



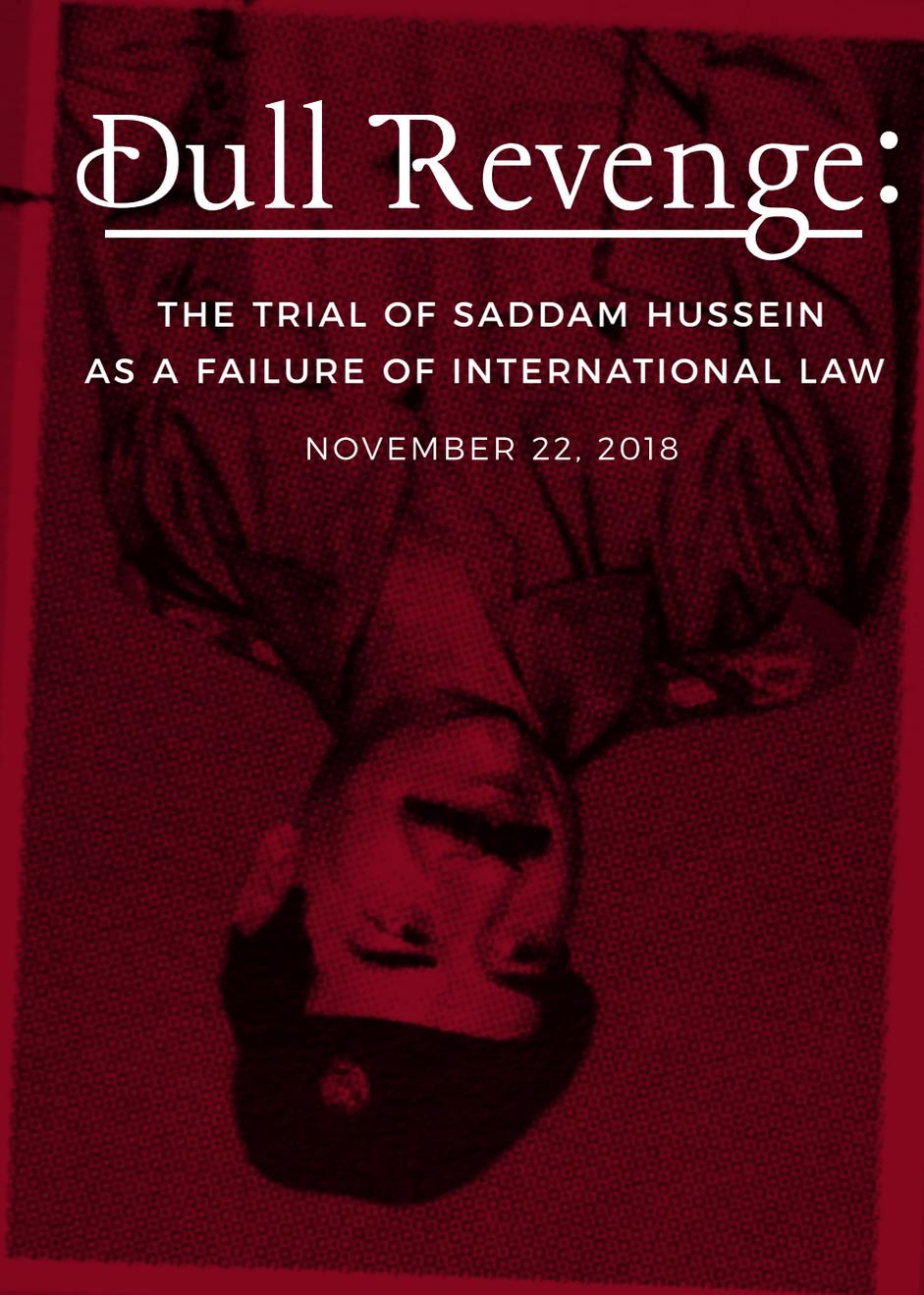
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Dull Revenge:

THE TRIAL OF SADDAM HUSSEIN
AS A FAILURE OF INTERNATIONAL LAW

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POSTAGE

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IRAQ

“His execution for the crimes he committed will come soon, just after the court ruling.”

- **NOURI AL-MALIKI, *PRIME MINISTER OF IRAQ***

ON JULY 5, 2006, REGARDING HIS PREDECESSOR,
EX-PRESIDENT OF THE REPUBLIC OF IRAQ, SADDAM HUSSEIN

I. INTRODUCTION

On July 5, 2006, then-Prime Minister of Iraq, Nouri al-Maliki, glibly noted during the middle of the trial for former President Saddam Hussein that Hussein would be executed right after the court issued a final ruling. Maliki’s statement is a sad but accurate summary of the trial of Saddam Hussein (the “Dujail Trial”).⁰¹ While envisioned as a trial that would reestablish the rule of law in Iraq, the judicial process implemented against Hussein has instead faced considerable criticism for being a “show trial.” The reason for this is clear: it was almost certain throughout the trial that Hussein would be found guilty and sentenced to death.

A decade following Hussein’s execution, Iraq and Syria have descended into chaos, as violent international factions compete for power and act out their own visions of morality. The crimes committed by ISIS as well as the warring groups in the Syrian civil war present the possibility of (one day) trying Bashar al-Assad or Abu Bakr al-Baghdadi for international crimes. While those international legal frameworks remain to be seen, the Dujail Trial is valuable as an example of what not to do, particularly when such trials are associated with outside, foreign actors such as the great powers.

