



## **The Anfal Trial and the Iraqi High Tribunal Update Number One:**

### **The Complainant Phase 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 covers the first, complainant phase of the Anfal trial, which lasted for twenty-three sessions from August 21 to November 27, 2006. Seventy-six complainants presented testimony regarding their experiences during the Anfal campaign. During the second, witness phase of the trial, expert and other witnesses presented testimony on behalf of the prosecution from November 27 to December 7. The presentation of documentary evidence began on December 18. The defense is expected to present its own witnesses before final arguments are heard and a judgment is issued.

## 2. Background

### A. The Iraqi High Tribunal (IHT)

The history of the IHT began prior to the fall of the Ba'athist regime, when US officials stated their intention to establish an Iraqi-led tribunal to try the alleged perpetrators of the regime's crimes.<sup>1</sup> The IHT, originally titled the "Iraqi Special Tribunal," was established by order of the Coalition Provisional Authority in December 2003. 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.<sup>2</sup> The Tribunal was re-established in Iraqi national law and renamed in October 2005. Tribunal proceedings are regulated by the IHT statute, and specialized rules of procedure and evidence.<sup>3</sup> 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.<sup>4</sup> The definitions of genocide, crimes against humanity and war crimes used in the IHT statute closely map 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, assisted technically and logistically by internationals (primarily Americans) via the Regime Crimes Liaison Office, based at the United States Embassy in

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

<sup>2</sup> See, e.g., M. Cherif Bassiouni, "Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal," 38 *Cornell International Law Journal* 327 (2005).

<sup>3</sup> *Law of the Supreme Iraqi Criminal Tribunal* (Law Number 10 of 2005), *Official Gazette of the Republic of Iraq* (October 18, 2005) (afterwards "the 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.

<sup>4</sup> IHT Statute, Article 1 (Second). The non-international crimes include crimes such as the wastage of national resources, and are taken from Law 7 of 1958, the year of the Iraqi revolution and overthrow of the British-controlled monarchy.

Baghdad. The courthouse is located in the former Ba'ath Party headquarters in Baghdad's International Zone.

The Tribunal's first trial was that of Dujail, which began on October 19, 2005. On November 5, 2006 Trial Chamber One rendered its judgment in the Dujail trial, finding the former Iraqi President and other defendants guilty of crimes against humanity for torture, forced deportation, imprisonment, willful killing, and other inhumane acts committed against hundreds of villagers in southern Iraq after an assassination attempt against Hussein in 1982. The Tribunal released a written judgment in Arabic on November 22, 2006.<sup>5</sup> The Cassation Chamber announced its final judgment on December 26, 2006, and a written judgment was issued the following day.<sup>6</sup> Saddam Hussein was executed four days later in a hanging that drew widespread international condemnation.<sup>7</sup> Barzan Ibrahim al-Hassan and Awad Hamad al-Bandar were executed on January 15, 2007.

The ICTJ and human rights groups have criticized the Dujail trial for falling short of international fair trial standards, and for serious administrative failures including inadequate security for defense lawyers and a lack of outreach to the Iraqi public. Moreover, the interference of the De-Ba'athification Commission and members of the Iraqi legislative branch (including the Prime Minister) seriously compromised judicial independence during the Dujail trial.<sup>8</sup> The rushed cassation process failed to seriously review the many substantive and procedural issues of the trial phase, and exposed the extent to which the court was susceptible to political pressure.<sup>9</sup> The swift execution of Saddam Hussein, Barzan Ibrahim al-Hassan and Awad Hamad al-Bandar after a flawed legal process made these errors irreversible. The executions also prevented a full accounting for other crimes the three were alleged to have committed.

## B. The Anfal Trial

The Anfal trial of Saddam Hussein, his cousin Ali Hassan al-Majid, and five other co-defendants began on August 21, 2006. The defendants were referred to trial<sup>10</sup> 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. According to the chief

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<sup>5</sup> Available online in Arabic at <http://www.iraq-ihf.org/ar/22112006.html>. A preliminary English translation is available at <http://law.case.edu/saddamtrial/dujail/opinion.asp>

<sup>6</sup> Available online in Arabic at <http://www.iraq-ihf.org/ar/doc/ihfdf.pdf>. A preliminary English translation is available at <http://law.case.edu/saddamtrial/content.asp?id=88>

<sup>7</sup> See for example 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>

<sup>8</sup> Because several defendants were sentenced to death, the Dujail judgment has automatically been appealed to the cassation chamber of the IHT. For the ICTJ's analysis, see ICTJ, *Dujail: Trial and Error?* (2006), available at [www.ictj.org/static/MENA/Iraq/ICTJDujailBrief.eng.pdf](http://www.ictj.org/static/MENA/Iraq/ICTJDujailBrief.eng.pdf); see also Human Rights Watch, *Judging Dujail: The First Trial before the Iraqi High Tribunal* (2006), available at [www.hrw.org/reports/2006/iraq1106/](http://www.hrw.org/reports/2006/iraq1106/).

