to accept the security measures that we were offering. The U.S. Marshal Service is protecting a judge or someone else. It is take it or leave it. You do it their way, or you are not getting the protection. If you do not like the fact they are going to bring a dog in to search the room you are going into, that is tough. You accept their protection or not.

In Iraq, we were very flexible. We were bending over backwards, and even the Iraqi Minister of Interior was bending over backwards because he knew how difficult it would be if one of the defense counsel were killed. So the question is, what do you do in this case? You cannot say we are not going to have a trial because it is too dangerous and moving out of the country does not solve the problem because an Iraqi defense counsel living in Iraq, whose family is Iraq, is going to go back to Iraq. And you are going to have the same problem whether they are going to comply with the security arrangements or not. So this issue, unlike some others, really does not go to the issue of should it be in Iraq or shouldn't it? ... You cannot kidnap the defense counsel. You cannot make them accept security.

MR. ELLIS: Where does it stop? You are saying you can still have a trial even with the security issues. We have lost three defense attorneys. [What if] we lose a fourth? Does it stop there? [If we] lose five. Does it stop there? What is the standard?

Somebody has to question the legitimacy of the entire trial process because of something as fundamental as losing three defense attorneys. We are trying to get a sense of the appropriate measurement? Where do we go?

MR. REID: We are dealing with [more than a] philosophical issue, but a real world issue. What do you do? What do you do in order to have a fair trial because you have to have a fair trial, because you cannot kidnap people.

PROF. SCHARF: When the ambassador [Samir Sumaida’ie] came [to Case Western Reserve University School of Law], I was
asked if he was coming with his own security. And I said, "No, he did not think there would be any security threat in the heartland of the Midwest." He was coming by himself. And other people said that it is diplomatic security. The State Department will be following him around, and that got me to thinking. What about the idea of passive security? If the defendants do not want security, or if they are pocketing the money that they are supposed to be spending on security, could you give them security that just kind of follows them from a distance but is there in case there is the kind of attack that occurred two weeks before the final judgment? Would that work? What are the problems with that?

**PROF. CRANE:** It is just a practical point. The farther away you get from the principal, the chances go up exponentially. It is almost a waste of time in some ways. It is tough anyway, but it becomes tougher to protect if that becomes more of a background security.

**PROF. SCHABAS:** Yeah. I think we are getting off the track. First of all, we are not experts on security. We are lawyers, you know. And I do not want your advice. If my life is in danger, frankly, with all due respect, I do not need your advice. I am going to get a professional to advise me because I do not know what to do, but I also suspect, the three that were killed, they were colleagues, they were fellow lawyers. And I would assume, I would give them the benefit of the doubt that they were using their best judgment on how to protect themselves; that they were not doing crazy things. I do not think it is good to be speculating about them pocketing the money and saying we offered them protection. Okay. So we offered them three U.S. Marines with submachine guns. I am not sure that is a way to protect my life walking around like that. I assume they used their own best judgment to do what was best to save their lives, and they got killed anyway, and that is terrible. But I do not know how to avoid that except maybe just sequester a trial, the whole thing from beginning to end.

**MS. HODGKINSON:** That was the point of spending all the money on building and actual housing within the Green Zone right next
to the court by a law library where they could do everything, [including] meet with their clients. That was the purpose—to sequester it in a safe place. But I think—and this may not satisfy a lot of people because it is a generalized security issue—but it is sad but true that in Iraq, IHT judges are not the only judges who have been killed. And so the question is whether they are being targeted because they are related to this tribunal, whether they are being targeted because they are judges. . . And the same defense counsel or whether it is simply that some of them were unfortunately victim to random violence, while we will never know for sure . . .

MR. BHUTA: I really do think it is outrageous to suggest that he put that money into his pocket. He had four children at home. He was staying in Bagdad until the end of the year to try and get them out of the country after that. . . .I think that is an insult to him and that is an insult to his family.

PROF. SCHARF: Okay. I was just saying that we do not know the reason, and that is one of the things that has been speculated about in the press.

MR. BHUTA: Talk to the defense lawyers, and you might get some perspective on it.

PROF. SCHARF: Okay. Well, thank you.

