



The Anfal Trial and the Iraqi High Tribunal Update Number Two:

The Prosecution Witness and Documentary Evidence Phases of the Anfal Trial

This update series is designed as a brief summary of developments in the Anfal trial. Information is taken directly from observer notes or detailed media reporting. This update does not reflect ICTJ legal analysis or ICTJ policy positions; for these please visit our website at <http://www.ictj.org> (English) or <http://198.170.242.9/arabic/> (Arabic).

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1. Overview

This update is the second of a series of updates summarizing developments in the *Anfal* trial before the Iraqi High Tribunal (IHT). The first update focused on the complainant phase of the trial, which ran from 21 August to 27 November 2006. This update covers the prosecution witness and documentary evidence phases of the *Anfal* trial. The prosecution witness phase lasted for five sessions, from 28 November to 7 December 2006. The documentary evidence phase lasted for nine sessions, from 18 December 2006 to 29 January 2007.

2. Background

A. The Iraqi High Tribunal (IHT)

The IHT, originally titled the “Iraqi Special Tribunal,” was established by order of the Coalition Provisional Authority in December 2003.¹ As the Tribunal’s creation involved the introduction of international crimes into Iraqi law, many legal experts questioned the validity of the Tribunal’s establishment.² The Tribunal was re-established under Iraqi law and renamed in October 2005. Tribunal proceedings are regulated by the IHT Statute and specialized rules of procedure and evidence.³ They also draw heavily from the Iraqi Criminal Procedural Code (Law 23 of 1971) and the Iraqi Penal Code (Law 111 of 1969).

The Tribunal has jurisdiction over Iraqis and Iraqi residents alleged to have committed genocide, crimes against humanity, war crimes, and violations of certain Iraqi laws between July 17, 1968 and May 1, 2003.⁴ The definitions of genocide, crimes against humanity and war crimes used in the IHT statute closely mirror the definitions codified by the international community in the statute of the International Criminal Court. Embracing these crimes and their internationally accepted definitions has made the IHT a domestic judicial institution responsible for trying international crimes.

The Tribunal is staffed by Iraqis and receives technical and logistical assistance from internationals (primarily Americans) through the Regime Crimes Liaison Office, based at the United States Embassy in Baghdad. The courthouse is located in the former Ba’ath Party headquarters in Baghdad’s International Zone.

¹ For a fuller description of its complex history please see ICTJ, *Creation and First Trials of the Supreme Iraqi Criminal Tribunal*, October 2005, available online at <http://www.ictj.org/images/content/1/2/123.pdf>.

² See, e.g., M. Cherif Bassiouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal*, 38 CORNELL INT’L L. J. 327 (2005).

³ *Law of the Supreme Iraqi Criminal Tribunal* (Law Number 10 of 2005), *Official Gazette of the Republic of Iraq* (October 18, 2005) (“IHT Statute”). For information on obtaining texts of the statute and the Tribunal’s *Rules of Procedure and Evidence*, see the Further Information section of this update.

⁴ *Id.* at art. 1 (Second). The non-international crimes include crimes such as the wastage of national resources, and are taken from Law No. 7 of 1958, the Punishment of Conspirators Against Public Safety and Corrupters of the System of Governance Law, created the year of the Iraqi revolution and overthrow of the British-controlled monarchy.

The Tribunal's first trial was that of *Dujail*, which began on 19 October 2005. For an overview of proceedings, please see the ICTJ briefing paper *Dujail: Trial and Error?*⁵ On 5 November 2006, Trial Chamber One rendered its judgment in the *Dujail* trial, finding former Iraqi President Saddam Hussein and other defendants guilty of crimes against humanity, including torture, forced deportation, imprisonment, willful killing, and other inhumane acts against hundreds of villagers in southern Iraq after an assassination attempt against Hussein in 1982. The Tribunal released a written judgment in Arabic on 22 November 22 2006.⁶ The Cassation Chamber announced its final judgment on 26 December 2006, and a written judgment was issued the following day.⁷ Hussein was executed four days later in a hanging that drew widespread international condemnation.⁸ Barzan Ibrahim al-Hassan and Awad Hamad al-Bandar were executed on 15 January 2007.

*B. The Anfal Trial*⁹

The Anfal trial of Saddam Hussein, his cousin Ali Hassan al-Majid, and five other co-defendants began on 21 August 2006. The defendants were referred to trial based on their alleged roles in planning, authorizing and executing the 1988 Anfal campaign – a series of large-scale, coordinated attacks targeting the Kurdish population of northern Iraq.¹⁰ According to the Chief Prosecutor, Iraqi forces repeatedly used chemical weapons, killed up to 182,000 civilians, forcibly displaced hundreds of thousands more, and almost completely destroyed local infrastructure.¹¹ The Anfal campaign has been well-documented by human rights groups.¹²

The Anfal trial is being conducted before the five judges of Trial Chamber Two. The defendants are:

- Ali Hassan al-Majid al-Tikriti, alleged architect of the Anfal campaign and cousin of Saddam Hussein, Secretary General of the Arab Ba'ath Socialist Party's Northern Bureau from March 1987 to April 1989, with authority over all state agencies in the Kurdish region during this period;

⁵ ICTJ, *Dujail: Trial and Error?* (November 2006), available online at <http://198.170.242.9/arabic/report.html> (Arabic) and <http://www.ictj.org/images/content/5/9/597.pdf> (English).

⁶ Available online at <http://www.iraq-ihf.org/ar/22112006.html> (Arabic) and <http://www.ictj.org/static/MENA/Iraq/DujailJudgment.eng.pdf> (English).

⁷ Available online at <http://www.iraq-ihf.org/ar/doc/ihtdf.pdf> (Arabic); a preliminary English translation is available at <http://law.case.edu/saddamtrial/content.asp?id=88>.

⁸ See, e.g., Romesh Ratnesar, "Saddam's Botched Trial," *Time* January 5, 2007, available online at <http://www.time.com/time/world/article/0,8599,1574349,00.html>.