<sup>9</sup> ICTJ Press Release "Iraq Tribunal Chooses Speed Over Justice in Final Ruling," December 26, 2006. Available online at <http://www.ictj.org/en/news/press/release/1096.html>

<sup>10</sup> Iraq's *Code of Criminal Procedure* (Law 23 of 1971) stipulates a two-step charging process. Defendants are first referred to trial (article 131) and a charging instrument is drawn up by the court after prosecution has presented its evidence (article 181). At the time of writing, charging instruments had not yet been presented.

prosecutor in the Anfal trial, Iraqi forces repeatedly used chemical weapons, killed up to 182,000 civilians, forcibly displaced hundreds of thousands more, and almost completely destroyed local infrastructure.<sup>11</sup> The Anfal campaign has been well-documented by human rights groups.<sup>12</sup>

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

- Saddam Hussein al-Majid al-Tikriti, former President of Iraq from 1979 until 2003;
- 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;
- Sultan Hashem Ahmed al-Ta'i, former commander of I 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 Ali Hassan al-Majid;
- Sabir Abd al-Aziz al-Douri, former general director of Iraq's Military Intelligence Service;
- Farhan Mutlaq al-Jaburi, 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.

The allegations 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.<sup>13</sup> 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(1) A and C of the IHT Statute, the defendants are charged with killing 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. Such crimes are

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

<sup>12</sup> See for example Human Rights Watch, *Iraq's Crime of Genocide: The Anfal Campaign Against the Kurds*. May 1994, available in English online at <http://www.hrw.org/reports/1993/iraqanfal/>

<sup>13</sup> See Article 11(1) of the IHT Statute.

either committed on a massive scale, or are systemic and committed pursuant to an official policy. Under Article 12(1) A, C and E of the Statute, the defendants are charged with willful killing, enslavement, and imprisonment or other severe deprivation of physical liberty in violation of the norms of international law.<sup>14</sup>

- War crimes, which is a broad category of prohibited acts related to armed conflict, by which civilian persons or places are harmed. The defendants are charged, under Article 13(4) A, D, 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; and destroying or seizing the property of an adversary when doing so was not absolutely required by the necessities of the conflict.<sup>15</sup>

In pre-trial documents, Saddam Hussein and Ali Hassan al-Majid were the only defendants charged with genocide, and Tahir Tawfiq was not charged with war crimes.<sup>16</sup> During the trial's first session, however, presiding Judge Abdallah al-Amiri asked each defendant to enter a plea to crimes under all three charges. All seven defendants pled not guilty on all counts.<sup>17</sup>

The four prosecutors are headed by chief prosecutor Jaafar al-Mussawi, with Munqidh al-Fir'an taking the lead role in this case. With the exception of Tahir Tawfiq, each defendant had retained private counsel by the first session.<sup>18</sup> Tahir Tawfiq later retained private counsel as well. Defense lawyers are provided by the defense office to step in if these private attorneys are dismissed or do not attend trial sessions.<sup>19</sup>

### **3. The Complainant Phase of the Anfal Trial**

#### *A. Overview*

The complainant phase of the Anfal trial spanned twenty-three sessions, from August 21 to November 27, 2006. Seventy-six complainants presented testimony. Highlights of the complainant phase of the Anfal trial included:

- prosecution opening statements (the defense opening was truncated);
- the rejection of defense arguments that the IHT and the charges were illegitimate or illegal;

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<sup>14</sup> See Article 12 (1), of the IHT Statute.

<sup>15</sup> See Article 13(4) A, D, L of the IHT Statute.

<sup>16</sup> IHT Press Release, April 4, 2006.

<sup>17</sup> ICTJ Observer Notes, Trial Session 1, August 21, 2006.

<sup>18</sup> *Id.*

<sup>19</sup> Non-Iraqi lawyers may advise defense counsel or defendants. *See IHT Statute, supra* note 3, Art. 19(4)(b).