PROF. DRUMBL: It is valuable to ask ourselves whether this trial conforms to due process? But for me another important question is, what is the relationship between this trial and peace and stability in Iraq as a whole? And that is not a question that we have really asked ourselves today, and I think it is a very important one. I agree with Bill. We are not security experts . . . this is a broad question that addresses sequencing. When is the right time to have trials? And, if trials create stability, that is good. But what if in the Iraqi context . . . there is an inverse relationship? Then I would be very worried about holding that trial right now in whatever zone you might want to have it in Baghdad.
PROF. BASSIOUNI: First, let me lay a foundation to answer your question, and I do not mean to be self-serving, but for three years I have been working in Iraq. We have had six conferences with law professors and judges and maybe involving a total of about six hundred people. I have had all the judges in Siracusa for ten days, and we have done a lot of work presently. I have sixty-six people working in Iraq doing an oral history. We have interviewed 2,700 victims so far, and I can tell you there probably is not an Iraqi, at least that I can imagine, that would not want justice in a broader sense, that would not want the truth to be known, that would not want all of these people in the Ba’ath regime and not only those major defendants strung by their toes.

So there is no doubt that this is very much in need. Every one of the different constituencies, particularly the Kurds and the Shiites want the story of their victimization to come out. They want to show how bad the regime was. And frankly, I think the majority of people that I have dealt with are disappointed with the trials. They do not think it is bringing out the truth. They do not think it is showing these people the way they really were. They do not think the proceedings in any way resemble what they imagined or anticipated. They really see Saddam as running away with the show.

So the wrenching problem is really what Ken Roth said. We should have been speaking about all of these terrible crimes. We should have been conveying to the people the sense of justice, and unfortunately, we wind up quibbling about [whether] that is proper law and [if the procedure] worked out right. And that is the unfortunate part of it, and maybe more unfortunate, had we given it more thought before we set it all up and had we tried to play all these contingencies and tried to mitigate the damage, we would not have been in that position, and we are now trying to mitigate the damages that are proceeding. But there is no doubt the people really want justice in any way, and they want to have a record of these terrible violations that took place, and for them to think that all of this is now sort of bound in a quagmire about procedures and processes and antics and the tribunal is adding almost insult to injury I think.
PROF. SCHARF: Let me ask a follow-up that Nehal's comment got me to thinking about. Would it make sense to have an international investigation into the assassination of these defense counsel, like the international investigation that is ongoing with respect to the assassination of a former Lebanese prime minister, Hariri?

PROF. CRANE: How would they do that? I mean, it is an interesting idea, but how would they do it, even if the U.S. or the coalition forces gave them full protection? It would almost be impossible. How would you do that? I am just throwing that out.

PROF. SCHARF: What is the alternative? Just to turn your back on it and not investigate it? Or allow the people to investigate it that are accused of committing . . .

PROF. CRANE: We have to live in the real world. I do not think you can do any investigation.

PROF. SCHARF: Ever?

PROF. CRANE: Well, I am not so sure. When the dust settles, maybe some day, but right now I do not think you can do it effectively.

MS. HODGKINSON: There have been investigations into it. The question is whether or not you think the brokers are credible, whether they are the Iraqi government or the Americans looking into it on their behalf at their request. But the independent investigations have not moved at such a tremendous pace in the past that I would have reason to believe that they could be achieved in a time to really impact what is happening in the trial. . . . It has been looked into by the Iraqis, by the Americans, and again, there has not yet been any reason to be able to definitively link that they were targeted specifically because of their role in the trial.

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LESSONS FROM THE DUJAIL TRIAL

PROF. SCHARF: Let me change tacks and ask a brand new line of questioning, which I am sure is going to get everybody else going. Was it a mistake to begin with the Dujail rather than Anfal trial or another case, especially in light of the fact that there is the possibility of the death penalty?

PROF. BASSIOUNI: I was among those recommending it to the judges, and I thought that this was the ideal case to start with because it was a case that did not have any political dimensions to it. This was not a situation where the defense could raise the argument of you received intelligence information from the U.S. or you received the precursors from the UK or Germany or the Netherlands. This was a fairly straight-forward murder case, and so there were no political ramifications to it. I think it was really the ideal case to proceed on because it was on very narrow technical grounds, and all of the documentary evidence was really there from the record of the revolutionary court that went through the decisions and Saddam’s approval of the death sentence.

PROF. SCHABAS: You got to the heart of one of the problems with the death penalty there. If he is executed probably in the next six to eight months, you are going to deprive the people of Iraq a justice for all of the other crimes, and there is a suggestion that he is [akin to] the private property of the people of Iraq. But there are other victims as well. Iran would love to have a little crack at him at some point. In fact, they have asked for him, and they are going to be deprived as well. So he should be tried for the crimes he committed against the people of Iran and the people of Kuwait and all of that. If this hasty trial on a very focused narrow indictment is followed by the death penalty, it will give a few people satisfaction. We say now it is a fundamental human right to know the truth and have justice, and there are going to be a lot of people deprived of that.

PROF. BASSIOUNI: But that is easy to solve. You amend the statute, and you do not execute the person thirty days after the date of entry of judgment, or you withhold the entry of judgment until all of the trials have taken place, you know, and you enter it three years from now. So one does not exclude a remedy here.
PROF. SCHARF: Mark?