⁹ Defendant profiles and descriptions of the crimes with which they are charged, as well as the overview of the complainant phase found in this section, draw largely from the ICTJ's "The Anfal Trial and the Iraqi High Tribunal Update Number One," (January 2007) available online at <http://198.170.242.9/arabic/AnfalUpdateOne.arb.pdf> (Arabic) and <http://www.ictj.org/static/MENA/Iraq/AnfalUpdateOne.eng.pdf> (English).

¹⁰ The Iraqi Code of Criminal Procedure (Law 23 of 1971) stipulates a two-step charging process. Defendants are first referred to trial (art. 131), and a charging instrument is then drawn up by the court after prosecution has presented its evidence (art. 181).

¹¹ Prosecutor's opening statement, 21 August 21 2006 (ICTJ Observer Notes).

¹² See, e.g., GENOCIDE IN IRAQ: THE ANFAL CAMPAIGN AGAINST THE KURDS, Human Rights Watch (1993), available online at <http://www.hrw.org/reports/1993/iraqanfal/>.

- Sultan Hashem Ahmed al-Ta'i, former commander of the Army First Corps, which was based in northern Iraq and involved in several, but not all, of the eight Anfal operations. Also former Army Chief of Staff, and former Minister of Defense 1995-2003;
- Tahir Tawfiq al-'Aani, former Governor of Mosul during the Anfal campaign, Ba'ath party official. Prior to the Anfal campaign, al-'Aani was also Secretary of the Northern Affairs Committee, which was subordinate to al-Majid;
- Sabir Abd al-Aziz al-Douri, former general director of Iraq's Military Intelligence Service;
- Farhan Mutlaq al-Jabouri, former director of the Military Intelligence Service of the northern and later eastern regions; and
- Hussein Rashid al-Tikriti, Army Deputy Chief of Staff for Operations during the Anfal campaign.

Saddam Hussein al-Majid al-Tikriti, former President of Iraq from 1979 until 2003, was also a defendant in the al-Anfal trial. After his execution on 30 December 2006, however, the Tribunal announced that all legal proceedings against him would be halted according to Articles 300 and 304 of the Iraqi Law of Criminal procedures No. 23 (1971).

Allegations and charges in the Anfal trial include:

- Genocide, meaning any number of specified acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such.¹³ The prohibition against acts intended to destroy a group of people—in this case, Iraqi Kurds—based on their group identity is one of the most fundamental norms of international law. Under Article 11, First, (A), (B) and (C) of the IHT Statute, the defendants were charged with: killing members of the group; causing serious bodily or mental harm to members of the group and deliberately inflicting living conditions calculated to bring about the group's physical destruction in whole or in part.
- Crimes against humanity, meaning certain specified acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the general context of the attack.¹⁴ Such crimes are either committed on a massive scale, or are systemic, and are committed pursuant to an official policy. Under Article 12, First, (A), (B), (C), (D), (E), (F), (H), (I) and (J) of the Statute, the defendants were eventually charged with: willful killing; extermination, enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental norms of international law; torture, persecution against any specific party or population on political, racial, national, ethnic, cultural, religious,

¹³ Supreme Iraqi Criminal Tribunal Law No. 10 of 2005, *al-Waqa'ia al-Iraqiyya* (the official gazette of the Republic of Iraq), no. 4006, October 18, 2005 ("IHT Statute") art. 11, available online at <http://www.ictj.org/static/MENA/Iraq/IraqStatute.ara.pdf> (Arabic) and <http://www.ictj.org/static/MENA/Iraq/iraq.statute.engtrans.pdf> (English).

¹⁴ *Id.* at art. 12.

gender or other grounds that are impermissible under international law, in connection with any act referred to as a form of sexual violence of comparable gravity; enforced disappearance of persons and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to the body or to the mental or physical health.

- War crimes, which is a broad category of prohibited acts related to armed conflict, by which civilian persons or places are harmed.¹⁵ The defendants were charged, under Article 13, Fourth, (A), (D), (E), (H) and (L) of the Statute, with: intentionally directing attacks against the civilian population or against civilian individuals not taking direct part in hostilities; intentionally directing attacks against buildings such as schools and hospitals which are not military objectives; pillaging any town or place, even when taken over by force; ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand and destroying or seizing the property of an adversary, unless such destruction or seizure is imperatively demanded by the necessities of the conflict .
- Willfully killing another person using toxic substances or explosives.¹⁶

In pre-trial documents, Hussein and al-Majid were the only defendants charged with genocide, and al-‘Aani was not charged with war crimes.¹⁷ During the trial’s first session, however, presiding Judge Abdallah al-Amiri asked each defendant to enter a plea to crimes under all three categories. All seven defendants pled not guilty on all counts.¹⁸

The prosecution was officially headed by Chief Prosecutor Jaafar al-Mussawi, with Proecutor Munqidh al-Fir’an taking the lead role in this case. With the exception of al-‘Aani, each defendant had retained private counsel by the first session.¹⁹ Al-‘Aani later retained private counsel as well. Defense lawyers were provided by the defense office to step in if private attorneys were dismissed or did not attend trial sessions.²⁰

C. The Complainant Phase

The first ICTJ Anfal update dealt with the complainant phase, which lasted for twenty-three sessions, from 21 August to 27 November 2006, in which sixty-five complainants presented testimony regarding their experiences during the Anfal campaign. For a detailed overview please refer to the first update of this series: “The Anfal Trial and the Iraqi High Tribunal Update Number One: The Complainant Phase of the Anfal Trial.”²¹

During this first phase the complainants – some identified in court and some not – testified in harrowing terms to what befell them during the Anfal campaign. Some complainants offered testimony against only a few defendants, while others testified against all of them. The testimony

¹⁵ *Id.* at art. 13.

¹⁶ Iraqi Penal Law (Law No. 111 of 1969) art. 406(1)(B).

¹⁷ IHT Press Release, April 4, 2006.

¹⁸ ICTJ Observer Notes, Trial Session 1, 21 August 21 2006.

¹⁹ ICTJ Observer Notes, Trial Session 1, 21 August 21 2006

²⁰ Non-Iraqi lawyers may advise defense counsel or defendants. *See* IHT Statute, *supra* note 13 at art. 19(4)(b).