- the replacement of Presiding Judge Amiri with Judge Uraybi after the former stated in court that Saddam Hussein was “not a dictator”,<sup>20</sup>
- the testimony of seventy-six complainants relating inter alia to indiscriminate chemical weapons attacks, the destruction of villages, and the detention, execution, torture and mistreatment of Kurdish civilians.

The ICTJ has directly observed many of these sessions. While in some respects the Anfal trial has proceeded more smoothly than the Dujail trial—the number of outbursts by defendants and their attorneys has dropped, though a defense lawyer boycott was initiated—several problems that plagued the former trial continue to cause concern. Most notably, the removal of Presiding Judge Amiri showed blatant interference with the independence of the judiciary, and the new presiding judge began to restrict defense questioning. The prosecution had not laid out clear theories of liability for each defendant, although the witness phase was yet to come. It appears that administrative problems may have continued to threaten such fair trial rights as the defendants’ right to examine the evidence against them.

### *B. The Prosecution’s Opening Statement and Prosecutorial Strategy*

Chief prosecutor Ja’afar al-Mussawi stated that the defendants’ roles in the Anfal campaign rendered them guilty of genocide, crimes against humanity, and war crimes. According to al-Mussawi, the Anfal campaign was intended to kill, displace, and imprison Kurds of northern Iraq, regardless of their civilian status. He described the Anfal attacks as a carefully planned, eight-phase campaign lasting from February 22 to September 6, 1988.<sup>21</sup> The use of chemical and conventional weapons in wide-ranging land and air strikes killed 182,000 people, he said, and razed thousands of Kurdish villages to the ground. Referring to the Ba’ath regime’s choice to name the campaign “al-Anfal” after a Qur’anic sura which translates roughly as “the spoils [of a just war],” al-Mussawi stated that the attacks were justified neither in terms of spoils nor of faith, but victimized impoverished Muslims.<sup>22</sup>

Implicitly, the prosecution’s opening statement set out a case of command responsibility against Saddam Hussein, arguing that in order to implement the Anfal plans, Saddam Hussein gave Ali Hassan al-Majid express control over all state forces in northern Iraq—military, security, intelligence, administrative, and Ba’athist. According to the prosecution, al-Majid gave orders to eliminate all “Kurdish inhabitants” and to execute all individuals between fifteen to seventy years old.<sup>23</sup>

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<sup>20</sup> After making the statement on September 14, Amiri was replaced on September 20, 2006 by Muhammad Uraybi al-Khalifa. See BBC Monitoring, al-Iraqiyah television broadcast, September 14 and 20, 2006 (Trial Sessions 7 and 10).

<sup>21</sup> Several complainants in early trial sessions described chemical weapons attacks occurring before February 22, 1988, which was the date of the beginning of the Anfal campaign according to the Prosecution’s opening statement. ICTJ Observer Notes, Trial Session 2, August 22, 2006. One complainant’s lawyer argued that the start of the Anfal campaign should be measured from Revolutionary Command Council Resolution 160, issued on March 29, 1987. ICTJ Observer Notes, Trial Session 3, August 23, 2006.

<sup>22</sup> ICTJ Observer Notes, Trial Session 1, August 21, 2006. “Al-Anfal” is the title of the eighth sura of the Qur’an.

<sup>23</sup> *Id.*

In examining complainants, the prosecution generally sought to establish various factual elements of the crimes charged, such as deliberate attacks against civilians and illegal imprisonments. Complainants' lawyers, however, asked questions that began to demonstrate that Kurds were deliberately targeted, including questions establishing that only Kurds were targeted for attack, or that only Kurds were imprisoned at the Nugrat al-Salman concentration camp.<sup>24</sup> Such facts might go towards demonstrating intent to destroy a particular ethnic group as such. No testimony or evidence was presented, apart from in the opening statement, that directly linked the defendants to the crimes charged, or demonstrated a theory of their culpability. This may be forthcoming during other phases of the trial, such as the presentation of documentary evidence.