The fairness of Hussein’s trial is important to the relevance and legitimacy of international law. If a dominant power can so blatantly ignore critical aspects of a trial to ensure conviction, what does the future hold for international law?

01 Human Rights Watch, *Judging Dujail: The First Trial before the Iraqi High Tribunal*, (New York: Human Rights Watch, 2006), E18 No. 9, 43.

II. BACKGROUND

A. CASES

Almost two years after Saddam Hussein was captured by American forces, he was tried in the newly created Iraqi High Tribunal (IHT), previously named the Iraqi Special Tribunal (IST) by the American occupying forces,⁰² for the false imprisonment and execution of the residents of al-Dujail.

Initially, the Dujail Trial, as it came to be known, was one of two trials intended for Hussein. The second trial, Anfal, was to involve the prosecution of seven individuals, including Hussein, for war crimes, crimes against humanity, and genocide for actions against the Kurds in the late 1980s. However, six months after the trial began, Hussein was executed and removed as a defendant from the Anfal case according to Iraqi law, which prohibits prosecution in absentia.⁰³

As part of the Dujail Trial framework, Hussein was formally indicted under Articles 12 and 15 of Iraqi Law Number 10 of 2005, under the rubric of “individual criminal responsibility” for crimes against humanity. The crimes in al-Dujail occurred allegedly at his behest, following the 1982 attempted assassination of Hussein by locals. Following the assassination attempt in 1982, 687 residents were detained,⁰⁴ 148 of whom were executed after a brief trial.⁰⁵ Another 46 men died in prison after suffering physical and psychological torture. The survivors of the massacre, 399 women, children, and elderly men, were held in desert camps for four years while their town was razed. Hussein was formally charged with premeditated murder, false imprisonment, forcible expulsion of residents, destruction of agricultural land, and confiscation of the victims’ land and orchards for these events.⁰⁶

02 International Center for Transitional Justice, *DUJAIL: TRIAL AND ERROR?* (New York, 2006), 3.

03 Chatham House, Discussion Group Summary: *The Iraqi Tribunal: The Post-Saddam Cases*, (London: Chatham House, 2008), 3.

04 Issam Saliba, “First Prosecution,” July 03, 2007. <https://www.loc.gov/law/help/hussein/present.php>.

05 Jeremy Peterson, “Unpacking Show Trials: Situating the Trial of Saddam Hussein.” *Harvard International Law Journal* 48, no. 1 (Winter 2007): 282.

06 Saliba, “First Prosecution.”

B. WHAT IS A “SHOW TRIAL?”

The Oxford English Dictionary defines a show trial as “a judicial trial held in public with the intention of influencing or satisfying public opinion, rather than of ensuring justice.”⁰⁷ Others have described show trials as “morality plays” where the main purpose of the trial is to teach a lesson, rather than render justice.

In other words, a show trial is an example of “victor’s justice” where the trial plays to the favor of the victors both in the production and in the judgment, but for consumption by an external audience.⁰⁸ The Third and Fourth Geneva Conventions classify the deprivation of a right to a fair trial as a war crime.⁰⁹

It is possible to examine the inherent fairness of the Dujail Trial by looking at several factors. In particular, this report looks at the ways in which the trial gave Hussein access to an impartial tribunal, charged him with relevant crimes, provided due process and evidentiary rights, allowed public access, and ensured the right to appeal. We discuss each in turn.

07 “Show Trial,” Oxford Dictionaries | English, https://en.oxforddictionaries.com/definition/show_trial.

08 Daphne Eviatar, “The Show Trial: A Larger Justice?” *The New York Times*, July 20, 2002. <https://www.nytimes.com/2002/07/20/books/the-show-trial-a-larger-justice.html>.

09 Curtis. F.J Doebbler, “An Intentionally Unfair Trial.” *Journal of International Criminal Justice* 5, no. 2 (2007): 269. doi:10.1093/jicj/mqm005.

III. IMPARTIAL TRIBUNAL

A. AMERICAN OVERSIGHT AND NOT AN INTERNATIONAL TRIBUNAL

The Iraqi Special Tribunal was fundamentally flawed from the day it was signed into law, with flaws so grave that this factor pushes heavily against a determination that the trial was fair to Hussein. The extent to which Americans had a role in the establishment and administration of the IHT, in addition to their selectivity in providing legal advice, indicates significant bias against Hussein and his co-defendants.

One of the chief concerns of the IHT was that it was, effectively, an American led and created effort, not at all accountable to international pressures, and divorced from the practice of establishing international tribunals such as in Rwanda, the former Yugoslavia or Cambodia (a mixed international-national framework). Immediately, then, one must grapple with the very framework of the IHT and its intended purpose. The right to a fair trial begins with the court—if the court is unfair, the legitimacy of everything that court does is called into question. The IHT was created under the advisement of and with financial assistance from, American authorities, incorporating both international and Iraqi law.¹⁰ Its sole purpose was to try individuals for war crimes, crimes against humanity, and related offenses. The statute of the IHT was originally drafted in English, strongly suggesting it was written by American advisers, and, even more importantly, the statute was signed into law by the Administrator of the transitional Iraqi government, the US-created Coalition Provisional Authority (the de facto occupying power in Iraq). The American Administrator, L. Paul Bremer, unilaterally signed into law a court that would sentence an enemy of the United States to death. It is a violation of international humanitarian law under Geneva Convention IV (Art. 66) for an occupying power to rewrite the law of the occupied country and establish new special courts, unless the laws of the occupied country are discriminatory and courts ineffective.¹¹⁻¹² Thus, the mere existence of this supposedly Iraqi court was arguably illegal because it was unnecessary for the occupying power to establish a new court in order to prosecute individuals for grave crimes.¹³

¹⁰ Kingsley Chiedu Moghalu, "Saddam Hussein's Trial Meets the "Fairness" Test," *Ethics & International Affairs* 20, no. 04 (Cambridge: Cambridge University Press, 2006): 517-25, doi:10.1111/j.1747-7093.2006.00048.x, 522.