²¹ *Supra* note 9.

apparently constituted the factual basis of war crimes, and indicated crimes against humanity including willful killing and imprisonment. As for the charge of genocide, complainant testimony seemed to establish the factual basis for the constituent acts required by the charge, but much of the evidence did not seem to go towards the requisite intent.²²

In its examination of complainants, the defense argued that the Anfal campaign was part of Iraq's strategy in the Iran-Iraq war and was directed at Iranian forces and the Kurdish "saboteurs" allegedly fighting alongside them.

It was during this complainant phase of the trial that Presiding Judge al-Amiri stated in court that Hussein was "not a dictator." At the request of the Prime Minister's office, Judge al-Amiri was immediately replaced and Muhammad Uraybi al-Khalifa became the new Presiding Judge.²³ The process behind the decision to replace Judge Amiri marked another, severe blow to the Tribunal's independence, particularly when viewed in the context of the repeated (and successful) attempts to interference with judicial assignments that occurred during the *Dujail* trial.²⁴

3. The Prosecution Witness Phase of the Anfal Trial

A. Introduction

During the prosecution witness phase of the trial, witnesses were heard over the course of five trial sessions (from 28 November to 7 December 2006), and nine individuals provided testimony. Many of these were expert witnesses.

B. Details of Witness Testimony

Witness One (name unknown)²⁵

- The first witness to provide testimony was an unidentified former *Peshmerga* member. The witness described chemical weapons attacks on his village, his detention and torture in Irbil, and surviving an execution in front of an open grave.

Dr. Clyde Snow²⁶

- Clyde Snow, an American forensic anthropologist, provided testimony regarding a forensic investigation he carried out in a Kurdish village, during which he examined bodies in a mass grave that showed signs of violence consistent with gunshot wounds. Dr. Snow concluded that civilians had been killed by chemical weapons, including mustard and sarin gas.

²² See *supra* note 13.

²³ Richard A. Opiel Jr. After Remark, Judge in Trial of Hussein Loses His Post, *The New York Times*, September 19, 2006.

²⁴ *Id.* See also Miranda Sissons and Ari. S. Bassin "Was the Dujail Trial Fair?" 5 J. INT'L CRIM. JUSTICE. 272 (2007).

²⁵ ICTJ Observer Notes, Trial Session 24, 28 November 2006.

²⁶ *Id.*

Douglas Scott²⁷

- Douglas Scott, an American expert in firearms identification, ballistics and battlefield archeology, testified to examining cartridge cases found at the site of a mass execution in northern Iraq in 1992. He stated that the cartridge cases and bullets found among bodies in a mass grave in the Kurdish village of Koreme showed evidence of "firing-squad type organization."

Asfandiar Shukri²⁸

- Asfandiar Shukri, an American physician, testified to having examined Kurdish refugees near the Turkish border. The refugees displayed traces of attacks from mustard gas and possibly nerve gas in 1988.

Michael Trimble²⁹

- Michael Trimble, a forensic anthropologist with the US Army Corps of Engineers, described investigations of three mass graves in 2004 carried out at the request of the Tribunal. He testified to having found hundreds of bodies of Kurdish men, women, pregnant women and children that were apparently killed by firing squads and bulldozed into mass graves between 1998 and 1990.

Abdallah Abd al-Qadir Abdallah³⁰

- Abdallah Abd al-Qadir, a Kurdish chemistry teacher, recalled how he saw more than 40 people dead from an alleged chemical attack in 1988. He stated he had lost 25 members of his own family, including his mother and five of his six children.

Witness Seven (name unknown)³¹

- The unidentified witness testified about chemical weapons attacks in 1988. He stated he had medically treated a number of victims, but had not issued them medical records as they would have been arrested and executed.

Witness Eight (name unknown)³²

- The unidentified witness, a doctor, stated that he regularly treated villagers and members of the *Peshmerga* forces. The number of casualties of the first chemical attack in the Kurdistan region had been high because residents of the village were not used to such attacks.

Witness Nine (name unknown)³³

²⁷ ICTJ Observer Notes, Trial Session 25, 29 November 2006.

²⁸ *Id.*

²⁹ ICTJ Observer Notes, Trial Session 26, 30 November 2006.

³⁰ ICTJ Observer Notes, Trial Session 27, 4 December 2006.

³¹ ICTJ Observer Notes, Trial Session 28, 6 December 2006.

³² ICTJ Observer Notes, Trial Session 29, 7 December 2006.

³³ *Id.*

- The unidentified witness, a doctor at Bergalou Hospital, gave testimony on the shelling of the Bergalou area on 16 April 1987.

C. Observations

The testimony of the prosecution witnesses was general in nature, focusing on proving the existence and locations of the Anfal campaign, as well as the campaign's use of chemical weapons against the Kurdish civilian population. Complainant testimony did not focus on proving the individual liability of the defendants, and the prosecution focused more specifically on issues of individual liability during the documentary evidence phase (below).

Witness testimony fell into two general categories: testimony related to the use of chemical weapons, and testimony about mass graves (much of it from American forensic experts).

In discussing the use of chemical weapons, Witness One testified directly to chemical weapons attacks on his village, and Witnesses Seven and Eight both testified not only to the existence of chemical weapons attacks but also to their experience in treating the survivors of such attacks. Providing direct witness testimony of both the use of chemical weapons and the civilian and Kurdish ethnicity of the victims was crucial for the prosecution in terms of establishing key elements of crimes against humanity, war crimes, and genocide.

In discussing the location of mass graves, Dr. Clyde Snow testified directly to a grave excavated in a Kurdish village, and Douglas Scott provided testimony on “firing squad-type organization” in sites of mass execution. The witnesses noted that the victims found in the mass graves included men, women, pregnant women, and children. The testimony pertaining to the civilian status of the victims and the organized and massive scale of the executions supported the prosecution's allegations of the commission of war crimes, crimes against humanity, and genocide (in particular the element “to destroy, in whole or in part, a national, ethnic, racial or religious group”³⁴).