### *C. Rejection of Defense Challenges to Tribunal's Legitimacy and Jurisdiction*

During the opening session, defense lawyers launched a number of preliminary claims against the IHT.<sup>25</sup> Saddam Hussein's lawyer Khalili al-Dulaimi argued that the IHT was the set up by an occupying force and was therefore illegal under international law; that the crimes charged violated the principle of non-retroactivity, as many of the alleged crimes took place before they had been defined in Iraqi law. Several other lawyers echoed these arguments. Farhan Mutlaq al-Jaburi's attorney claimed that the law establishing the Tribunal had not been signed by the president of Iraq, as required. Defense attorneys also argued that their clients were not subject to prosecution because they were included in an amnesty granted by Saddam Hussein in October 2002, and because they enjoyed immunity under the Iraqi constitution of 1970. Defense counsel further alleged that the IHT was violating the defendants' putative POW status, which al-Dulaimi argued should extend to Saddam Hussein. Along similar lines, Sabir al-Douri's lawyer argued that his client had merely been carrying out the orders of the commander-in-chief of the Iraqi army.<sup>26</sup>

The lead prosecutor in the case, Munqidh al-Fir'an, responded that the IHT was formed by a national assembly elected by the Iraqi people. Whether or not the crimes charged were part of Iraqi domestic law at the time committed, Iraq had the duty to prosecute them under customary international law and its treaty obligations. The defense's arguments of non-retroactivity and immunity for international crimes, he argued, were discredited at the Nuremberg trials. Regarding the claim that most of the defendants were generals or other high level officers and that they should therefore be exempt from prosecution as POWs, al Fir'an replied that, under international law, anyone who committed war crimes should be tried.<sup>27</sup>

Judge Al-Amiri dismissed the defense objections immediately, and gave his reasoning in his dismissal. He stated the Tribunal's legitimacy was not based on the authority of the Coalition Provisional Authority, but on international treaties, including the Hague Regulations [of 1907] and the Geneva Conventions of 1949, which were ratified by Iraq in 1956. The Statute of the

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<sup>24</sup> ICTJ Observer Notes, Trial Sessions 11 and 19, September 25 and October 30, 2006.

<sup>25</sup> The following claims were presented during the first session. ICTJ Observer Notes, Trial Session 1, August 21, 2006.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* Similar reasoning was present in the IHT's Dujail judgment, available in Arabic on the IHT website, *supra* note 2.

IHT was issued by an elected national assembly in Law 10 of October 19, 2005, in accordance with the Iraqi Constitution. The objection that the alleged crimes were being charged retroactively was irrelevant, because they were based on international custom and on international treaties, and thus in accordance with Article 11(2) of the Universal Declaration of Human Rights. Al-Amiri concluded that the insistence of the defense on immunity according to the Iraqi Constitution is misplaced because such immunity claims for international crimes have been rejected by international criminal tribunals. Nor does immunity prevent the court from obtaining jurisdiction, because the “constitutional” immunities claimed by the defense were in violation of the limits prescribed by international law, which recognizes no immunities for the crimes charged.<sup>28</sup>

#### *D. Scope and Nature of Complainants’ Testimony*

Seventy-six complainants<sup>29</sup>— most but not all identified in court —have testified in harrowing terms to what befell them during the Anfal campaign.<sup>30</sup> Certain complainants complained against only a few defendants; others complained against all of them. They recalled the rotten apple smell of chemical weapons, and the aftermath of vomiting, burns, choking, blindness and death. Some escaped from attacks on one village, only to be bombed again after fleeing to another.<sup>31</sup> Survivors hid in caves or mountains,<sup>32</sup> but most fell into the hands of the Iraqi authorities.<sup>33</sup> Of those who escaped execution, many were sent to concentration camps, where inmates were tortured, beaten, raped, and died of hunger and disease.<sup>34</sup>

The attacks described by complainants apparently constituted the factual basis of the allegations of war crimes, crimes against humanity and genocide. According to testimony that was often strikingly similar, civilians and villages suffered unprovoked artillery and aerial bombardments with chemical and conventional weapons, after which virtually all buildings were completely destroyed by bulldozers or explosives.<sup>35</sup> Mosques were leveled,<sup>36</sup> water sources destroyed, and

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<sup>28</sup> *Id.*

<sup>29</sup> All complainants asked for compensation, and for the punishment of the defendants. Some openly addressed Saddam Hussein, asking why he had persecuted them. Many requested the return of their relatives’ remains. *E.g.*, ICTJ Observer Notes, Trial Session 16, October 17, 2006; BBC Monitoring, al-Iraqiyah television broadcast, October 31, 2006 (Trial Session 20).