¹¹ International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, available at: <http://www.refworld.org/docid/3ae6b36d2.html>.

¹² International Committee of the Red Cross (ICRC), *The Law of Armed Conflict: Belligerent Occupation*, (Geneva: ICRC, 2002), 6-7. https://www.icrc.org/eng/assets/files/other/law9_final.pdf.

¹³ Doebbler, "An Intentionally Unfair Trial," 268.

Thus, while the trial of Hussein and his co-defendants did not begin until after the establishment of an official Iraqi government, and the Americans ceased their occupation, his and others' eventual executions were likely the product of a violation of international law.

U.S. control over the process was financial and administrative. The U.S. paid for the building in the International Zone where the court was established, maintained the evidence, and led the administration. All defendants were kept in U.S. custody.¹⁴ As previously stated, the international law trainings took place at the behest of the Americans. All judges presiding in this inquisitorial court were Iraqi,¹⁵ but neither the judges nor the Iraqi attorneys were properly experienced in the relevant international statutes or in trying crimes of this gravity, so training and advisement was absolutely necessary. However, the advisement was biased as it only came from U.S. and U.K. advisors. Court staff complained that their lack of training inhibited their ability to run a smooth court process, so much so that it was hard to keep track of when motions and documents had been filed with the court.¹⁶

Members of the defense team (the "Defense") complained that they did not receive the same training in international law or investigative assistance that the judges and prosecution team received, putting them at a disadvantage that was only magnified when the defense team was suddenly replaced with IHT Defense Office attorneys who were not trained in international law at all.¹⁷ An investigation by Human Rights Watch determined that the closing statements for the Defense in the Dujail Trial were written by an "adviser" and then translated in Arabic to give to the Defense team. Interestingly, there was very little reference to international criminal law in the Defense's summation,¹⁸ even though it was written by someone who was supposedly engaged to advise on such rules. This appearance of bias against the Defense is notable since the most convincing defense tactics for Hussein would have been challenging the legitimacy of the court in which he was tried and the "individual criminal responsibility" clause under which he was charged.¹⁹

14 Chatham House, *The Iraqi Tribunal*, 8.

15 Human Rights Watch, *Judging Dujail*, 11.

16 Human Rights Watch, *Judging Dujail*, 14.

17 Human Rights Watch, *Judging Dujail*, 29-31.

18 Human Rights Watch, *Judging Dujail*, 32.

19 Human Rights Watch, *Judging Dujail*, 73.

Ultimately, major international actors disengaged and deprived the court of badly needed diversity of legal and logistical support,²⁰ giving the IHT an appearance of bias and ineptitude for such serious cases. The inclusion of the death penalty in the IHT process, and the establishment of the court under a government that came to power after a perceived illegal invasion by American forces complicated, made international participation doubly doubtful.

B. JUDICIAL SENTENCE

Iraq has an inquisitorial court system where judges are a part of the investigation into the alleged crimes. Thus, as with the Dujail Trial, it was especially egregious when the hand of the occupying power disrupted the independence of the judiciary by removing judges or encouraged their resignation.

There is evidence that the U.S. had a hand in choosing the judges prior to the beginning of Hussein's trial,²¹ meaning at its inception, the court had a prejudiced foundation. The IHT statute also stated that judges could be removed "for any reason" with approval from the Iraqi President and two Vice Presidents,²² which guaranteed political interference with the judicial process. In fact, mild pressure from above was often all that was needed to influence the court, and the result was a judicial body that was far more likely to ensure a favorable outcome for the prosecution.

Chief Judge Rizgar Mohammed Amin resigned following public pressure from Iraqi officials, including the Prime Minister, for failing to control Hussein's outbursts in court.²³ A second judge, Judge Saeed al-Hammash, resigned, or was removed (the specifics are debatable) because of his alleged membership in the Ba'ath party.²⁴ This left the court with Chief Judge Raoul Rouf Abdel Rahman, whose appointment was contested by the Defense team because of Judge Rahman's alleged statements that Hussein should be executed without a trial.²⁵

20 Noah Feldman, "The Way We Live Now; Not the Case," *The New York Times*, January 02, 2007, <https://archive.nytimes.com/query.nytimes.com/gst/fullpage-9D01E2DD1130F931A35752C0A9619C8B63.html>.

21 Doebbler, "An Intentionally Unfair Trial," 268.

22 Peterson, "Unpacking Show Trials," 285.

23 Human Rights Watch, *Judging Dujail*, 44.

24 Sinan Salaheddin, "Suicide Car Bomber, House Raids Kill Six in Baghdad," *DeseretNews.com*, January 23, 2006, <https://www.deseretnews.com/article/635178529/Suicide-car-bomber-house-raids-kill-six-in-Baghdad.html>.

