REMARKS REGARDING THE IRAQI HIGH TRIBUNAL'S "ANFAL" TRIAL: SPEECH DELIVERED AT INTERNATIONAL LAW WEEKEND

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My remarks today will focus on the second trial of the Iraqi High Tribunal (the IHT or Tribunal), the so-called "Anfal" trial.[1] In contrast to the IHT's first trial, the "Dujail" trial, which involved a relatively small instance of criminality[2]—given the vast scope of crimes committed during Ba'ath Party rule[3]—the

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1. This publication consists of an annotated version of the original remarks. The findings presented herein are also the subject of a much more detailed law review article by the Author. *See* Jennifer Trahan, *A Critical Guide To The Iraqi High Tribunal's Anfal Judgment: Genocide Against The Kurds*, 30 Mich. J. Int'l L. 305 (2009).

2. The Dujail trial involved an assassination attempt against Saddam Hussein and the resulting crack-down on the people of Dujail in retaliation. Approximately 146 individuals were killed (some under torture and some by execution), and several hundred townspeople were sent to a prison camp in the desert. *See* INT'L CTR. FOR TRANSITIONAL JUSTICE, DUJAIL: TRIAL AND ERROR? 2 (2006), http://www.ictj.org/static/MENA/Iraq/ICTJDujailBrief.eng.pdf (last visited Feb. 17, 2009).

3. *See, e.g.*, HUMAN RIGHTS WATCH, JUSTICE FOR IRAQ (Dec. 17, 2002), *available at* http://www.hrw.org/backgrounder/mena/iraq1217bg.htm (last visited February 17, 2009) (discussing attacks against the Iraqi Kurds; forced expulsion of ethnic minorities from Kirkuk; repression of the Marsh Arabs and other Shi`a; general repression, large-scale "disappearances" and other crimes; the use of chemical weapons during the Iran-Iraq war; and the occupation of Kuwait and related abuses).

"Anfal" trial was a much more significant trial. The eight-phased "Anfal campaign" against the Iraqi Kurds in 1988 resulted in an estimated death toll of 182,000.[4] In this presentation, I will provide: i) an overview of the trial process; ii) an evaluation of the Trial Chamber Judgment; iii) a discussion of fair trial issues that arose during the trial; and iv) a critical evaluation of the Cassation Chamber (appellate level) Judgment.[5] The presentation concludes that the evidence presented was quite solid and the Trial Chamber Judgment was generally well-reasoned; however, fair trial issues were not properly resolved and the Cassation Chamber decision appears to be wholly lacking in merit.[6]

I. OVERVIEW OF THE TRIAL

During the trial, seventy-seven "complainants" testified, presenting truly horrific, graphic testimony.[7] The complainants generally testified to one or more aspects of the Anfal campaign: i) military strikes, using conventional weapons and "special ammunitions"—that is chemical weapons—against villagers in the "prohibited zones" in Northern Iraq; ii) survivors driven to prison camps, where they were subjected to deplorable conditions, including torture and rape, and many additionally died; and iii) mass executions in the desert, with bodies plowed under by bulldozers.[8]

A few individuals, who were accidentally buried along with the corpses and mistaken for dead at the mass graves, crawled out and survived to testify.[9] The Trial Chamber judges observed that many of those who testified still had respiratory problems due to chemical gas attacks, bore scars on their bodies, and suffered from psychological harm caused by time spent in prison.[10] Most complainants also testified to having lost numerous family members during the

4. Case No. 1/ CSecond/2006, Al Anfal, Trial Chamber Judgment, at 501, June 24, 2007 *available at* http://law.case.edu/grotian-moment-blog/anfal/opinion.asp (last visited Feb. 24, 2009) [hereinafter *Trial Chamber Judgment*].

5. Case No. 1/CSecond/2006, Al Anfal, Cassation Chamber Judgment, Sept. 4, 2007 *available at* http://law.case.edu/grotian-moment-blog/documents/Anfal_Cassation_Panel_Opinion.pdf (last visited Feb. 24, 2009) [hereinafter *Cassation Chamber Judgment*].

6. *See* Trahan, *supra* note 1.

7. *See Trial Chamber Judgment*, *supra* note 4, at 146-212 (recounting their testimony).

8. Int'l Ctr. for Transitional Justice [ICTJ], *The Anfal Trial and the Iraqi High Tribunal Update Number One: The Complainant Phase of the Anfal Trial*, at 8–9, http://www.ictj.org/static/MENA/Iraq/AnfalUpdateOne.eng.pdf (last visited Feb. 24, 2009) [hereinafter *ICTJ, Update I*].

9. *See, e.g.*, *ICTJ, Update I*, *supra* note 8, at 9–10 (summarizing testimony of Taymur Abdallah Ahmad).

10. *Trial Chamber Judgment*, *supra* note 4, at 505.