<sup>30</sup> Based on ICTJ observer notes and BBC monitoring of trial sessions 1 to 23. From session 24 onward, witnesses rather than complainants appeared in court. Before appearing in court, complainants’ testimony has been recorded by the examining magistrate, under Art. 58 of the *Iraqi Code of Criminal Procedure*, Law No. 23 of 1971, as incorporated by article 16 of the Tribunal Statute.

<sup>31</sup> A few managed to cross the borders into Iran or Turkey. BBC Monitoring, al-Iraqiyah television broadcast, November 7, 2006 (Trial Session 21).

<sup>32</sup> Neighboring villagers provided food and rudimentary care, but medical treatment came with the risk of reprisals. Doctors told one complainant to pretend he had been treated for a welding accident. ICTJ Observer Notes, Trial Session 2, August 22, 2006.

<sup>33</sup> In one case, village elders, believing an amnesty proclamation, led Iraqi authorities directly to where young men were hiding. BBC Monitoring, al-Iraqiyah television broadcast, September 26, 2006 (Trial Session 12).

<sup>34</sup> BBC monitoring, al-Iraqiyah television broadcast, September 25, 2006 (Trial Session 11).

<sup>35</sup> Iraqi National Defense Battalions, comprised largely of Kurdish conscripts, were mentioned as being involved in several attacks.

<sup>36</sup> BBC Monitoring, al-Iraqiyah television broadcast, September 25, 2006 (Trial Session 11); ICTJ Observer Notes, Trial Session 19, October 30, 2006.



livestock that survived the first attacks was killed or stolen.<sup>37</sup> Most complainants testified that Kurdish Peshmerga or other armed groups were not active in these areas.

Other aspects of the testimony indicated crimes against humanity, including willful killing and imprisonment. Apart from the military attacks, complainants described being driven to a series of detention centers, where they were denied food and medical treatment and crowded into unhygienic quarters. Iraqi soldiers separated the men from the women and children, after which many complainants never saw their relatives again.<sup>38</sup> Several complainants were blindfolded and driven to isolated desert sites, where they somehow survived mass executions and escaped.<sup>39</sup> Many stated that close relatives, and in some cases their entire families, had been “Anfalized”; their fates were known only once their identity cards were found in mass graves after the fall of the regime.

Finally, complainant testimony seemed to establish the factual basis for the constituent acts — but not yet the intent — required for the genocide charge. In addition to large-scale attacks against civilian villages, and executions, many complainants were transported from detention centers in northern Iraq to concentration camps in the southern desert. Left for months with little food or water, inadequate shelter, and no medical care, complainants testified to burying family members and other inmates of the Nugrat al-Salman camp.<sup>40</sup> They also stated that the camps contained only Kurdish people.<sup>41</sup> While going a long way toward proving many elements of the crime of genocide, because many who were detained at these camps were subsequently released,<sup>42</sup> it is unclear that this first round of testimony adequately established the defendants’ genocidal intent to destroy a group, in whole or in part.

The testimony of Taymur Abdallah Ahmad is an example of the kinds of experience articulated by complainants during the complainant phase:<sup>43</sup>

Units of the army and the National Defense Battalion attacked the village. He was detained; he and the survivors were moved to the al-Sumud compound, where soldiers shot over their heads. Then he and the others were moved to Topzawah Detention Centre, where they stayed for 30 days. The soldiers used to tie men together by twos and take off their clothes and take them away. Women and children were taken away in cars; two young girls died due to hunger and poor ventilation. Then he too was taken away. A soldier fired at him and the other villagers. He felt that the soldier was forced to shoot them; he had tears in his eyes. The soldiers threw the villagers into a pit that had been made by bulldozer. He saw a pregnant woman who was shot in the head. His mother,

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<sup>37</sup> ICTJ Observer Notes, Trial Sessions 13 and 19, October 9 and 30, 2006.

<sup>38</sup> E.g., BBC Monitoring, al-Iraqiyah television broadcast, October 11, 2006 (Trial Session 15).

<sup>39</sup> E.g., BBC Monitoring, al-Iraqiyah television broadcast, November 27, 2006 (Trial Session 23).

<sup>40</sup> E.g., ICTJ Observer Notes, Trial Session 11, September 25, 2006.