D. Concerns with the Witness Evidence

In primarily hearing evidence from ballistic and forensic experts, an opportunity was lost to clarify the respective responsibilities of the different organs of Hussein's regime. There was also no use of experts who could testify to the political and military structures of the Ba'ath regime, or the strategy of the Anfal campaign, to refute some of the claims made by the defendants. Tribunals from Nuremburg to the ICTY have frequently made use of expert witnesses to give an overview of how particular military and political regimes operate, which helps produce clear descriptions of the chain of command and respective responsibilities the parts of the system under analysis, including the respective responsibilities of politicians and military actors. In the prosecution witness phase of the Anfal trial, no such witnesses were called, and the respective competencies of the defendants and the institutions they represented were not clearly defined. The result is that the evidence related more clearly to the facts of the crimes themselves, rather than to the respective culpability of those who orchestrated them, and the chains of command

³⁴ *Supra* note 13.

through which they were carried out. That said, the prosecution did make greater efforts to link the individual defendants with the commission of the alleged crimes during the documentary evidence phase of the trial.

The Defense objected strongly to the predominance of American expert witnesses, and suggested that the experts were not impartial. Hussein echoed that objection before his execution, saying, with reference to the testimony given by Michael Trimble (a forensic anthropologist with the US Army Corps of Engineers): “Any Iraqi person will notice that only American experts are coming ... and will be suspicious...so I suggest bringing neutral witnesses.”³⁵

E. The Court’s Relationship with the Defense

The court continued to experience difficulties in its relations with defense lawyers. At Trial Session 25 (29 November 2006) defense lawyer Badia Aref was ejected from the court. Aref had repeatedly referred to the prosecution and judges as “brother,” rather than by their official titles, and continued to do so after warnings by Chief Judge al-Khalifa that Aref should respect the court. The lawyer’s refusal to address the court in the formal manner requested by Judge al-Khalifa was taken as an extension of the defense team’s greater refusal to recognize the legitimacy of the Tribunal as a whole, and Judge al-Khalifa eventually ordered Aref removed from the Court and placed in custody for 24 hours for “insulting the Court.”³⁶ Both defense and prosecution lawyers requested Judge al-Khalifa to allow Badia Aref to return, but the defense lawyer returned only briefly before leaving again, saying he was unwell.

4. The Documentary Evidence Phase of the Anfal Trial

A. Introduction

The documentary evidence phase of the Anfal trial lasted for nine sessions, from 18 December 2006 to 29 January 2007. The prosecution introduced a large volume of evidence against the defendants, and the evidence was stronger and better-presented than in the *Dujail* trial.

Some 4935 documents were presented in the referral file (dossier). Although disclosure to the defense improved since *Dujail*, documents were nevertheless introduced during trial sessions as evidence even when they had not been previously disclosed. This constitutes a departure from international norms of criminal procedure that seriously threatens fair trial rights and the ability of the defense to mount a case against the evidence before it in a considered and timely manner.

³⁵ ICTJ Observer Notes, Trial Session 26, 30 November 2006.

³⁶ ICTJ Observer Notes, Trial Session 25, 29 November 2006. Badia Aref was again expelled for insulting the court during Trial Session 49 on 15 March 2007. Insulting an Iraqi court is a crime under Art. 226 of the Iraqi Penal Law No. 111 of 1969, and committing a crime in court is punishable by 24 hours detention under Art. 159 of the Iraqi Code of Criminal Procedure No. 23 of 1971. The Trial Chamber also has wide latitudes under Rule 31 of the Rules of Procedure and Evidence, which allows the Trial Chamber to “take legal measures” against a lawyer if that lawyer’s conduct “has become offensive and harmful, or demeans the dignity of the [Tribunal].”

This section is designed to give readers a flavor of the nature of documentary evidence available in the Anfal case. The text of two important documents is reproduced in full, and a summary of the evidence highlighted in Trial Session 30 (the first session devoted to documentary evidence) is also given.

B. Observations

The prosecution introduced documentary evidence in two phases. The first phase involved the introduction of evidence designed to prove the general existence of the Anfal campaign, as well as the use of chemical weapons against the Kurdish civilian population. This was similar to the strategy employed during the prosecution witness phase. The second phase involved the introduction of documentary evidence specifically targeted to prove the responsibility of the individual defendants. The defendants were then provided with an opportunity to respond to the evidence introduced against them.

The documentary evidence primarily consisted of official communications (eg: letters and memoranda of instruction) between different agencies of the Hussein regime relating to the Anfal campaign. The prosecution used the documentary evidence in an attempt to demonstrate the chain of command from the President to Military Intelligence, and then to specific elements of the Armed Forces tasked with carrying-out various aspects of the Anfal campaign.

The prosecution strategy was to demonstrate the responsibility of individual defendants by showing the involvement of their respective institutions in the execution of the Anfal campaign. Central to this strategy was a tracing of the decision to use chemical weapons. Evidence was introduced showing official communications, instructions, and directions from the Presidential Secretary (implicating Hussein), the head of Military Intelligence (implicating al-Douri as General Director of Iraq's Military Intelligence Service, and al-Jabouri as Director of the Military Intelligence Service for the Northern and Eastern Regions), Military Headquarters, the First Division and Special Division of the Army Corps, the Air Force (implicating Rashid as Army Deputy Chief of Staff of Operations, and al-Ta'i as former Commander of First Corps), and the Ba'ath Party Northern Command (implicating al-Majid).

Much of the documentary evidence introduced to support the allegations of the commission of crimes against humanity, war crimes, and genocide focused on the widespread and systematic nature of the Anfal attacks and the civilian and Kurdish ethnicity of the victims. Part of the documentary evidence introduced against al-'Aani, for example, included a document issued by the northern branch of the Ba'ath Party that stated that the corps commanders were preparing for special attacks by artillery, helicopters, and planes, their goal being to kill the largest possible number of people. The document also stated that villagers between the ages of 15 and 70 were to be executed.³⁷

Two additional documents introduced into evidence, Order Number SF/4008 and Document 6414, appear below. These two documents are, on the face of it, highly incriminating. Specific examples of the prosecution strategy to implicate individual defendants by elucidating the clear

³⁷ ICTJ Observer Notes, Trial Session 24, 7 January 2006

and functional chain of command appear in the review of Trial Session 30 (18 December 2006), below.