Anfal.[11] In fact, fatalities were so numerous that a term was developed to describe the victims: the "Anfalized."[12]

The case was supported by strong documentary evidence. Some of this first came to light when withdrawing Iraqi forces left a trove of documents in Kurdish areas, and individuals brought them to the attention of Human Rights Watch, which, with the help of the United States Government, had them brought to the United States.[13] Human Rights Watch analyzed the documents, arguing, years before the second Gulf War, that Iraq should have faced civil genocide claims before the International Court of Justice.[14]

Two of the key documents used at trial contained written orders by Defendant Ali-Hassan al-Majid (Majid)[15] to perpetrate the campaign.[16] The first document, dated June 3, 1987, was issued by the Northern Organization Office (headed by Majid), and ordered that "supplies of food and medicine to the Kurdish villages were prohibited in addition to agriculture, . . . human beings and animals . . . ."[17] In the second document, dated June 20, 1987, Majid ordered the military commanders to prohibit human and animal existence in certain areas, and to kill every person whose age was between fifteen and seventy years, and requested the Army Corps Commanders to carry out special strikes (using chemical weapons).[18]

Evidence also came in the form of audio-tapes played at trial, including statements by Majid (also know as "Chemical Ali"): "when I strike them with the chemical I will cause them high casualties . . . and I will not strike them with chemical . . . only one day, but (15) days, two days, ten, five and so

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11. *See, e.g., id.* at 504.

12. *Id.* at 565.

13. "Human Rights Watch was able to obtain access to eighteen tons of Iraqi government documents seized by Kurds from Iraqi police, security, and intelligence headquarters during March 1991, which were airlifted to Washington and analyzed." HUMAN RIGHTS WATCH, *supra* note 3.

14. *See* Kenneth Roth, *Indict Saddam*, WALL ST. J., Mar. 22, 2002 at A14.

15. The IHT found that Majid served as a member of the Revolutionary Command Council, State Command of the Ba'ath Party, and head of the Northern Organization Office for the period 1987–1989. *Trial Chamber Judgment, supra* note 4, at 481. The IHT also found that he was given wide authority by the Revolutionary Command Council to command all civilian, military, security and party organizations in the Kurdish areas of Northern Iraq. *Id.*

16. As to these documents—Documents Nos. 3650 and 4008—the IHT stated: "These two letters are considered the pillars upon which all attacks after [April 6, 1987] were based." *Id.* at 512.

17. *Id.* at 610. The document was directed to the Commanders of the 1st, 2d and 5th Corps, Ba'ath Party Branches Command, Security Directors of the Autonomous Region, the Directorates of the General Military Intelligence Directorate and Intelligence System. *See id.* at 481; *Trial Chamber Judgment, supra* note 4, at 610. All quoted documents and quotes from the Trial and Cassation Chamber Judgments have been translated from the original Arabic.

18. *Id.* at 481, 610, 623.

on . . ."; [19] "I will tell them there is an amnesty . . . . I will print a million pamphlet[s] and spread them in the north . . . and I will not mention that it is from the state of Iraq";[20] "I will [kill] them with the new weapon which will eradicate you, God willing; all God's vehicles are not enough to carry them; I told the specialists, I need gangs . . . the good ones in Europe to kill them wherever they catch them";[21] "[s]trike them chemically and eradicate them all . . . . They thought the International community will rescue them . . . . Damn this International community . . . . [a]nd any of God's States who back them."[22]

The other convicted defendants included two military figures— Sultan Hashem Ahmad al-Ta'i (Sultan Ahmad) and Hussein Rashid al-Tikriti (Hussein Rashid),[23] and two individuals who headed intelligence service branches—Sabir Abd al-Aziz al-Douri (al-Douri) and Farhan Mutlaq al-Jaburi (al-Jaburi).[24] As to these defendants, while the evidence was certainly not as strong, it is possible, at minimum, to deduce from the documentary evidence that each knew that Iraqi armed forces were attacking villages (not just the Kurdish "Peshmerga" insurgents), and that chemical weapons were being used (a weapon that is completely incapable of discriminating between civilian and military targets).[25]

Majid, Sultan Ahmad, and Hussein Rashid were sentenced to death, and al-Douri and al-Jaburi were sentenced to life sentences.[26] The Tribunal found that Sultan Ahmad, as a military commander, "implemented" the Anfal plans,[27] and that Hussein Rashid participated in planning, and provided supplies, resources, and technical expertise to the military.[28] As to al-Douri, the IHT found that he gathered and supplied information to the military to conduct their operations.[29] As to al-Jaburi, the IHT found that he provided "information

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19. *Id.* at 483.

20. *Id.* at 484.

21. *Id.*

22. *Trial Chamber Judgment*, *supra* note 4, at 514.

23. Sultan Ahmad was former commander of the 1st Corps, which was based in northern Iraq and involved in several, but not all, of the eight Anfal operations. Hussein Rashid was Army Deputy Chief of Staff for Operations during the Anfal campaign.

24. Al-Douri was former general director of Iraq's Military Intelligence Service. Al-Jaburi was former director of the Military Intelligence Service of the northern and later eastern regions.

25. A more extensive analysis of the documentary evidence and role of each convicted defendant is set forth in Trahan, *supra* note 1.

26. *See Trial Chamber Judgment*, *supra* note 4, at 957 (sentence of Majid); *id.* at 949 (sentence of Sultan Ahmad); *id.* at 953 (sentence of Hussein Rashid); *id.* at 946 (sentence of al-Duri); *id.* at 943 (sentence of al-Jaburi).

27. *Trial Chamber Judgment*, *supra* note 4, at 695.

28. *Id.* at 767, 750.