MR. ELLIS: Well, I think to clarify for the audience, the issue here is that under the statute, if the trial chamber were to convict Saddam Hussein and then sentence him to death, that case would automatically go to the appeals court. But after the final decision of the appeals court, assuming they uphold the verdict, then the sentence has to be imposed within thirty days, and that is the conflict within the statute. Having said that, I think that administratively, logistically the court will figure out how they can come up with a Dujail verdict and at the same time move forward with the Anfal case and any other future cases. I think they are wrestling with this issue right now, which is why I believe the Dujail case was the appropriate first case. The case was manageable and certainly not as complex as what we are seeing now in the Anfal case. And I had great hope that once the Dujail case was over and the court moved to the Anfal case, which was the more complex case, the court would have resolved all these issues.

Of course, the lingering problem is, as I said earlier, government interference, which existed in the Dujail, and exists now in the Anfal case.

PROF. SCHARF: Mark?

PROF. DRUMBL: Regardless of one's concerns regarding sequencing or the effects of trials, I do agree that in this case the people want to see justice done. Probably the most valuable aspect of this trial is truth-telling and legitimizing the historical records. One concern that I have, even if a death sentence were suspended with regard to a verdict in the Dujail case is what value any subsequent trials would convey if they were trials of a man who already had been convicted and sentenced to death. One of the reasons why the prosecutors’ focus in Iraq is on serial mini trials is to avoid the blockbuster, all-encompassing, very long trial that came out of the Milosevic proceedings, which we all know ended in a very unsatisfying way. Charging Milosevic with so many counts allowed him to effectively delay the proceedings and, hence, cheat justice.
But I think there are dangers with mini trials, too. Does the sum of the mini trial parts add up to an overall narrative of Saddam’s and the Ba’ath regime’s criminal conduct? I think it can work in that regard, but I think it is something to which folks associated with the tribunal need to be sensitive. This is especially important insofar as the trials that follow the Dujail proceedings are higher impact. For example, the Anfal proceedings will involve genocide charges and the use of chemical weapons on the Kurdish population, with at least fifty thousand deaths.

PROF. SCHARF: I am going to go to Marieke, and then Sandy, and then David.

MS. WIERDA: Of course, originally Saddam was not part of this trial, and he was added at the very last minute. Could you reflect on whether that was really such a good idea? I think we have been talking also a lot about the fair trial rights of the senior defendants in this trial, but what do you think it did to the fair trial rights of the more junior defendants? And also, in terms of using this trial to start out, I know a lot of us started early on to analyze the evidence, but there is not a very clear narrative perhaps that emerged through the evidence from this trial . . . there were just facts that were confusing, an assassination attempt, and all these kinds of things.

So in light of that convoluted history and then perhaps the prosecution case, which may not have been as strong as it should be, where do we think we stand on whether it really was such a good idea?

PROF. SCHARF: Before we go to your two issues, does anybody want to answer that directly?

MS. HODGKINSON: I was just going to add two quick footnotes to what everybody else said because I think Dujail was the right trial to start with to try to work out the kinks. It was not necessarily envisioned that Saddam would be a defendant naturally in that. He might have been. He might not have been. But that is what came out of the investigative process through the Iraqi system. The fact that he was part of it obviously brought up
the specter of how much the public was scrutinizing outbursts and other parts.

The second one as to whether or not if he is, in fact, executed based upon this first case, which I suspect we will all see the Iraqis trying to find a way to work this out somehow in their system correctly. What is important to remember is there are a lot of other defendants who are responsible for the other major atrocities that they want justice for. Chemical Ali, for example, for the Anfal [trial], and there are other defendants. So despite the fact that other trials may go forward long after [Saddam] has had his sentence carried out, whenever that may be, there are other people that are still to be held accountable.

**PROF. BASSIOUNI:** To answer Marieke’s question ... If you understood the evolution of the very repressive Ba’ath regime over a period of thirty years and how that repressive regime worked, in so many sometimes devious ways, and ways that you may never imagine. We have an attorney [here today who] said I am an immigration lawyer. I have represented a woman who was raped by the driver of Uday. You know, we do have situations that do not rise to the level of a genocide, but we have a regime, which on a daily basis violated every possible rule that the Iraqi law and society have. And this one was a case in which, you know, Saddam was elevated to a demagogue. The demagogue was about to be shot, and everybody in the system of security was running like crazy to get there before the other in order to show that they were the good guys who caught the bad guys that wanted to assassinate. If they would have had to kill thousands of people in order to be able to say, “See, Mr. President, we got the people who wanted to kill you,” they would have done so. And so it was in a sense a very good case to show how all of these underlings did it for him, but ultimately, he approved, he encouraged, he supported, and he had command responsibility.