In addition to these documents, the prosecution also introduced audio and video evidence. Video evidence was introduced showing al-Majid in military uniform, saying: “I will attack them with chemical weapons and kill them all. What will they, the international [community] say?”³⁸

The audio evidence included a recording in which a voice, alleged to be that of al-Majid, states that he expelled all of the Kurds in Kirkuk, had denied them job opportunities in the whole of Kirkuk City, and had jailed some and tortured others.³⁹ In another recording, a voice alleged to be that of Hussein touted the efficacy of chemical weapons, saying: “[They are] effective against those who do not immediately don gas masks....[they] annihilate thousands at a time and prevent them from drinking, eating what is available or leaving the city for a period of time until it is completely cleansed. They cannot sleep in their beds, eat, drink or anything. They come out naked.”⁴⁰ A further tape was submitted in which the voice of Hussein ordered that Kurds be forced to live in Arab governorates so that they might become Arabs with the passage of time. In a third audio recording, Hussein stated that anyone over the age of 15 [in the region] should be beheaded.⁴¹

Such audio and video evidence was used firstly, to demonstrate the direct involvement of the defendants in the Anfal campaign, and secondly, to demonstrate their genocidal intent in planning to maximize casualties amongst the Iraqi Kurdish population, thus indicating an intent to destroy them in whole or in part.⁴²

In general, the evidence in *Anfal* was stronger than that in the *Dujail* trial, and it was also better presented. This was probably a consequence of the efforts of the international community to document the crimes when they were happening, including the Human Rights Watch *Genocide in Iraq* report, and the studies done by international forensic experts as early as May 1992.⁴³ The evidence was also better managed, and the defense had more ready access to the referral file than it did in *Dujail*, as it was given the file at the outset of the trial. Serious concerns over defense access to certain pieces of evidence remain, however, some of which are elaborated in the next section of this update.

³⁸ ICTJ Observer Notes, Trial Session 34, 8 January 2007; see also BBC Monitoring Middle East, *Iraqi TV carries 34th session of Al-Anfal trial 8 January* (9 January 2006).

³⁹ ICTJ Observer Notes, Trial Session 35, 11 January 2006; see also BBC Monitoring Middle East, *Iraqi TV carries 35th session of Al-Anfal trial 11 January* (11 January 2006).

⁴⁰ ICTJ Observer Notes, Trial Session 34, 8 January 2007; see also BBC Monitoring Middle East, *Iraqi TV carries 34th session of Al-Anfal trial 8 January* (9 January 2006).

⁴¹ ICTJ Observer Notes, Trial Session 34, 8 January 2007; see also BBC Monitoring Middle East, *Iraqi TV carries 34th session of Al-Anfal trial 8 January*, (9 January 2006).

⁴² A key element in the crime of genocide is an “intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such an “intent to eliminate, in whole or in part;” see IHT Statute, Art. 11, First.

⁴³ See, e.g., Human Rights Watch Report, “Genocide in Iraq: The Anfal Campaign against the Kurds,” July 1993, available online at <http://www.hrw.org/reports/1993/iraqanfal>.

Finally, the absence of high-profile, obstructive defendants allowed the proceedings to appear more orderly, particularly after the execution of Hussein, when the defendants in general seemed more resigned to the formalities of the courtroom.⁴⁴

C. Defense Approach and Concerns

In spite of improvements in disclosure, many documents were not in the referral file, and other forms of evidence, including video and audio evidence, were still only introduced in court. For example, on 11 February 2007 the prosecution was allowed to show a video which it claimed it had only received “that morning,” even though the video had not been previously shown to the defense.⁴⁵

The statements of the accused gave some insight into their possible defenses. Rather than deny that all the crimes took place, many of the defendants argued that the acts that occurred were not within the scope of their responsibility. For example, al-Jabouri refuted the applicability of some of the documentary evidence, arguing that documents from Trial Session 32 describing the razing of villages during October 1987 could not be used to prove his participation, since other documents proved that he did not assume his post in the Eastern District Intelligence Network until November, one month after the alleged events occurred.⁴⁶

Although denying their own responsibility, most defendants were extremely reluctant to identify who may have been responsible instead. Defendants generally either denied involvement in, or even knowledge of, the use of chemical weapons, or argued that their role had not been essential to the decision to deploy chemical weapons. In most cases, defendants simply argued that prosecution documents were fake or their signatures had been forged, and rarely did they engage with the substance of the evidence presented against them.⁴⁷

In some cases, defendants admitted involvement in attacks but argued that the targets were military and not civilian, or Iranian and not Kurdish. In Trial Session 32 (20 December 2006), for example, al-Jabouri admitted that the Intelligence Directorate provided the army with a list of targets that should be attacked, but argued that the targets were the headquarters of “Iran’s agents” and the Iranian army.⁴⁸

The defense raised several procedural issues, including the legibility of some documents, as well as the general process for disclosure of evidence. In Trial Session 26 (23 January 2006), al-Majid made a statement complaining about the difficulties that he and other defendants faced in terms of meeting with their lawyers, an issue that would become even more important as the trial entered into the defense stage.⁴⁹

⁴⁴ See John F. Burns, *Hussein’s Voice Speaks in Court in Praise of Chemical Atrocities*, NEW YORK TIMES, 9 January 2007.

⁴⁵ ICTJ Observer Notes, Trial Session 42, 11 February 2007.

⁴⁶ ICTJ Observer Notes, Trial Session 45, 15 February 2007.

⁴⁷ ICTJ Report: Observer Mission to the Iraqi High Tribunal, [CONFIDENTIAL] 1 March 2007.

⁴⁸ ICTJ Observer Notes, Trial Session 32; see also BBC Monitoring Middle East, *Trial of Saddam, codefendants in Al-Anfal case resumes 20 Dec*, (20 December 2006).

⁴⁹ ICTJ Observer Notes, Trial Session 36, 23 January 2007; see also BBC Monitoring Middle East, *Iraqi TV carries further session of Al-Anfal case trial* (23 January 2007).