29. *Id.* at 802.

about targeted villages,"[30] and was "in charge of sending Kurdish villagers to [the] North[ern] Organization Office, supervising interrogations, [and] executing detainees . . . ."[31] A sixth defendant, Tahir Tawfiq al-'Aani (al-'Aani) was acquitted.[32] Former Iraqi President Saddam Hussein al-Majid al-Tikriti (Saddam Hussein) was dropped from the trial after his execution as a result of the verdict in the IHT's Dujail trial. None of the death sentences in the Anfal case have been carried out due to political disagreement within the Iraqi Government as to whether they should be implemented.[33]

II. THE TRIAL CHAMBER JUDGMENT

The Anfal Trial Chamber Judgment consists of 963 pages. At least read in translation, it is meandering, repetitive, hard to read, and not always well-organized. Yet, generally, as to each crime, it: i) contains analysis of the elements of the crime; ii) cites to evidence presented at trial that supports the Tribunal's conclusions as to the elements; and iii) shows a linkage that satisfies "individual criminal responsibility"—that is, how each convicted defendant was implicated in each crime.[34] The IHT often does not clearly identify which form of individual criminal responsibility it found, generally entering the convictions under the article of the Statute dealing with individual criminal responsibility generally, but not making clear under which sub-part it was operating (i.e., which particular form of responsibility it found). Yet, a careful analysis, which is beyond the scope of this presentation but has been done by this Author elsewhere,[35] suggests that one or more forms of individual criminal responsibility appears to be present as to each crime.

In terms of the crimes against humanity convictions, it is not hard to understand how a multi-phased military campaign that involved a huge number of civilian fatalities constituted a crime against humanity. The facts presented at trial (as recounted in the Trial Chamber Judgment)[36] clearly show a

30. *Id.* at 917.

31. *Id.* at 917–18.

32. *Trial Chamber Judgment*, *supra* note 4, at 943. Al-'Aani was former Governor of Mosul during the Anfal campaign and a Ba'ath party official.

33. Particularly Sunni Arabs advocate that the death sentence regarding Sultan Ahmad should not be carried out. *See, e.g.*, Ross Colvin, *U.S. Rebuffs Iraq Demand for Handover of Prisoners*, REUTERS, Nov. 12, 2007, http://www.reuters.com/article/worldNews/idUSL126015152007112 (last visited Feb 24, 2009).

34. The forms of individual criminal responsibility are contained in Article 15 of the IHT Statute. *See Al-Waqa'l Al-Iraqiya: Law of the Supreme Iraqi Criminal Tribunal*, OFFICIAL GAZETTE OF THE REPUBLIC OF IRAQ, No. 4006, Oct. 18, 2005, at 15–16, *available at* http://www.ictj.org/static/MENA/Iraq/iraq.statute.engtrans.pdf (last visited Feb. 26, 2009) [hereinafter *IHT Statute*].

35. The Author has done such a crime-by-crime analysis elsewhere. *See* Trahan, *supra* note 1.

36. The analysis presented herein is based on the evidence recounted in the Trial Chamber Judgment. The Author has not independently reviewed the evidence presented at trial.

widespread or systematic attack against the civilian population pursuant to a plan or policy.[37] As to the underlying crimes, Majid was convicted of: i) willful killing; ii) extermination (that is, mass killing); iii) deportation or forcible transfer of population; iv) imprisonment or other severe deprivation of physical liberty in violation of fundamental norms of international law; v) torture; vi) enforced disappearances; and vii) other inhumane acts of similar character intentionally causing great suffering or serious injury to the body or to mental or physical health.[38] The IHT relied upon eye-witness testimony in concluding that these crimes occurred, as well as documentary evidence as to some of them.[39] Regarding the crimes against humanity convictions, each of the other convicted defendants was convicted of fewer underlying crimes (thus, fewer counts) than Majid.[40]

As to war crimes, the Trial Chamber judgment cites to both eye-witness testimony as well as documentary evidence in concluding that the Iraqi military, *inter alia*, targeted civilians in the context of its fight against the insurgents, which it found to constitute "internal armed conflict."[41] The war crimes of which Majid was convicted were: i) intentionally directing attacks against the civilian population; ii) 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; iii) intentionally directing attacks

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37. For example, the judges found: (1) that the Anfal campaign "constitute[d] an attack within the concept [of the Tribunal Statute]," *Trial Chamber Judgment*, supra note 4, at 519; (2) that "civil[ian] inhabitants in Kurdish villages" were the subject of the attack, *id.* at 522; (3) that the attack was "widespread" and "systematic," relying on the fact that "more than three thousand villages" were targeted, and the operations "relied on organized plans laid down and applied by officials in the former regime," *id.* at 519; and (4) that the attack was pursuant to or in furtherance of a state or organizational policy, *see id.* at 520 ("all attacks, which occurred after [June 1987] were an implementation of a stipulated policy [reflected] in the instructions issued by . . . Majid according to Letter [4008]"). The evidence clearly also shows that the defendants' acts were part of the attack and it is possible to infer that they knew that their acts constituted part of the attack.

38. *Id.* at 527, 537, 545, 552, 560, 568, 574 (convicting Majid of those underlying crimes).

39. For example, Documents Nos. 3650 and 4008 both suggest that killing and mass killing occurred.

40. The Trial Chamber convicted Sultan Ahmad of murder, extermination, deportation or forcible transfer of population, imprisonment, and other inhumane acts. *See Trial Chamber Judgment, supra* note 4, at 665–66, 660, 675, 699, 701, 704, 705–06, 708. The Trial Chamber convicted Hussein Rashid of murder and extermination. *Id.* at 766, 774. The Trial Chamber convicted al-Jaburi of willful killing and "deportation or forcible transfer of population." *Id.* at 944. The Trial Chamber convicted al-Douri of willful killing. *Id.* at 871.