25 Doebbler, "An Intentionally Unfair Trial," 268.

Another judge, Abdullah al-Amiri, was removed via the official process set out by the IHT for appearing too favorably toward Hussein, including allowing his outbursts in court and publicly agreeing with Hussein that he was not a dictator.²⁶

One can presume that the Americans wanted nothing short of Hussein's execution; President George W. Bush admitted as much.²⁷ This factor of open partiality of the court, as well, cuts against the finding of a fair trial for Hussein.

C. CHARGES

The chief charges against Hussein came from Iraqi Law Number 10, Articles 12 and 15, which were adopted into law on October 18, 2005, the day before Hussein's trial commenced. While made part of Iraqi law under an occupying power, the charges of "crimes against humanity" (Article 12) and the notion of "individual criminal responsibility" (Article 15) are globally recognized. Some acts that are defined as crimes against humanity were, for example, previously a part of Iraqi law. The 1970 Iraqi Constitution, which was in force throughout Hussein's rule,²⁸ specified the rights of man including the equality of citizens before the Law without distinction for reason of, among other things, "social category," which the Dujail residents may be defined as such. Additionally, the "dignity of man is secured," forbidding physical and psychological torture, of which Dujail residents were said to have endured in this event.²⁹

The legitimacy of Article 15 is similarly valid, but without the same precedent in Iraqi law that the "crimes against humanity" specified in Article 12 had. Article 15 specifies how an individual may be held liable for crimes he or she contributed to, ordered, solicited, or induced, as well as personally committed.³⁰ The crimes charged against Hussein were not carried out by him personally, but were committed at his order, fulfilling the requirement. The notion of "individual criminal responsibility" is recognized as part of customary international law.

26 Peterson, "Unpacking Show Trials," 278.

27 Doebbler, "An Intentionally Unfair Trial," 267.

28 Saad Jawad, "The Iraqi constitution: structural flaws and political implications," LSE Middle East Centre Paper Series, 01. (London: LSE Middle East Centre, 2013), 6-7.

http://eprints.lse.ac.uk/54927/1/SaadJawad_Iraqi_Constitution_LSE_Middle_East_Centre_WP01_Nov2013.pdf

29 "The New Interim Constitution," The Weekly Gazette of the Republic of Iraq, no. 10, (13 March 1971): 4-5. <http://www.hrcr.org/hottopics/statute/scans/iraq1.pdf>

30 Law of the Supreme Iraqi Criminal Tribunal, arts. 12, 14, 14 Ramadan 1426 Hijri, October 18, 2005, Number (4006).

While the charges against Hussein seem justifiable, things get significantly murkier regarding the burden of proof that was used to convict Hussein. At the time of his prosecution, Iraqi law demanded that proof meet the standard of “moral certainty.” International war tribunals, including those at the Hague and for Rwanda, require the more familiar “proof beyond a reasonable doubt.”³¹ While the Statute for the IHT did not define the burden of proof necessary at this tribunal,³² these two standards are often interpreted to be the same. At the opening of the Dujail Trial, the judges did proclaim that they were adopting the *intime conviction du juge* burden of proof, which, unfortunately, was widely mistranslated from Arabic as “to the satisfaction of the judges,” instead of “to the conviction of the judges.”³³ Ultimately, it is extremely difficult to assess how the standard of proof was met, or even what the standard was, for the grave offenses with which Hussein was charged. Even today, there are no publicly available transcripts or court records from the trial.³⁴ The lack of transcripts serves as a microcosm of the legitimacy of the trial itself: it would be impossible in any other setting to think a trial was fair when the proceedings of what took place are essentially unknown. If this trial was intended to set up the Iraqi government for success, or teach a moral lesson, what is the sense in keeping so much of it private? There is no reasonable explanation for a single record of the trial proceedings to not be publicly available today, eleven years after Hussein’s execution.

Those privy to the actual proceedings disagree whether the prosecution satisfied its burden of proof. While there was considerable evidence concerning the Dujail massacre, it was not clear whether Hussein’s blame was certain. Two potentially damning recordings of Hussein talking about al-Dujail were presented by the prosecution during the trial, but without any authentication to the voices, or even authentication regarding true name of the town being discussed in the second recording.³⁵ The Chatham House International Law Discussion Group determined that there was extensive documentary evidence providing Hussein’s involvement in the crimes,³⁶ while others have commented that “unwarranted inferences” from witness testimony were made to prove his guilt. Additionally, testimony for the prosecution was often taken as proof without verification, while testimony for the defense was not, furthering the sense that the judges were not impartial.³⁷

31 Moghalu. “Saddam Hussein’s Trial Meets the “Fairness” Test,” 523-524.

32 Peterson, “Unpacking Show Trials,” 284.

33 Miranda Sissons and Ari S. Bassin, “Was the Dujail Trial Fair?,” *Journal of International Criminal Justice*, 5, no. 2, (1 May 2007): 272-286, <https://doi.org/10.1093/jicj/mqm014>.

34 Human Rights Watch, *Judging Dujail*, 53-54. Human Rights Watch reports that a verbatim written transcript was not taken at the Dujail Trial. Instead, the court had notes taken by court clerks about the proceedings as a “court record.” Attempts to find these documents online have produced zero results.

35 Human Rights Watch, *Judging Dujail*, 50.

36 Chatham House, *The Iraqi Tribunal*, 8.

37 Miranda Sissons et al., “Was the Dujail Trial Fair?,” 10.

Show trials and political trials often go hand-in-hand, with the defendant being charged with crimes of a political nature against the current power. It is quite significant that Hussein was not charged with any political crimes, but only with crimes against his own people that had national and international precedent. This factor thus points in the direction of a legitimate judicial undertaking. However, this factor in itself does not preclude the Dujail Trial from being a show trial. In particular, while the burden of proof necessary to convict Hussein appeared high, at least nominally, the lack of transcripts means that one cannot truly evaluate what actually took place, and there remains significant uncertainty whether any burden of proof was actually met.