**MR. ELLIS:** I think the question is such a great one because it points to another issue in the Dujail case of having eight defendants—four senior defendants and four lower defendants—and I question whether the evidence has proven that the four lower defendants are guilty of crimes against humanity. My sense is
that the court has not proven that the charges against the four lower defendants because of the intent and knowledge requirements for crimes against humanity. And in the end, that may work to the advantage of the court if the court finds the four senior defendants guilty but the four lower defendants not guilty of crimes against humanity. It is not that they have not committed criminal acts, but it is an interesting as to why the court has brought charges of crimes against humanity against these four lower defendants. I really question whether they should have ever been in the court on these charges.

PROF. SCHARF: And Mike Newton suggested in the margins that a really good development might [take place] on October 16 when the tribunal reconvenes, and it is assessing the evidence but not [rendering] its verdict. It could actually decide to dismiss two, three, four of those cases, and that would be consistent with what it says it is going to do, and it might be a really nice signal to the tribunal.

MR. ELLIS: That is what I am saying. But the real question, Michael, is what was the basis for including those four defendants to begin with? In my opinion, the evidence was lacking for the charges of crimes against humanity. My question is why were they there to begin with?

PROF. SCHARF: We actually have a debate on our website on this. Our students at Case School of Law completed a sixty-page research memo on the question of whether, if somebody turned over a friend or neighbor, knowing that the regime was going to torture and kill them, would that be sufficient to be a crime against humanity if it was done in the course of widespread similar occasions? And apparently, the allegations—I do not know if they were proven, because it really seemed like the evidence focused on Barzan, Saddam, and Al Bandar, but the allegations were that at least two of these individuals had been for political reasons turning in their neighbors who disappeared forever.

PROF. BASSIOUNI: See, that problem would have been resolved had we added to the statute and other violations of the 1969 crimi-
nal code, and we could have gotten these people for murder and rape and torture. It would have been much easier if that would have been the case.

PROF. SCARF: When David Crane prosecuted, his tribunal had a clause that none of the other tribunals have, which was a limiting clause that said his tribunal was only allowed to focus on those who bear the greatest responsibility. It is analogous, I suppose, to the higher-ups. And there have been debates that if you only focus on the higher-ups, it sends the wrong signal to the [underlings]—that you cannot succeed as a Saddam Hussein or as a dictator unless you have a psychopathic following, and, therefore, you have to have exemplary trials at other levels. So I am wondering what the panel’s take is on the fact that they even indicted some of these [underlings]. Was that a mistake?

PROF. CRANE: Certainly you have raised a very important question, and that is, what is the standard now that we need to move forward into the twenty-first century, creating mandates for future trials, whatever they may be? It is my considered opinion that the greatest responsibility should be the standard because we cannot prosecute everyone. We have to go to those who created the conditions about which these situations are developed.

Greatest responsibility proved to be an effective tool in Sierra Leone and West Africa. It allowed the prosecutor to focus very quickly and get started. I am very well aware of the impunity gap, but the difference between prosecuting twenty people or so and thirty thousand is significant and would literally throw the baby out with the bath water in my opinion.

And the greatest responsibility were the political compromises, as we all know, when they were drafting the statute for the Special Court for Sierra Leone. If it would not have been the greatest responsibility, there would not have been a special court. It is as simple as that.

PROF. SCHABAS: Well, the judges at the international criminal court are, in effect, importing similar to the one from Sierra Leone through the use of the word gravity in Article 17, Paragraph 1
of the statute. And the prosecutor has also made some interesting determinations along those lines. He, for example, is saying he will not prosecute certain cases where there aren't large numbers of victims. So in other words, he makes his choice based on just a numeric, just a calculation on the quality of victims, which sends an interesting message as well with respect to the investigation concerning British war crimes in Iraq. He said, yes, British soldiers have committed war crimes in Iraq but not very many. And I guess the legal advisor in Britain now has probably written an opinion to the general saying, “Keep the numbers down, boys. It is okay. You can commit war crimes but not too many, you know. That is off limits.”

PROF. CRANE: It is really important to understand, prosecuting thirteen, twenty individuals is going to take around five or six years to do it fairly, openly and appropriately, because it is an international tribunal and under international criminal law and the statutes. If you change that to most responsible in the West African situation, it went from twenty-ish to one hundred to three hundred. I am looking at in my estimation fifteen to twenty years of prosecution. So in my opinion, just as a way of thinking is that, you know, any tribunal that is in existence over five years begins to unravel around the edges and becomes more of a political liability than a stability.
In the name of Allah, Most Gracious, Most Merciful

"And if you rule, do so with fairness."

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