41. *Id.* at 595, 579. The Tribunal also concluded, for example, as to Majid, that he "was fully aware of factual conditions which [established] an internal armed conflict's existence." *Trial Chamber Judgment, supra* note 4, at 595. In terms of a nexus between the crimes and the armed conflict, the IHT found: "it is clear that these crimes were committed in a time and geographic frame during the military conflict (1987–88) linked to the attack on Kurdistan in Al-Anfal operations." *Id.* at 579.

against buildings dedicated to religious or educational purposes, or against hospitals and places where the sick and wounded are collected, provided they are not military objectives—here, schools, mosques and a medical clinic;[42] iv) pillage; and v) destroying or seizing the property of an adversary, unless such destruction or seizure is imperatively demanded by the necessities of the conflict.[43] The eye-witness testimony at trial supported the Tribunal's findings as to these crimes.[44] Again, each of the other convicted defendants was convicted of fewer war crimes (thus, fewer counts) than Majid.[45]

As to the crime of genocide, the IHT found that there was intent to destroy, based on a variety of factors, including: the use of aircraft, tanks, artillery, helicopters, rocket launchers, infantry and "special ammunitions" (i.e., chemical weapons) to attack the Iraqi Kurds;[46] the direct orders from Majid to carry out the attack—banning the existence of individuals between fifteen and seventy years of age (included);[47] direct orders from Majid to kill the largest possible number of people;[48] that the attacking troops prevented individuals from escaping so that none were able to cross the borders into Turkey;[49] that attacking troops "did not distinguish between the victims . . . [as] civilians or fighters ([Peshmerga]);"[50] that thousands of children, women and elderly were killed by chemical weapons;[51] that the former regime "prevented . . . humanit-[arian] organizations from entering Kurdistan to . . . find out the circumstances of the victims";[52] that the attacking troops destroyed "the electricity and water [filtration systems]";[53] and that animal and human existence was prohibited in the restricted areas.[54] The IHT also relied on the intentions expressed by Majid

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42. The IHT found that "more than 3000 villages were totally destroyed," including approximately "1000 primary and preparatory schools[,] . . . more than 2000 mosques," and a medical clinic. *Id.* at 589.

43. *See id.* at 582, 586–87, 592, 596, 600–01.

44. There may be some question whether the last war crime—destroying or seizing the property of an adversary—occurred, because the evidence at trial showed that civilian objects were targeted. The crime, however, appears to cover the destruction of property of an "adversary," which suggests a military adversary.

45. The Trial Chamber convicted Sultan Ahmad of four war crimes, *see id.* at 679, 682, 684, 711, 713, 715, 717–18; Hussein Rashid of two war crimes, *see Trial Chamber Judgment*, *supra* note 4, at 783; *id.* at 788; and al-Douri of two war crimes, *see id.* at 872–82; *id.* at 883–96.

46. *Id.* at 493.

47. *Trial Chamber Judgment*, *supra* note 4, at 494.

48. *Id.*

49. *Id.*

50. *Id.* at 500.

51. *Id.* at 494.

52. *Trial Chamber Judgment*, *supra* note 4, at 498.

53. *Id.*

54. *Id.*

in the audio-taped recordings.[55] The Tribunal additionally found a "strategy and prepared policy by the regime to target the Kurds."[56]

Based on all the evidence, the IHT ultimately concluded that Majid possessed "intent to partially or totally eradicate Kurdish civilians due to their ethnicity."[57] The Tribunal went through similar analysis as the other elements of genocide's *dolus specialis*, finding that the intent to destroy targeted in whole or in part,[58] "a national, ethnical, racial or religious group" (here, the Iraqi Kurds)[59] as such[60] (that is, because of their group membership).[61] The underlying crimes supporting the genocide convictions as to Majid are: i) killing members of the group; ii) inflicting serious bodily or mental harm on members of the group; and iii) creating conditions of life calculated to destroy the group in whole or in part.[62] Again, most of the other convicted defendants were convicted of fewer underlying crimes (and thus fewer counts) than Majid.[63]

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55. *Id.* at 514.

56. *Id.* at 497. Specifically, the IHT relied on Document No. 4008 and the fact that Majid (author of the document) was a member of the Revolutionary Command Council and a member of the Ba'ath Party leadership. *Trial Chamber Judgment*, *supra* note 4, at 497. Additionally the Tribunal found that evidence of the plan came from the "repetition" and "systematization" of the attacks, and the way mass executions were prepared. *Id.* at 499–500. Case law states that a plan or policy is not required to prove intent to destroy, although it may be an important factor in evaluating whether or not there is intent to destroy. *See* Prosecutor v. Krstic, Case No. IT-98-33-A, Judgment, ¶ 225 (Apr. 19, 2004).

57. *Trial Chamber Judgment*, *supra* note 4, at 516.

58. *Id.* at 501 (finding "partial eradication").

59. The Iraqi part of the Kurdish ethnic group was targeted. *See id.* at 490 (finding ethnic and national group targeting); *id.* at 493 ("The Kurds are a *national* and *ethnic* group living in [the] Kurdistan area for many thousands of years in . . . northern Iraq and the Iraqi temporary constitution [of] 1970 had endorse[d] them as [the] second nationality in Iraq.") (emphasis added).

60. *Id.* at 490 ("[t]he Kurds were targeted for their ethnicity"). This appears to be an oversimplification, as another motivation was likely to target the Kurds for political reasons.