D. DEFENDANT RIGHTS

War crimes tribunals have historically found difficulty in striking the balance between ensuring the defendant his or her due rights, and preventing the process from being an opportunity to grandstand or make political points. While imperfect, the IHT appears to have done at least a decent job in permitting Hussein to initially choose his counsel, cross-examine witnesses, make statements impertinent to the case, and speak out of turn, even as the prosecution was presenting.

A historic, politically-infused trial usually provides a chief defendant the opportunity to address a far-reaching crowd. Hussein unquestionably took advantage of this, much like Milošević at the Hague and dictator Hissène Habré in Chad. At the beginning of the trial, the tribunal took significant criticism for permitting Hussein's outbursts in court and general petulance. He refused counsel until he was told the court proceedings would not continue without his acceptance of them, and on a separate occasion was ordered out of court for refusing to sit down. The court permitted monologues from Hussein, in which he complained about his American jailors, and expressed his opinion that the tribunal was illegitimate and that the United States had lied about Iraq having weapons of mass destruction.³⁸ For a trial that appeared to be tightly controlled behind the scenes, it is quite remarkable that Hussein was allowed so much leeway in expressing himself.

E. EQUALITY OF ARMS

While Hussein was given the right to present a case, allowed to speak, and permitted counsel, the lack of security for his defense team makes it likely that he was not provided an adequate right to counsel. Many of Hussein's lawyers were assassinated. This lack of security no doubt prevented Hussein's defense team from working to full capacity, as each wondered if they would be next, not to mention having to cope with the trauma of colleagues being viciously murdered.³⁹

Before the Dujail Trial began, five individuals working for the court were killed.⁴⁰ From October 2005 through June 2006, four members of the Defense team were attacked, three fatally so.⁴¹ While the images and identity for each member of the Defense was broadcasted, only the chief prosecutor and presiding judge were also visible on television. The day after the first broadcast of the trial, an attorney from the Defense was kidnapped and killed. Eventually, the Americans, who were mostly responsible for security, worked to bolster the safety of trial participants. One such measure was offering every defense attorney personal guards, but the salaries for those guards were never approved. Months into the trial some, but not all, of the appointed attorneys were able to move into the International Zone with their families for their safety.⁴²

Attorneys from the Defense boycotted the proceedings, in large part because of these security concerns. Instead of addressing those concerns, the attorneys were replaced⁴³ with attorneys from the IHT mandated Defense Office, which was only established in September 2005 with little resources.⁴⁴ Unfortunately for Hussein, these replacement attorneys had even more difficulty presenting his case because of their lack of training and resources, as well as difficulties imposed by the presiding judges.

A fair trial requires "equality of arms" wherein each party is given an equal opportunity to present their case.⁴⁵ In response to the predicted difficulties the defense would have in making their case and managing witnesses and defendants, the IHT Statute called for the creation of a Defense Office.

39 Human Rights Watch, *Judging Dujail*, 21.

40 Human Rights Watch, *Judging Dujail*, 20.

41 Peterson, "Unpacking Show Trials," 280.

42 Human Rights Watch, *Judging Dujail*, 33-34.

43 Human Rights Watch, *Judging Dujail*, 30-31.

44 Human Rights Watch, *Judging Dujail*, 30.

45 Human Rights Watch, *Judging Dujail*, 28.

However, the Defense Office did not provide support to the privately retained attorneys, or even support to its own appointed attorneys. Defense Office lawyers never received adequate training concerning international criminal trials and never learned about standards about what constitutes a fair trial. The tension that existed between the Defense Office and the private attorneys furthered this information gap. When, in December of 2005, the names of six Defense Office attorneys were accidentally released to the media, they resigned en masse, to be replaced by attorneys that eventually filled in for the private lawyers in court during the boycott. Not only were these new Defense Office lawyers never trained, they also did not have access to international criminal law judgments in Arabic. The appointed adviser to the Defense Office, who was not appointed until six months into the trial, was not even a lawyer. Furthermore, the privately retained defense attorneys raised accusations against the American-recruited advisor, who was speaking to their witnesses without their permission. When it came time to review the prosecution's case, the Defense team found large swaths of the evidence dossier illegible. Human Rights Watch has qualified this finding by stating that they found 30% of it to be unreadable.⁴⁶ This was, of course, when the prosecution did not ambush the defense by submitting new documents and exhibits into evidence during court sessions, without prior disclosure.⁴⁷

The right to equality of arms demands procedural equality, but does not require substantive equality.⁴⁸ However, even without a substantive equality requirement, a defense team cannot reasonably be expected to prepare a case equal to the opposing party when assassins are targeting the defense team for death, and security measures are not in place. This, the lack of training, and the different standards of court procedure to which the defense was held, furthers the argument that equality of arms was not secured at this trial, again pointing in the direction of an unfair process.