E. Order Number SF/4008

Order Number SF/4008 played an important role in the prosecution's case. A well-known document in the public domain since 1993, it was contained in the referral file and referenced the Chief Prosecutor's opening statement.⁵⁰

The 29 June 1987 order was issued by the Northern Bureau Command and bears the signature of al-Majid. It was addressed to the "First Corps Command, Second Corps Command [and] Fifth Corps Command," under the responsibility of al-Ta'i.

The full text of the document reads:⁵¹

[BEGIN TEXT]

June 20, 1987

From: Northern Bureau Command

To: First Corps Command, Second Corps Command, Fifth Corps Command

Subject: *Procedure to deal with the villages that are prohibited for security reasons*

In view of the fact that the officially announced deadline for the amalgamation of these villages expires on June 21, 1987, we have decided that the following action should be taken with effect from June 22, 1987:

1. All the villages in which subversives, agents of Iran and similar traitors to Iraq are still to be found shall be regarded as out of bounds for security reasons;
2. They shall be regarded as operational zones that are strictly out of bounds to all persons and animals and in which the troops can open fire at will, without any restrictions, unless otherwise instructed by our Bureau;
3. Travel to and from these zones, as well as all agricultural, animal husbandry and industrial activities shall be prohibited and carefully monitored by all the competent agencies within their respective fields of jurisdiction;
4. The corps commanders shall carry out random bombardments using artillery, helicopters and aircraft, at all times of the day or night in order to kill the largest number of persons present in those prohibited zones, keeping us informed of the results;
5. All persons captured in those villages shall be detained and interrogated by the security services and those between the ages of 15 and 70 shall be executed after any useful information has been obtained from them, of which we should be duly notified;

⁵⁰ ICTJ Observer Notes, Trial Session 1, 21 August 2006.

⁵¹ Translation from Human Rights Watch, *Prelude to Anfal*, Chapter 2, available online at <http://hrw.org/reports/1993/iraqanfal/ANFAL2.htm>.

6. Those who surrender to the governmental or Party authorities shall be interrogated by the competent agencies for a maximum period of three days, which may be extended to ten days if necessary, provided that we are notified of such cases. If the interrogation requires a longer period of time, approval must be obtained from us by telephone or telegraph or through comrade Taher al-Ani;

7. Everything seized by the advisers and troops of the National Defense Battalions shall be retained by them, with the exception of heavy, mounted and medium weapons. They can keep the light weapons, notifying us only of the number of these weapons. The Corps commanders shall promptly bring this to the attention of all the advisers, company commanders and platoon leaders and shall provide us with detailed information concerning their activities in the National Defense Battalions.

For information and action within your respective fields of jurisdiction. Keep us informed.

[Signed]

Comrade

Ali Hassan al-Majid

Member of the Regional Command

Secretary General of the Northern Bureau

[END TEXT]

From the repeated references to it in official documents throughout 1988, it is apparent that Order Number SF/4008 remained in force as the standing orders for the Iraqi armed forces and security services during the Anfal campaign and beyond.⁵²

F. Document 6414

Document 6414 is also indicative of the nature and strength of the evidence against the defendants in the Anfal trial. It was introduced on the first day of documentary evidence (Trial Session 30, 18 December 2006) and allegedly demonstrates the involvement of the President and Military Intelligence Office in the decision to use chemical weapons. It also appears to indicate an intention to maximize casualties through the use of chemical agents.

The document is a letter dated 18 March 1987 from the Director of Military Intelligence (al-Douri) to the Presidential Office. Its subject is the “Use of Special Ammunition,” and it evaluates “possible prospects...for using the special ammunition.” It states: “The weather conditions do not serve the use of the agent (al-zarin) at the present time, due to the fact that the specified targets are covered by snow. [This] fact leads to the breakdown of the agent and its transformation into a non-toxic substance...The Air Force, tube-launched projectiles, as well as helicopters may be used for this purpose at night.”

⁵² *Id.*

The document concludes by suggesting “to postpone the launch of the strike...until next June” and “to proceed in planning similar defined operations towards the bases of the agents of Iran.”

The full text of the document reads as follows:

[BEGIN TEXT]

The Presidency of the Republic
The Secretary
The General Military Intelligence Directorate
Number: M 1/Sect 3/Div 2/6414
Date: 1987 March 18

Top Secret, Confidential
And Immediate

To/ The Presidency of the Republic- the Secretary
Subject/ Use of Special Ammunition

Your top secret and confidential letter numbered 7/J2/808/K and dated 12 March 1987.

1. Below mentioned are the possible prospects that we have for using the special ammunition against the bases of the Khomeini Guard within the bases of the saboteurs of the 1st Branch of the Barzani Group:-
 - a. The weather conditions do not serve the use of the agent (al-zarin) at the present time, due to the fact that the specified targets are covered by snow. [This] fact leads to the breakdown of the agent and its transformation into a non-toxic substance. This case applies as well to the agent (tapun).
 - b. We have sizeable available quantities of the agent (mustard) nonetheless, its anticipated effect is considered unattainable unless a concentrated dose is delivered; in addition to that, it evaporates slowly in snowy areas.
 - c. The Air Force, tube-launched projectiles, as well as helicopters may be used for this purpose at night.
2. We suggest the following:
 - a. To postpone the launch of the strike on the bases of the Khomeini guards within the Barzani group headquarters until next June because the targets lie on the line of the Turkish-Iraqi border. It is preferable to choose the targets lying outside the possible effect on the Turkish border units or the Turkish villages.
 - b. To proceed in planning similar defined operations towards the bases of the agents of Iran.

Kindly review and inform us... with appreciation

[handwritten margin note:
Walid
17 March]

[Signature]
Staff Major General
The General Military Intelligence Director

[handwritten margin note
Signature
17 March]

[END TEXT]

G. Trial Session 30

Trial Session 30 (18 December 2006) was the first session in which documentary evidence was produced. The prosecution strategy was to demonstrate a clear and functioning chain of command linking the President (through the Presidential Secretary) to the specific military actors charged with implementing the Anfal campaign. The evidence was also intended to implicate individual defendants in the decision to use chemical agents in a manner designed to maximize loss of life. The evidence was introduced in a well-organized manner, a distinct improvement on the documentary evidence phase of the *Dujail* trial.