61. *See* Prosecutor v. Blagojevic and Jokic, Case No. IT-02-60-T, Judgment, ¶ 669 (Jan. 17, 2005). The judge who wrote the section of the Trial Chamber Judgment discussing Sultan Ahmad persuasively explains that the existence of any political motivation for targeting the Kurds (*e.g.*, for supporting the Peshmerga insurgency and/or Iran during the Iran/Iraq war) does not negate genocidal intent. *See Trial Chamber Judgment*, *supra* note 4, at 629 (citing the ICTR case of *Nahimana* at ¶ 969). Nahimana, Barayagwiza, & Ngeze v. Prosecutor, Case No. ICTR-99-52-A, Judgment, ¶ 969 (Nov. 28, 2007). This is a correct conclusion. *See* Jennifer Trahan, *Why the Killing in Darfur is Genocide*, 31 FORDHAM INT'L L. J. 990, 1037–40 (2008) (discussing the case law distinguishing motive and intent regarding genocide). Due to differences in writing style and duplication of effort, the Author assumes that each of the five Trial Chamber Judges wrote one of the sections in the Trial Chamber Judgment covering one of the five convicted defendants.

62. *See Trial Chamber Judgment*, *supra* note 4, at 490–502, 502–06, 506–17.

63. Sultan Ahmad was convicted of all three underlying crimes. *See id.* at 631–40, 641–43, 644–49. Hussein Rashid and al-Douri were convicted of the first two. *See id.* at 755; *id.* at 842, 859. Al-

One point of criticism, however, is that as to the four convicted defendants other than Majid, the Tribunal never found that they possessed genocidal intent. Rather, the findings seem to be that they participated in and/or assisted with the Anfal campaign, *knowing* of Majid's genocidal intent.[64] This is the *mens rea* of aiding and abetting genocide.[65] Yet, the Tribunal does not appear to differentiate between a conviction of genocide and a conviction of aiding and abetting genocide.

The failure to convict Sultan Ahmad, Hussein Rashid, al-Douri and al-Jaburi of aiding and abetting genocide, rather than genocide, constitutes possible legal error, and one that may have resulted in a sentencing error. There exists international precedent that the responsibility of an aider and abettor is less than that of a perpetrator.[66] Furthermore, the Iraqi High Tribunal Statute (IHT Statute) states that in terms of sentencing, where the crimes do not have a counterpart under Iraqi law (as these crimes did not), the Tribunal shall be guided by "judicial precedents and relevant sentences issued by the international criminal tribunals,"[67] making international standards relevant. Yet, if Sultan Ahmad and Hussein Rashid were sentenced to death along with Majid, that differentiation between a primary perpetrator (such as one who orders the campaign) and an aider and abettor (one who assists the primary perpetrator but does not have the required *mens rea* of a primary perpetrator) was not made.[68] Additionally, all convicted defendants other than Majid argued that they were "following orders,"[69] which, under the IHT Statute, permits

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Jaburi was convicted of killing and may have been convicted of the second underlying crime. *Compare id.* at 922 *with Trial Chamber Judgment*, *supra* note 4, at 943.

64. For example, as to Sultan Ahmad, the IHT stated: "The accused (Sultan Hashim Ahmad) knew that the accused (*'Ali Hasan Al-Majid) intended to commit genocide* against the Kurdish civilians in Northern Iraq . . . and he was required to take necessary actions *to achieve the aims and intentions of [Majid].*" *Id.* at 693 (emphasis added); *see also id.* at 695.

65. The *mens rea* of an aider and abetter requires that "'an accused knew that his own acts assisted in the commission of genocide by the principal offender and was aware of the principal offender's state of mind . . . .'" Prosecutor v. Brdanin, Case No. IT-99-36-T, Judgment, ¶ 730 (Sept. 1, 2004).

66. *See Krstic*, Case No. IT-98-33-A, ¶ 268 ("aiding and abetting is a form of responsibility which generally warrants lower sentences than responsibility as a co-perpetrator"); Prosecutor v. Vasiljevic, Case No. IT-98-32-A, Judgment, ¶¶ 181, 182 (Feb. 25, 2004) (similar); Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, ¶ 73 (Sept. 17, 2003) (similar).

67. *IHT Statute*, *supra* note 34, art. 21.

68. While these comments focus on the possible sentencing error as to Sultan Ahmad and Hussein Rashid, they should not be taken as an endorsement of the death penalty for Majid. The Author opposes implementation of the death penalty as to any IHT defendant. The fair trial issues raised in this article as well as lack of serious appellate review (discussed *infra*) suggest that no death sentences should be carried out.

69. *See, e.g.*, *Trial Chamber Judgment*, *supra* note 4, at 624, 625 (Sultan Ahmed testified that he acted under orders).

mitigation of sentences;[70] again, this cannot have occurred where death sentences were imposed. All these factors suggest that the death sentences against Sultan Ahmad and Hussein Rashid (and potentially the life sentences against al-Douri and al-Jaburi) may have been the product of legal error. This potential error is extremely significant, given that the death sentences have not yet been executed. Other than this potential (and significant) error, this Author's analysis is that the Trial Chamber Judgment generally demonstrates that most of the other convictions were supported by the evidence with two significant caveats. [71]

III. FAIR TRIAL ISSUES

The merits of the Trial Chamber Judgment, nonetheless, only represent a partial picture, one that does not reflect the fair trial problems, or at least, potential problems, that arose during the trial.