46 Human Rights Watch, *Judging Dujail*, 28-35.

47 International Center for Transitional Justice, *DUJAIL*, 12.

48 Reply of the Government of the United States to January 27, 2000 Petition, *Garza v. United State*, Case No. 12.243.

F. PUBLIC ACCESS

As previously stated, there are no transcripts publicly available from the Dujail Trial. Information on the trial comes from pertinent legal documents, journalists, and officials who were party to the trial, including Hussein's former lawyers. The lack of record about the actual proceedings underscores that the trial was intended for an external audience, without any real intention to maintain any record as legitimate precedent.⁴⁹

The fact that the trial was held in-country, in an Iraqi court, that was most visibly handled by Iraqi officials, made the trial much more accessible and relevant to the Iraqi people.⁵⁰ At times, however, the American company broadcasting the trial, Court TV,⁵¹ blanked out the images and sound, and when Hussein testified the trial was completely barred to the public.⁵² There is also criticism that there was a concerted effort to hide the extent to which the Americans and British were involved in the trial, by comparatively making the Iraqi contribution so visible, and minimizing the influence of the occupying power.⁵³

It would be a mistake to think that the Iraqis were the only external audience here. International actors were watching this pivotal trial, especially Americans, who had sent their sons and daughters into war because of Hussein's supposed weapons of mass destruction. While the official finding that Iraq did not have WMDs came before the Dujail Trial began,⁵⁴ the damage had already been done: in just 2003 and 2004, 1,335 Americans died in the war in Iraq.⁵⁵ Without the WMD motivation, Americans surely wanted to know what they were doing in another war in the Middle East. This external audience was likely greatly appeased knowing that Hussein was convicted of directing heinous acts and sentenced to death for the greater good; before the trial began, 94% of Americans believed the allegations against Hussein were "definitely true" or "probably true" and were far more interested in following this trial than other high-profile ones of the time.⁵⁶ The literal ace of spades for the U.S. military, Hussein's capture and death was the top priority for the U.S. in Iraq.⁵⁷ In February

49 Peterson, "Unpacking Show Trials," 260.

50 Peterson, "Unpacking Show Trials," 283.

51 "Saddam Argues with Trial Judge." IAI Jazeera. November 28, 2005. <https://www.aljazeera.com/archive/2005/11/2008410135549242841.html>.

52 Peterson, "Unpacking Show Trials," 285.

53 Peterson, "Unpacking Show Trials," 287.

54 "CIA's Final Report: No WMD Found in Iraq," NBCNews.com, April 26, 2005, http://www.nbcnews.com/id/7634313/ns/world_news-mideast_n_af-rica/t/cias-final-report-no-wmd-found-iraq/.

55 "Iraq War - American Soldiers Killed in Iraq up to 2018," Statista, <https://www.statista.com/statistics/263798/american-soldiers-killed-in-iraq/>.

56 Gallup, Inc. "Americans Most Interested in Pending Saddam Hussein Trial," Gallup.com, February 06, 2004, https://news.gallup.com/poll/10528/Americans-Most-Interested-Pending-Saddam-Hussein-Trial.aspx?g_source=link_NEWSV9&g_medium=tile_2&g_campaign=item_10027&g_content=Americans-Most-Interested-in-Pending-Saddam-Hussein-Trial.

57 Scott MacLeod, "Searching for the Ace of Spades," Time, June 22, 2003, <https://content.time.com/time/world/article/0,8599,460169,00.html>.

2006, a poll conducted of the public across nine countries (none of which were located in the Middle East), found that only in the U.S. did more people support the death penalty for Hussein (57%) over life imprisonment. A resounding 73% of Americans also believed that Hussein was getting a fair trial, twelve percentage points above the next leading statistic.⁵⁸ A separate poll found that 61% of Iraqis supported Hussein receiving the death penalty.⁵⁹

The tight control over public access to the Dujail Trial is evidence that the trial was geared towards an audience and not solely focused on rendering justice. But without transcripts, the true nature of the trial proceedings cannot be evaluated. It was all too easy for the external audience to see what they wanted to and ignore matters of human rights.

⁵⁸ "Saddam Hussein Trial International Poll," Ipsos MORI, March 6, 2006, <https://www.ipsos.com/ipsos-mori/en-uk/saddam-hussein-trial-international-poll>.

⁵⁹ Gallup, Inc. "Gallup Poll of Iraq: Hussein Should Be Executed If Found Responsible for Murder," Gallup.com, May 18, 2004, <https://news.gallup.com/poll/11737/gallup-poll-iraq-hussein-should-executed-found-responsible-murder.aspx>.

G. APPEAL PROCESS

Iraqi law requires that an execution be carried out within thirty days of all legal recourse being exhausted.⁶⁰ In the case of a sentence of death, an appeal is automatically initiated, and expected to be a long, complicated process. Under Iraqi law, then, it was presumably the case that Hussein's appeals would have taken time and effort, and would have been subject to this complex appellate structure.

Instead, the denial of Hussein's appeal, along with his co-defendants, was released less than two months after the conviction, on December 26, 2006. Four days later, Hussein was hanged.⁶¹

The speed at which the appeal was rejected, and the fact that the appeal's sole finding were in a paltry twenty-one page document,⁶² indicates a severe lack of due process with respect to any appeal. There was little effort put into examining the trial court decision by the appellate court, reflecting a determined interest in finalizing the entire process and eliminating Hussein. UN Special Rapporteur Philip Alston accused the Iraqi government of engaging in an "unseemly and evidently politically motivated effort to expedite the execution by denying time for a meaningful appeal and by closing off every avenue to review the punishment." Alston also called upon the government to review their thirty day policy of carrying out executions, to ensure the right to appeal is respected.⁶³ Hussein was nonetheless put to death.