<sup>41</sup> E.g., *id.*

<sup>42</sup> E.g., *id.*

<sup>43</sup> Testimony of Taymur Abdallah Ahmad, summarized from a BBC Monitoring Middle East report of the Anfal trial broadcast on al-Iraqiyah television, November 27, 2006 (Trial Session 23). Ahmad was a resident of Kulajuh village in Kalar district in 1988. The residents of the village received information that the Iraqi forces were gathering near their village. He and others fled to a nearby village but returned to pack their things, and were attacked upon returning to the nearby village.

sisters, aunt and cousins were in the pit with him. He acted dead. The soldiers fired into the pit, then they went away. He attempted to get out of the pit but was stopped by a little girl. He asked her to leave with him but she refused. He was unable to climb out, so he dug a small hole in one of the mounds around the pit and hid in it. Then he moved from one pit to another until he lost consciousness. When he awoke he found that all the pits had been filled with dirt. He was wounded, but he walked until he saw a tent. He saw a man, and asked for help. The man took him to a nearby village where he remained until his health condition improved ...

The complainant later complained directly against Saddam Hussein, Ali Hassan al-Majid, and their aides, adding:

If they gave me the treasures of the world, they would not compensate even for one of my father's fingers. Still, I ask for compensation.<sup>44</sup>

### *E. Defense Strategy*

The defense generally sought to establish that intended targets of the Anfal campaign were combatants who belonged to the Kurdish Peshmerga and collaborated with invading Iranian forces. Based on questioning, it seemed that in the defense's view, civilian victims were to be regarded as collateral damage of legitimate battlefield attacks against combatants;<sup>45</sup> moreover victims had ignored Iraqi warnings to leave the areas before the attacks,<sup>46</sup> or even refused to be relocated to safe "residential complexes."<sup>47</sup>

In statements and 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 aimed at Iranian forces and the Kurdish "saboteurs" allegedly fighting alongside them. Defendant Sultan Hashem claimed that Iran had occupied "vast areas" of northern Iraq, and that a "heavy presence" of Iranian Revolutionary Guards was planning to occupy Suleimaniya and destroy two dams in order to flood Baghdad. The Anfal campaign was implemented by the Kurdish National Defense Battalions, he said, with the Iraqi army playing a supporting role. Sultan Hashem argued that the campaign was carried out against Kurdish insurgents who fought "like a regular army."<sup>48</sup>

On cross-examination defense attorneys asked complainants whether they spoke Farsi, and if they had witnessed fighting between Iranian and Iraqi forces inside Iraq.<sup>49</sup> (None did.) Complainants were frequently asked whether they were Peshmerga members or whether Peshmerga forces were present in or being supported by their villages,<sup>50</sup> implying that they or

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<sup>44</sup> Ibid.

<sup>45</sup> ICTJ Observer Notes, Trial Session 19, October 30, 2006.

<sup>46</sup> For instance, defense lawyers and defendants often asked, "Were you warned to leave the area before the attacks?". See for example ICTJ Observer Notes, Trial Session 19, October 30, 2006.

<sup>47</sup> BBC Monitoring, al-Iraqiyah television broadcast, August 23, 2006 (Trial Session 3); questioning of complainant by Farhan Mutlak al-Jaburi.

<sup>48</sup> ICTJ Observer Notes, Trial Session 2, August 22, 2006.

<sup>49</sup> BBC Monitoring, al-Iraqiyah television broadcast, August 23, 2006 (Trial Session 3).

<sup>50</sup> See for example ICTJ Observer Notes, Trial Session 11, September 25, 2006.

their areas might have been legitimate military targets—though the prosecutor argued that killing large numbers of civilians would not have been justified by the presence of Peshmerga.<sup>51</sup> They were also asked if they were members of the Peshmerga, possibly in an attempt to mark the complainants as deserters. The defense sought to undermine complainants’ credibility by asking them to identify the markings of the planes that allegedly used chemical weapons. In a related response, one complainant, a former Peshmerga fighter, said he was a radio expert and overheard the military pilots speaking in Arabic.