Why does one have to be scrupulous to ensure fair trials, even for the worst dictators and their henchmen? Judge Pavel Dolenc summarized this persuasively in the case of *Prosecutor v. Ntagerura, Bagambiki, and Imanishimwe*[72] before the International Criminal Tribunal for Rwanda (ICTR) where (in the context of examining indictment defects)[73] he wrote: "In my opinion, the legitimacy and legacy of this Tribunal rests as much on the fairness of the proceedings as on the substance of the Judgments that we deliver. It is only through fair and equitable proceedings that international justice is achieved."[74] This holds equally true for any tribunal attempting to ensure internationally accepted standards of fairness, as the IHT Statute requires of the IHT.[75] It is true that the Anfal trial occurred

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70. *IHT Statute*, *supra* note 34, art. 17.

71. As shown below, there were significant fair trial issues, and appellate review was inadequate. Thus, even as to convictions as to which the evidence appeared to be solid, this article does not necessarily suggest those convictions should stand. The Author also has a few specific criticisms of some of the convictions, which appear to lack findings as to certain elements of the crimes and/or individual criminal responsibility and which are explained in detail by the Author elsewhere. *See* Trahan, *supra* note 1.

72. Prosecutor v. Ntagerura, Bagambiki and Imanishimwe, Case No. ICTR-99-46-T, Trial Chamber Judgment & Sentence (Feb. 25, 2004).

73. These were eloquent words, by a judge who faced a difficult decision. The case involved, *inter alia*, gruesome rape charges, but the Indictment alleged it was soldiers from one camp that committed rape, when, in fact, the facts at trial showed that it was soldiers from the camp where the defendant was in command who committed rape, but because the Indictment charged it incorrectly, the Trial Chamber dismissed the charges. *See* Prosecutor v. Muvunyi, Case No. ICTR-2000-SSA-T, Judgment & Sentence, ¶ 526 (Sept. 12, 2006) (finding Muvunyi not guilty of rape because the Indictment alleged soldiers from Ngoma Camp committed rape, and the evidence at trial was that soldiers from the ESO Camp committed rape).

74. Prosecutor v. Ntagerura, Bagambiki, and Imanishimwe, Trial Chamber, ¶ 5 (Feb. 25, 2004), Separate Opinion of Judge Pavel Dolenc.

75. Article 19 of the IHT Statute reproduces almost identically the fair trial protections contained in Article 14 of the International Covenant on Civil and Political Rights (ICCPR) Article 14. International

while Iraq was undergoing civil war, and the judges had never adjudicated these types of cases before and had been cut-off during Ba'ath Party rule from the significant developments in the field of international justice, including the work of the two ad hoc tribunals. Yet, given that the IHT Statute incorporates internationally accepted fair trial standards, these do appear to be an appropriate benchmark against which to evaluate the trial.[76]

The difficulty regarding the fair trial issues that arose during the trial is that there do not appear to be reasoned decisions resolving them. (Or, if there are, it is unclear where they may be located.) Possibilities include oral resolutions of some issues, or that motion papers may have been marked-up by the judges, with rulings in the margins. It may not have been Iraqi practice to rule upon procedural motions in writing and in detail, but in terms of posterity and convincing the public that the Iraqi High Tribunal was fair (if it was), the judges should have memorialized such decisions in reasoned, written rulings, either finding that there were no fair trial violations, that there were fair trial violations but they did not undermine the outcome, or, potentially, even

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Covenant on Civil and Political Rights art. 14, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR]. *Compare* ICCPR, Article 14 *with IHT Statute*, *supra* note 34, art. 19.

76. Article 19 of the IHT Statute provides:

First: All persons shall be equal before the Tribunal.

Second: The accused shall be presumed innocent until proven guilty before the Tribunal in accordance with this law.

Third: Every accused shall be entitled to a public hearing, in accordance with the provisions of this law and the rules of procedure made hereunder.

Fourth: When bringing charges against the accused pursuant to this Law, the accused shall be entitled to a *fair impartial trial* in accordance with the following minimum guarantees:

A. *To be informed promptly and in detail of the content, nature and cause of the charge against him;*

B. *To have adequate time and facilities for the preparation of his defense* and to communicate freely with counsel of his own choosing and to meet with him in private. The accused is entitled to have non-Iraqi legal representation so long as the principal lawyer of such accused is Iraqi;

C. To be tried without undue delay;

D. To be tried in his presence, and to be *assisted by counsel of his own choosing*, or to be informed of his right to request legal assistance if he cannot afford it; and to have the right to seek such assistance that will allow him to appoint a lawyer without paying the fees;

E. *To have the right to call and examine defense and prosecution witnesses, and to present any evidence in his defense in accordance with the law;*

F. Not to be compelled to confess guilt, and to have the right to remain silent and not to testify without such silence being interpreted as evidence of guilt or innocence.

IHT Statute, *supra* note 34, art. 19 (emphasis added).

vacating parts of the convictions, or reducing sentences, if there were violations.[77] The failure to resolve these issues is one of the two blemishes tarnishing the otherwise noteworthy achievements of the trial.