60 Law of the Supreme Iraqi Criminal Tribunal, art. 27, Law No. 10 of 2005, 14 Ramadan 1426 Hijri, October 18, 2005, Number (4006).

61 "Death Sentence for Saddam Upheld," BBC News, December 26, 2006, <http://news.bbc.co.uk/2/hi/asia-pacific/6210245.stm>.

62 The Prosecutor v. Saddam Hussein Abd al-Majid al-Tikriti, 29/c/2006.

http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Iraq/dujail_appellate_chamber_opinion_26-12-2006.pdf.

63 "UN Human Rights Expert Deplores Saddam's Trial and Execution: Calls for Legal Overhaul," United Nations, <https://news.un.org/en/story/2007/01/205002-un-human-rights-expert-deplores-saddams-trial-and-execution-calls-legal>

IV. CONCLUSIONS

A. ALTERNATIVE MEANS OF JUSTICE

The circumstances under which Saddam Hussein were tried and executed were not in compliance with international standards of a fair trial.⁶⁴ There has been heavy critique of the trial of former President of Yugoslav Slobodan Milošević, because, in acting pro se, he turned the courtroom into his stage. The trial only ended after four years when Milošević died in prison in March 2006. Nonetheless, Milošević was afforded considerable rights at the ICTY, while Hussein was not.⁶⁵

Another point of comparison is that while much has been written about the lessons to be learned from Milošević's trial, there is, most oddly, near silence concerning the Hussein case. Most writing has focused on the unfairness of the trial and how the IHT itself can improve. In the history of legal recourse for prosecuting war crimes and crimes against humanity, this trial has been largely ignored.

On the one hand, maybe this is for the better. Dangerous precedent would be set if the Hussein trial was used as the foundation or the framework for similar types of trials.

But on the other hand, there does need to be some reflection and learning from what was, in hindsight, an obviously biased and unjust judicial process. As the United States and great powers face down the crisis in Syria, transnational terrorism, and worldwide oppression by leaders, it behooves the international community to look at Hussein's trial and understand where it went wrong, what the ramifications have been and what the alternative means of justice were.

What were the alternatives? Immunity and exile, in addition to trials in various courts, were, at one time, options for dealing with a deposed dictator. Immunity and exile were offered to Hussein prior to the invasion⁶⁶ and could have been an option even after his capture. But immunity and exile would have angered many who supported the invasion. Hussein also expressed no interest in taking an offer of immunity and exile.

⁶⁴ Mr. Saddam Hussein al-Tikriti v. Iraq and United States of America, Working Group on Arbitrary Detention, Opinion No. 46/2005, U.N. Doc. A/HRC/4/40/Add.1 at 34 (2006); Mr. Saddam Hussein al-Tikriti v. Iraq and United States of America, Working Group on Arbitrary Detention, Opinion No. 31/2006, U.N. Doc. A/HRC/4/40/Add.1 at 114 (2006); and SR A:60:321 (15).

⁶⁵ Diane F. Orentlicher, "That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia," (New York: Open Society Institute, 2010): 15, 73-74. <https://www.opensocietyfoundations.org/publications/someone-guilty-be-punished-impact-icty-bosnia>.

⁶⁶ Richard Norton-Taylor and Helena Smith, "US Offers Immunity to Saddam," *The Guardian*, January 20, 2003, <https://www.theguardian.com/world/2003/jan/20/iraq.richardnortontaylor>.

Another option might have been another venue. Instead of creating a tribunal from scratch, Hussein could have been tried in the International Criminal Court ("ICC"), an international ad hoc tribunal, or a fully national court, rather than the hybrid and specialized tribunal that was created. The ICC prohibits prosecution for crimes committed prior to July 1, 2002, but the United Nations Security Council can refer cases to the ICC. Given the serious questions about the initial legality of the invasion, and the Bush Administration's hostility to the ICC, the ICC was unlikely ever to have been a venue for Hussein. An international ad hoc tribunal (something like the Rwanda or Yugoslavia tribunals) that was authorized to apply international law would have been a viable option to try Hussein and others, perhaps on charges of crimes against humanity, instead of the hybrid version that was created.⁶⁷ But in order to ensure compliance with international legal standards, the U.S. would not have had control over the process as it did with the IHT. Another issue is the death penalty: the IHT remains exceptional in the fact that it is the only modern ad hoc tribunal to permit the death penalty, which the international community has almost universally condemned in the last half-century. The Rwanda and Yugoslavia tribunals had no authority to impose any penalty of death. Finally, an international tribunal probably would not have been largely Iraqi, or even largely Arab. The idea of Europeans, Latin Americans and Africans condemning Hussein may have been unpalatable.

Given the importance to show the competence and legitimacy of the new government, a national court could have also been considered. Iraqi law provides plenty of opportunities to have prosecuted Hussein and his co-defendants, and it would have been more familiar legal ground for the Iraqi lawyers and judges. Based on how the hybrid IHT fared in prosecuting Hussein, it is probable that such a trial would have faced similar cries of injustice, but certainly would have been far more impartial because there would have been no need for the foreign advisors or assistance. This scenario may have provided the most recourse for justice.

⁶⁷ "Iraq, The Trial of Saddam Hussein." How Does Law Protect in War? - Online Casebook. <https://casebook.icrc.org/case-study/iraq-trial-saddam-hussein>.