Certain defense questions seemed intended to rebut the genocide charge, such as questions about the release of Kurdish prisoners or the amnesty granted to Kurdish victims of the campaign. Another tactic was to ask complainants to identify the defendants in the courtroom, which some complainants were unable to do.<sup>52</sup> The defense attempted to pick holes in testimony by claiming factual inconsistencies between testimony given before the investigative magistrate and during the trial itself.<sup>53</sup> The defense also sought to establish, through questioning, that detention centers were not large enough to hold as many prisoners as complainants claimed.<sup>54</sup>

#### *F. Defense Behavior and Issues Relating to Court-Appointed Counsel*

The defendants and their privately retained lawyers were combative during the first nine sessions. They alleged that complainants were being fed signals and information by the prosecutors or the interpreters, aggressively demanding that one complainant repeat her harrowing testimony and causing her to weep on the stand.<sup>55</sup> Saddam Hussein’s lawyer repeatedly referred to him as “the President.” Nonetheless, the Anfal trial seemed to proceed more smoothly than the Dujail trial — until Judge Amiri was replaced by Muhammad Uraybi al-Khalifa on September 20, 2006 (see section H, below). All private defense lawyers immediately withdrew in protest at the “flagrant interference” by the Prime Minister and his staff. Subsequently, the defendants objected to being assigned defense office counsel, and even instructed them not to participate in the trial sessions.<sup>56</sup> Private defense lawyers were absent from session 10 to session 19, when Saddam Hussein’s and Hussein Rashid’s lawyers appeared briefly to make complaints, but left almost immediately after their demands were reportedly not met. The private counsel of defendant al-Juburi was present only twice after Judge al-Amiri’s removal, and complained that documents relating to the case had been stolen or were not provided by the prosecutor.<sup>57</sup>

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<sup>51</sup> ICTJ Observer Notes, Trial Session 19, October 30, 2006.

<sup>52</sup> Sabir Abdul Aziz al-Duri’s lawyer asked a complainant why she was complaining against his client and what his role was in the attack. She replied that she did not know. BBC Monitoring, al-Iraqiyah television broadcast, August 23, 2006 (Trial Session 3).

<sup>53</sup> BBC Monitoring, al-Iraqiyah television broadcasts, October 17 and 18, 2006 (Trial Sessions 16 and 17).

<sup>54</sup> BBC Monitoring, al-Iraqiyah television broadcasts, October 11 and 17 (Trial Sessions 15 and 16).

<sup>55</sup> ICTJ Observer Notes, Trial Session 2, August 22, 2006.

<sup>56</sup> ICTJ Observer Notes, Trial Sessions 10, 11 and 19, September 25 and 26 and October 30, 2006; BBC Monitoring, al-Iraqiyah television broadcast, October 31, 2006 (Trial Session 20).

<sup>57</sup> BBC Monitoring, al-Iraqiyah television broadcasts, November 8 and 27, 2006 (Trial Sessions 22 and 23). Possibly incorrectly referring to an international legal advisor, the lawyer protested that a list of defense witnesses for his client was being “imposed” on him by “an American.” *Id.*, Trial Session 23.

Other defense grievances alleged potential procedural flaws. ICTJ cannot assess their validity. Defense lawyers complained about the lack of time to prepare before the trial and between sessions, which were sometimes held on consecutive days. The presiding judge replied that he had given two months' notice before the trial started, although he was only required by law to give forty-five days' notice.<sup>58</sup> Defense lawyers asked, in the fourth session, for a list of the witnesses that Prosecutors would summon. No reply is recorded as being given.<sup>59</sup> Saddam Hussein's lawyer presented the court with eleven complaints during the nineteenth session, ranging from the court's decision not to allow non-Iraqi Arab lawyers to speak in court, to the provenance of evidence, to the alleged beating of defendant Hussein Rashid by a guard. Defendants also complained that defense witnesses could not be contacted because they were either threatened or because they were afraid of becoming defendants themselves if they came before the court.<sup>60</sup>

While court-appointed defense counsel in this phase were generally more active than during the Dujail trial, Judge Uraybi has grown increasingly impatient with all defense counsel, and questions remain about the equality of arms. In the thirteenth session, a defense lawyer asked for ten minutes to read the testimony of the next complainant (the testimony that had been given before the investigative magistrate). The judge responded that the lawyers should have already asked for that information, and could ask for the testimonies of the week's remaining complainants at the end of the day.<sup>61</sup> As with other defense requests, this may indicate that the defense had not been presented with an adequate copy of the trial dossier, or that the relevant testimony was not included in it. Either possibility would be in contravention of the Tribunal's Rules of Procedure and Evidence.<sup>62</sup> Court officials have repeatedly stated that all counsel received the referral file well in advance, and that they hold signed receipts to this effect.