What are these fair trial issues? The first is the issue of Iraqi Government interference with the judicial panel. The Government removed Presiding Judge Abdallah al-Amiri near the start of the trial and replaced him with Judge Muhammad Uraybi al-Khalifa after Judge Amiri's comment that Saddam Hussein was "not a dictator."[78] This was not done pursuant to any procedures, so it appears wholly political. If it was, it potentially violates the right to a fair impartial trial guaranteed by the IHT Statute.[79] Various de-Ba'athification purges, of the IHT, may also have had an impact on the composition and fairness of the bench.[80]

Second, the charges (both times they were presented before proceedings opened and at the close of the Prosecution's case)[81] were framed only in general terms, and did not detail the individual roles of the defendants.[82] If they were

77. For example, in the ICTR's case Kajelijeli v. Prosecutor, the Appeals Chamber reduced Kajelijeli's sentence in part because it found that his rights were violated during arrest and detention. *See* Kajelijeli v. Prosecutor, Case No. ICTR-98-44A-A, Judgment, ¶ 323 (May 23, 2005) (finding, "he was not promptly informed of the reasons for his arrest or of the provisional charges against him, and . . . he was not promptly granted an initial appearance before a Judge or an official acting in a judicial capacity without undue delay"); *see also* Semanza v. Prosecutor, Case No. ICTR-97-20-A, Judgment, ¶¶ 325–28 (May 20, 2005) (granting a six-month reduction in the sentence for rights violations).

78. *See ICTJ, Update I, supra* note 8, at 13.

79. *IHT Statute, supra* note 34, art. 19.

80. *ICTJ, Update I, supra* note 8, at 3 (suggesting that the interference of the De-Ba'athification Commission and members of the Iraqi legislative branch, including the Prime Minister, compromised judicial independence during the Dujail trial). Michael A. Newton and Michael P. Scharf, in their book recent book—which generally praises the work of the IHT—do admit that the lack of controls regarding how de-Ba'athification was conducted "created a black hole of politicized influence" over the Tribunal. MICHAEL A. NEWTON & MICHAEL P. SCHARF, ENEMY OF THE STATE: THE TRIAL AND EXECUTION OF SADDAM HUSSEIN 101–02 (2008) [hereinafter ENEMY OF THE STATE]. These authors note that there was no oversight mechanism to ensure "that political interests outside the tribunal did not use the de-Ba'athification requirement as a pretext for exercising undue control over the judges and prosecutors." *Id.* at 101.

81. Charges are presented at two stages under Iraqi law: the "qirar al ihala," before proceedings open, and then the "qirar al tuhm," at the close of the prosecution's case. Law on Crim. Proceedings, The Revolutionary Command Council, Law No. 23 of 1971, ¶¶ 131, 181 (Iraq).

82. *See* Int'l Ctr. For Transitional Justice [ICTJ], *The Anfal Trial and the Iraqi High Tribunal Update Number Three: The Defense Phase and Closing Stages of the Anfal Trial*, at 10, http://www.ictj.org/images/content/7/2/726.pdf (last visited Feb. 26, 2009) [hereinafter *ICTJ, Update III*] ("As was the case in *Dujail*, the Tribunal used umbrella charges whereby all of the defendants were charged with the same charges, and were alleged to have perpetrated those crimes through all modes of criminal [responsibility].").

inadequate, that would violate the right "[t]o be informed promptly and in detail of the content, nature and cause of the charge" against each defendant.[83]

Third, investigations were opened regarding two private defense counsel involved in the trial, causing them to flee Iraq,[84] which may have had a chilling effect on defense representation, and/or an impact regarding the two attorneys' clients. Given limited information, it is hard to evaluate if the investigations were properly opened or done to undermine, or send a chilling message to, the defense. At issue is the right to a "fair impartial trial"[85] and the right "to be assisted by counsel of [the defendant's] own choosing."[86]

Fourth, the defendants were barely able to introduce any defense witnesses—only a total of five, four of whom were character witnesses, and one whose testimony does not appear to have been relevant.[87] It is understandable that individuals may have been hesitant to be seen speaking in favor of the defendants and/or may have feared they too could face charges if they came forward to testify.[88] Yet, the optics of having virtually no defense witnesses is clearly problematic. At issue is the right to call and examine defense and prosecution witnesses[89] and the principle of "equality of arms."[90]

Fifth, during the trial, there were times when the defendants and defense counsel boycotted the proceedings.[91] The assigned counsel then asked to represent the defendants were extremely passive. It is unclear whether they were: i) unprepared; ii) afraid, for example, due to threats by Saddam Hussein (while he was still alive); iii) afraid of being seen publicly to defend the defendants; or iv) acting on instructions from their clients. At issue is the right "to be assisted by counsel,"[92] interpreted to require "effective" assistance of counsel.[93] Some have argued vis-à-vis the Dujail trial, that assigned counsel

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83. *IHT Statute*, *supra* note 34, art. 19.

84. *ICTJ, Update III*, *supra* note 82, at 17–18.

85. *IHT Statute*, *supra* note 34, art. 19.

86. *Id.*

87. *See ICTJ, Update III*, *supra* note 82, at 11–12.

88. As to potential witness located outside of Iraq, the IHT's rules allowed for the hearing of testimony by video-link. *See Rules of Procedure and Gathering of Evidence With Regard to the Supreme Iraqi Criminal Tribunal*, Al-Waqa'I Al-Iraqiya, OFFICIAL GAZETTE OF THE REPUBLIC OF IRAQ, No. 4006, Oct. 18, 2005, R. 57 (the Trial Chamber has the power to hear evidence submitted "via such media communications, including video or satellite channels, and as the Tribunal may order."). Yet such video-linked testimony was not utilized.

89. *IHT Statute*, *supra* note 34, art. 19.

90. *Id.* ("All persons shall be equal before the Court.").

91. *ICTJ, Update I*, *supra* note 8, at 6.

92. *IHT Statute*, *supra* note 34, art. 19.