B. IRAQ POST-HUSSEIN

Would a better court or process for Hussein have had much of a difference on Iraq's fate? Probably not. Hussein had allies and enemies within Iraq, so regardless if he had been exiled, or sentenced to life in prison, or put to death, there would still have been large groups of people unhappy with his sentence or lack thereof. The difference between death and a long imprisonment would have done little to fundamentally change the state of Iraq in 2006, reeling from war, now fiercely divided along ethnic and religious lines, and with new, unknown threats on the horizon. Just a month prior to Hussein's conviction, Iraq saw the official birth of al-Qa'ida in Iraq, precursor to ISIS. Both the conviction and the execution of Hussein certainly led to increases in sectarian violence, but it was the U.S.-led invasion itself that irrevocably fractured Iraq. With the Shia majority leading Iraq following Hussein's ousting, al-Qa'ida in Iraq and the Ba'athists had similar motives. In fact, much credit has been given to Haji Bakr, an intelligence officer within the Ba'athist regime, for the surveillance and internal security systems of ISIS.⁶⁸ Perhaps if power had been more evenly spread across the new Iraqi government and de-ba'athification never occurred, the sectarian divides could have been mitigated and bad actors would not have been able to gain the foothold they did. This, of course, has little to do with the fairness of the trial of Saddam Hussein, but more to do with the invasion itself, and the conduct of the occupying American forces.

Had Hussein died in the mayhem of his capture, there would have been outrage and violence, but that occurred anyway. Had international opinion won and Hussein tried in a court that did not have the death penalty, he likely would have been convicted and sentenced to life in prison, and Iraq would be no different. Or maybe the judgment would have been a shorter sentence, like that of fifty years for former Liberian President Charles Taylor. In the wake of this judgment, however, Liberia is still struggling with peace, Taylor's allies are still in positions of government,⁶⁹ and he is likely still personally influencing elections.⁷⁰ With doubts about the trial in the first place, Arab public opinion outside of Iraq understood it as a way for the Americans to justify their invasion. As the trial progressed, the majority of Arabs polled believed that Iraq was worse off and that the Middle East was less democratic now than before. Iraqis were unsurprisingly split along sectarian lines about their

68 Jacob Siegel Jamie Dettmer, "What Saddam Gave ISIS," The Daily Beast, April 21, 2015, <https://www.thedailybeast.com/what-saddam-gave-isis>.

69 Brooks Marmon, "Twelve Years After Taylor's Removal, Instability Still Plagues Liberia," World Politics Review, September 04, 2015, <https://www.worldpoliticsreview.com/articles/16620/twelve-years-after-taylor-s-removal-instability-still-plagues-liberia>.

70 Charlotte Attwood, "Is Ex-warlord Charles Taylor Pulling Liberia's Election Strings from Prison?" BBC News, October 06, 2017, <https://www.bbc.com/news/uk-41509896>.

feelings about the new government in Iraq.⁷¹

C. RAMIFICATIONS

Many Americans probably do not care if Hussein had a fair trial because he was labeled an enemy of America. Have Americans strayed so far from basic principles of due process? A just society requires impartial legal process, even for alleged enemies. Law exists to hold people accountable for their actions. Therefore, it should be of the utmost concern when law is used primarily for punitive and political purposes, and not to uphold fair and impartial standards. The irony of sentencing a man to death after an unfair trial for, among other things, sentencing men to death after an unfair trial, should not be lost in taking care to show respect for his victims. Nor should the speculation that the place Saddam uttered his final words was the very place where he condemned his own enemies.

Injustice can neither render peace to victims nor legitimacy to governments; it only permits further acts of injustice. While Hussein himself should have been investigated for international crimes, Hussein became a victim of an injustice that has serious ramifications for the practice of law. The Dujail Trial leaves an uneasy feeling about the use and abuse of international law and war crimes tribunals in general. What does international law mean, or law in general, when it can be summarily ignored or rewritten in order to “legitimately” kill one’s enemies? What is the purpose of law when power trumps accountability to justice? Lest humanity fulfill apocalyptic visions of a return to a Hobbesian state of nature, a reckoning on the role and rule of law needs to be had. This is especially true of great powers’ use of international law. A society will lose its sense of ethics and decency without rule of law; without respect for the rule of law, an unjust society could even prosper eternally. Global institutions and the threat of nuclear war have for a time calmed the power struggles, but without great powers publicly committing to international law and being willing to prosecute their own, international criminal law will become meaningless.

⁷¹ Shibley Telhami, “Arab Public Opinion and the Trial of Saddam Hussein,” Brookings, July 28, 2016, <https://www.brookings.edu/opinions/arab-public-opinion-and-the-trial-of-saddam-hussein/>.

Those who argue that Saddam Hussein did not deserve a fair trial are effectively arguing that the rule of law should be circumscribed. This would be a terrible mistake for the international community to make. Do we wish to live in a world where law is used to further vengeance, or justice? And what is justice, but not a revelation of truth? To deprive Hussein's alleged victims of justice through an abuse of a legal remedy is a mark upon the system and his executioners. If the true purpose of this trial was to show that you cannot just go about committing human rights abuses, what does an American orchestration of an unfair trial, an internationally recognized war crime, say about the United States? Who would hold this superpower accountable to war crimes? In the case of Saddam Hussein, his determination of guilt or innocence was seemingly made before he even stepped foot in court, likely before he was even captured. The United States and Iraqi governments put a man on trial and deprived him of his due rights to ensure that he hung. He did just that, with a mocking crowd looking on, as he recited the shahada, before being cut off by a swift drop to his death.



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