The following notes are compiled from a report of an ICTJ observer who attended Trial Session 30. These notes list the documents in the order they were introduced by the prosecution, and detail the date of each document, as well as where it originated and who it was sent to (if known). The ways in which the following documents establish each defendant as a link in a chain of responsible persons are discussed below. As can be seen by the documents in sequence, the prosecution attempted to portray the communications, channeled through official government documents, through which the Anfal campaign took shape:

1. 25 March 1987: From the head of Military Intelligence to the Presidential Secretary in the President's office. The document notes that Military Intelligence had studied the presence of "Mukharabeen," Iranian agents in the North, and their "effect on the country and the security of the region". Locations studied included Toti, Hiti, Bani Sar and the Tekia Valley [as heard]. The letter says the locations "are distant from our military positions" and "lie in lowlands" suitable for using chemical weapons because they would spread out and stay in place a long time. "Due to the limited number of special weapons," the letter says, they recommended using one-third of their stock for the attack and saving the rest for other emergencies. The prosecutor noted that the document first uses the term "special ammunition," but then clarifies in parenthesis that it means "sarin agent" and "mustard agent." The letter is signed by the head of Military Intelligence.
2. 29 March 1987: From the Presidential Secretary to Military Intelligence. The letter states: "referring to your letter, the approval was given to attack. But the goal should not be to just harm the saboteurs".
3. 12 March 1987: From the Presidential Secretary to the head of Military Intelligence. The letter calls for a sudden strike against "Khomeini guards who are in spy areas" and envisions

“the possibility of implementing a strike in the following means: Using air force and interior ministry forces.” A footnote on the page says: “study and take action immediately.”

4. From Military Intelligence to the Presidential Secretary. The letter says a strike should be “accurate...with the element of surprise.” It says the strike should “use air force instead of artillery, because moving artillery into position will be seen and reduce the surprise,” should have a “severe effect,” should have pilots well-briefed on their targets (and to that end, “satellite imagery should be used”), should be done at dawn, should “assign more than one plane per target,” and should “hit all the targets simultaneously and with the all the severity available to the air force.”

5. 18 March 1987: From Ministry Intelligence to the Presidential Office. “Natural conditions do not permit the use of serin because the area is covered with snow,” which the letter says would reduce its toxicity. “We have good quantities of mustard agent,” it continues, but its effects could also be reduced by the conditions on the ground. In the letter, Military Intelligence suggests “delaying the strike against Khomeini's Guard and the headquarters of the Barzani group until June,” adding that the area lies near the Iraq-Turkey border and could “impact Turkish troops.” The letter is signed by the head of Military Intelligence.

6. 19 March 1987: From the Presidential Office to Military Intelligence. “Your suggestions have been approved.”

7. 31 March 1987: From Military Intelligence to Military HQ. Regarding the use of “special ammunition,” the President “instructed that our offices should consult about the possibility of launching such a strike.” The communiqué emphasizes the need to select targets away from Turkish areas, and defines targets as the locations of “pro-Iranian elements and Iranian agents.” “It is suitable for using special weapons” the letter reads, “because they are in low-lying areas that allow the chemical agent to last a long time.” The letter says that the military should use one-third of its supplies, and save the rest for emergencies: “Approval has been given for the strike.”

8. 5 April 1987: From Military HQ to the First Division and Special Division, copied to the President's Office. To facilitate the development of an attack plan, the letter says the targets are near the highway in the Bani Sar valley, and directs the First Army Corps to make the plan.

9. Military HQ says: “the President's office has approved to do a strike against pro-Iranian elements,” and says it will be delayed until the President's Secretary is notified.

10. 11 June 1987: From Chief of Staff to Command of Fifth Army. The letter says: “Military Intelligence informed us in a letter, 10 June 1987, that on 5 June 1987 an air strike was carried out...(locations in Dohuk province).” According to the letter, the strikes hit “Barzani headquarters” and “Communist Party headquarters,” noting that “the air strike was effective especially on the Communist Party Headquarters.” The memo reports 31 killed, including one official with the party, and 100 wounded.

11. 5 June 1987. A letter from Military Intelligence, reporting an air strike on the Communist Party headquarters in the Daiwa area.
12. 1 May 1987 (date not confirmed). A letter from the Diwan in the Ministry of Defense, saying that all headquarters of Iranian agents should be hit with “special ammunition”.
13. 2 May 1987: From the Ministry of Defense to Military Intelligence. The letter says: “All enemy targets should be hit with conventional and special ammunition.”
14. 12 May 1987: From the Air Force to Military Intelligence. The letter proposes a list of targets (apparently originating from Military Intelligence) and says four will be hit with chemical weapons. [The prosecutor said that the targets were hit before the letter was written on 7 May.]
15. A document from Military Intelligence stating that they had low stocks of chemical weapons.
16. 3 May 1987. From the Air Force Command to Military Intelligence. The letter states that attacks were carried out using 20 Jet planes with conventional weapons and 44 jets with special ammunition.
17. 6 September 1987. From Military Intelligence to the Ba‘ath Party Northern Command. The letter states that a “special ammunition” attack was carried out on the headquarters of “the criminal Jalal Talabani,” killing two and wounding twelve of the “pro-Iranian elements.” The letter notes an intercepted Communist Party letter denouncing the attack, and says that the casualties would have been greater if the “pro-Iranian” forces hadn't had special chemical gear and medical kits.
18. From the head of Military Intelligence to the head of “special security.” The letter apparently suggests that AK 7.62 caliber bullets that were treated with chemical agents should somehow be slipped to the “pro-Iranian” elements because they were apparently dangerous.
19. From the Air force to Military Intelligence. The letter reports on strikes conducted by jets with chemical ammunition and twenty with conventional ammunition. It states the planes hit a total of nineteen targets, only ten with conventional ammunition.
20. A document from Military Intelligence stating that journalists had gone to the area of an attack and seen the effects of the chemical weapons, and were likely to report them “to the world.”