### *G. Judicial Demeanor and Judicial Independence*

From the first to ninth sessions, Abdallah al-Amiri, an experienced Iraqi judge, was the presiding judge in the Anfal trial. Though the Anfal trial under Judge al-Amiri seemed to run smoothly, he sometimes showed impatience with defense lawyers' questions. At other times, however, the judge seemed willing to defer to the defendants for determinations of factual events. In the sixth session, Judge al-Amiri called upon a defendant to settle a dispute between himself and a defense lawyer as to which forces were in control of parts of the Iraq/Iran border during the Anfal campaign.

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<sup>58</sup> ICTJ Observer Notes, Trial Session 2, August 22, 2006.

<sup>59</sup> ICTJ Observer Notes, Trial Session 4, September 11, 2006.

<sup>60</sup> ICTJ Observer Notes, Trial Session 19, October 30, 2006; BBC Monitoring, al-Iraqiyah television broadcast, November 27, 2006 (Trial Session 23).

<sup>61</sup> ICTJ Observer Notes, Trial Session 13, October 9, 2006.

<sup>62</sup> Articles 40(a) and 41(a), *Rules of Procedure and Gathering of Evidence with regard to the Supreme Iraqi Criminal Tribunal* (October 18, 2005), available at [www.ictj.org](http://www.ictj.org), (see note 2 above). See also *Iraqi Code of Criminal Procedure (Law on Criminal Proceedings With Amendments: Number 23 of 1971)*, Articles 58 (recording of statement of complainant), 63 (recording of witness statements and entry into investigation dossier).

After Judge al-Amiri remarked that Saddam Hussein was “not a dictator,” the IHT came under intense political pressure, and he was replaced by Muhammad Uraybi al-Khalifa.<sup>63</sup> This interference with the independence of the IHT’s judges recalled the severe problems during the Dujail trial, when the trial was almost crippled by the De-Ba’athification Commission’s repeated removal of court personnel and by pressure from the Iraqi executive.<sup>64</sup>

Judge al-Uraybi, apparently determined to take a stronger line than his predecessor, removed Saddam Hussein from court in four of the first five sessions over which he presided.<sup>65</sup> He has also demonstrated repeated impatience with defense counsel, becoming angry at “foolish questions”,<sup>66</sup> and made several potentially prejudicial comments. A complainant testified to seeing girls taken to an officer’s room in a detention center, after which they came back crying; the judge remarked that they were “probably just taken there to clean the room.”<sup>67</sup>

#### *H. Administrative Concerns*

There were indications that the Tribunal was still suffering from some of the administrative flaws that hampered the Dujail trial. In the fifth session, the prosecutor felt obliged to ask that all requests made by the prosecution be documented during the court proceedings. In the seventh, eighth, ninth, and fourteenth sessions, defendants and the prosecutor requested that a medical committee be formed, including experts on effects of chemical weapons, so as to verify the claims of complainants, particularly those without medical records.<sup>68</sup> In the fourteenth session, Judge al-Uraybi said that the court had contacted the health ministry to form a medical committee of three experts to examine complainants claiming to have been harmed with chemical weapons.<sup>69</sup> No further mention of the committee has been made.

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<sup>63</sup> ICTJ Observer Notes, Trial Session 9, September 19, 2006; BBC Monitoring, al-Iraqiyah television broadcast, September 20, 2006 (Trial Session 10).

<sup>64</sup> See ICTJ, *Dujail: Trial and Error?*, supra note 4.

<sup>65</sup> Saddam Hussein was removed from the courtroom during sessions 10, 11, 12, and 14. ICTJ Observer Notes and BBC Monitoring.

<sup>66</sup> ICTJ Observer Notes, Trial Session 11, September 25, 2006.

<sup>67</sup> ICTJ Observer Notes, Trial Session 11, September 25, 2006.

<sup>68</sup> ICTJ Observer Notes and BBC Monitoring for September 14, 18, 19, and October 10, 2006.

<sup>69</sup> BBC Monitoring, al-Iraqiyah television broadcast, October 10, 2006 (Trial Session 14).

#### 4. Further Information

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

###### **Tribunal Official Website:**

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

###### **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://law.case.edu/saddamtrial/dujail/opinion.asp>.

###### **Dujail Chassation 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?* (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 Criminal Tribunal* (2006),

Available in Arabic at: Summary and recommendations only available at  
[www.hrw.org/reports/2006/iraq1106/iraq1106sumandrecsar.pdf](http://www.hrw.org/reports/2006/iraq1106/iraq1106sumandrecsar.pdf)  
Available in English at: <http://www.hrw.org/reports/2006/iraq1106/>.

##### 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/>.