These documents were used by the prosecution to establish a chain of command linking Hussein’s decision to strike the region (with chemical weapons) to the planning and execution of those strikes by the various military and intelligence personalities on trial. The communication between Military Intelligence and the Presidential Office potentially implicates Hussein, al-Douri (as General Director of the Military Intelligence Service) and al-Jabouri (as director of the

Military Intelligence service of the Northern and Eastern Regions) in the decision to use chemical weapons in the region.

The subsequent decision, taken by Military Intelligence and the Presidential Office, to use the Air Force and interior ministry forces to strike the area apparently illustrates a clear chain of command through to the Air Force, the First and Special Divisions, Military Headquarters, and the Ministry of Defense. This implicates additional defendants in the air strikes and the use of chemicals weapons in the region, namely al-Majid as Secretary General of the Ba'ath Party's Northern Affairs Bureau, al-Ta'i as former commander of the First Corps, and Rashid as Army Deputy Chief of Staff for Operations.

Trial Session 30 framed the documentary evidence phase of the trial as a vital stage in which the prosecution would attempt to elucidate the chain of command for the Anfal operations, and therein seek to establish the individual criminal culpability of each defendant. The documents presented in Trial Session 30 seemed to indicate that the defendants in the Anfal campaign were, at the very least, aware of the attacks, and were also aware that chemical and other weapons would be used to maximize the loss of life in areas that were certain to contain civilian Kurds. Notably, no such evidence was introduced implicating al-'Aani (the former Governor of Mosul during the Anfal campaign), and at the conclusion of the trial the prosecution eventually asked that the case against him be dismissed for lack of evidence.⁵³

5. The Execution of Saddam Hussein

After the execution of Hussein on 30 December 2006, the Tribunal announced that all legal proceedings against him would be halted according to Articles 300 and 304 of the Iraqi Code of Criminal Procedure No. 23 (1971).⁵⁴

Almost immediately after Hussein was executed, the quality of media coverage of the *Anfal* trial declined rapidly. The majority of news agencies immediately reduced the detail of their reporting, and after a number of weeks many stopped reporting entirely. The ramifications of Hussein's execution are best addressed more fully elsewhere, but it is likely that his execution has been detrimental to the justice process in Iraq on many levels. The execution and its sectarian overtones are deeply divisive within Iraq and the surrounding region; the remaining political and legal legitimacy of the Tribunal was badly damaged; and Hussein's role in other extremely resonant crimes will never be examined.

⁵³ ICTJ Observer Notes, Trial Session 53, 2 April 2007.

⁵⁴ *Supra* note 10 at arts. 300 and 304.

6. Further Information

First ICTJ Update on the *Anfal* Trial (Complainant Phase):

Available in Arabic at: <http://198.170.242.9/arabic/AnfalUpdateOne.arb.pdf>
Available in English at: <http://www.ictj.org/static/MENA/Iraq/AnfalUpdateOne.eng.pdf>

ICTJ Press Releases on the *Anfal* Trial:

“Iraq: Tribunal Must Improve Efforts in Anfal Trial” (17 August 2006),
Available in Arabic at: http://198.170.242.9/arabic/PR060817IraqAnfal_FINALar.html
Available in English at: <http://www.ictj.org/en/news/press/release/995.html>

“Iraq Tribunal Issues Verdict in Anfal Case” (24 June 2007),
Available in Arabic at: http://198.170.242.9/arabic/PR070624Anfal_Verdict.html
Available in English at: <http://www.ictj.org/en/news/press/release/1240.html>

The Iraqi High Tribunal:

Tribunal Statute of October 2005

Available in Arabic at: <http://www.iraq-iht.org/ar/abouttasesmahkama.html>
<http://www.ictj.org/static/MENA/Iraq/IraqStatute.ara.pdf>
Available in English at: <http://www.ictj.org/static/MENA/Iraq/iraq.statute.engtrans.pdf>

Tribunal Rules of Evidence and Procedure of October 2005

Available in Arabic at: <http://www.iraq-iht.org/ar/iraqi.html>
<http://www.ictj.org/static/MENA/Iraq/IraqTribRules.ara.pdf>
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Tribunal Official Website:

Available in Arabic at: <http://www.iraq-iht.org/ar/home.html>
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Background:

ICTJ, *The Creation and First Trials of the Supreme Iraqi Criminal Tribunal*, October 2005
Available in Arabic at: <http://198.170.242.9/arabic/ICTJ-SICT-Background-AR-20051118.pdf>
Available in English at: <http://www.ictj.org/images/content/1/2/123.pdf>

The *Dujail* Trial:

Dujail Trial Chamber Judgment of November 2006

Available in Arabic at: <http://www.iraq-iht.org/ar/22112006.html>
Available in English at: <http://www.ictj.org/static/MENA/Iraq/DujailJudgment.eng.pdf>

Dujail Cassation Chamber Ruling of December 26, 2006

Available in Arabic at: <http://www.iraq-iht.org/ar/doc/ihtdf.pdf>

Available in English at: <http://law.case.edu/saddamtrial/content.asp?id=88>

Analysis of the Dujail Trial:

ICTJ: *Dujail: Trial and Error?* (November 2006),

Available in Arabic at: <http://198.170.242.9/arabic/report.html>

Available in English at: <http://www.ictj.org/static/MENA/Iraq/ICTJDujailBrief.eng.pdf>

Human Rights Watch, *Judging Dujail: The First Trial before the Iraqi High Tribunal* (November 2006),

Available in Arabic at: Summary and recommendations only available at
www.hrw.org/reports/2006/iraq1106/iraq1106sumandrecsar.pdf

Available in English at: <http://www.hrw.org/reports/2006/iraq1106/>

Human Rights Watch, *The Poisoned Chalice: A Human Rights Watch Briefing Paper on the Decision of the Iraqi High Tribunal in the Dujail Case* (June 2007),

Available in Arabic at: <http://hrw.org/arabic/backgrounder/2007/iraq0607/>

Available in English at: <http://hrw.org/backgrounder/ij/iraq0607/>

The Anfal Campaign

Background

Human Rights Watch, *Genocide In Iraq: The Anfal Campaign Against the Kurds* (1993),

Available in Arabic at: Not available online. For hard copies contact ashrafa@hrw.org

Available in English at: <http://www.hrw.org/reports/1993/iraqanfal/>