93. *See* Nahimana, Barayagwiza & Ngeze v. Prosecutor, Case No. ICTR-99-52-A, Judgment, ¶ 130 (Nov. 28, 2007) ("The Appeals Chamber has for long recognized . . . the right of an . . . accused to be

were ably assisted by an international defense lawyer, a Canadian, so there was in fact effective assistance.[94] It is, however, unclear why representation behind the scenes should be treated as the equivalent of effective assistance in court.[95]

Sixth, the defendants appear to have made a huge number of motions to the Trial Chamber, which, as best as can be determined, never received articulate, reasoned responses. The right at issue is the right to a fair and impartial trial[96] and the right to an appeal[97]—since it is extremely hard to appeal motions that were (presumably) denied but as to which reasoned written responses are lacking.

Seventh, as discussed below, the requirement that appeal papers be filed within thirty days of the Trial Chamber verdict regarding a trial of the size and complexity of the Anfal trial was palpably inadequate. At issue is the right "[t]o have adequate time and facilities for the preparation of [the] defense."[98]

Eighth, also as discussed below, the Cassation Chamber Judgment appears so lacking in analysis of legal and factual issues that it hardly constitutes a reasoned decision, potentially nullifying the right to an appeal.[99]

The lack of reasoned rulings on all of these issues was a missed opportunity by the Trial Chamber judges to demonstrate that they ruled fairly on these, or at least some of these, issues. The failure was compounded when the Cassation Chamber never seriously addressed fair trial issues.[100] All this, of course, leads to the critical question of whether the convictions (well-reasoned as they, for the most part, appear to be in the Trial Chamber judgment) ought to stand. For example, at the International Criminal Tribunal for the former Yugoslavia (ICTY) and the ICTR, if the charges were never adequately presented (with material facts supporting them), and if the defects were not deemed "cured" (for example, through the prosecution's pre-trial brief or opening statement),[101] then defective charges or convictions are stricken or

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represented by competent counsel."). For application regarding the right to effective legal assistance, see *id.* ¶¶ 117–28, 130–69.

94. ENEMY OF THE STATE, *supra* note 80, at 222, 230 (Newton and Scharf making this argument).

95. As to the Dujail trial, it appears that the international defense advisor only commenced his work several months into that trial. Author interview with Nehal Bhuta (Oct. 31, 2008).

96. *IHT Statute*, *supra* note 34, art. 19.

97. ICCPR, *supra* note 75, art. 14.5 ("Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.").

98. *IHT Statute*, *supra* note 34, art. 19.

99. *See id.* art. 25 (providing for appeals); *see also* ICCPR, *supra* note 75, art. 14.5 (providing for the right to an appeal).

100. The Cassation Chamber Judgment devoted one superficial paragraph to three fair trial issues, addressing none sufficiently.

101. Both the ICTY and ICTR have recognized that information set forth in the prosecution's opening statement as well as the prosecution's pre-trial brief may be considered in determining whether a

vacated.[102] The IHT, by contrast, appears not to perform this analysis of the charges at all, even though the right "[t]o be informed . . . in detail of the content, nature and cause of the charge against [the defendant]"[103]—the same right pursuant to which the ICTY and ICTR perform this type of analysis—is contained in the IHT's Statute.[104] Neither did the Cassation Chamber judges give any serious consideration to this, or any other, fair trial issue.[105]

IV. THE CASSATION CHAMBER (APPEAL) JUDGMENT

The second huge defect of the trial lies in the Cassation Chamber Judgment, which suggests that appellate review was wholly inadequate. First, as mentioned above, the timing of providing the defendants, after this extremely complex trial and very lengthy Trial Chamber judgment, only thirty days to file their appeals papers was palpably inadequate. Second, the quality of the Cassation Chamber judgment does not suggest that there was any serious legal review.

It is true that one cannot necessarily conclude too much about the merits of a decision based on its length,[106] but one can conclude something. Here, there was a 963-page Trial Chamber decision, concerning numerous convictions for three crimes based on a panoply of underlying crimes involving five defendants pertaining to various (not always clearly identified) forms of individual criminal responsibility, with a panoply of fair trial issues. One is hard-pressed to imagine how all of this could have been adequately addressed

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defect in the indictment has been "cured" through subsequent timely, clear, and consistent information. *See, e.g.*, Prosecutor v. Kvocka, Radic, Zigic, & Prcac, Case No. IT-98-30/1-A, ¶¶ 44–46 (Feb. 28, 2005) (considering the pre-trial brief and prosecutor's opening statement); Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-A, ¶¶ 140, 169 (Dec. 17, 2004) (indictment supplemented by the prosecution's pre-trial brief; information contained in an opening statement of the prosecution may cure a defective indictment).

102. "If insufficient notice has violated the accused's right to a fair trial, no conviction may result." Prosecutor v. Brima, Kamara, & Kanu, Case No. SCSL-04-16-T, ¶ 47 (June 20, 2007) ("the AFRC Judgment"); *Kordic & Cerkez*, Case No. IT-95-14/2-A, ¶ 142 ("if an indictment is insufficiently specific, such a defect 'may, in certain circumstances cause the Appeals Chamber to reverse a conviction.'").

103. *IHT Statute*, *supra* note 34, art. 19.

104. There is some tension contained in the IHT Statute which simultaneously suggests that Iraqi Procedural rules will apply, *see id.* art. 16, and incorporates internationally accepted fair trial standards, *see id.* art. 19.

105. The Cassation Chamber Judgment cursorily dismissed challenges regarding the legitimacy of the Tribunal, the lack of defense witnesses and experts, and the adequacy of the charges, in a few sentences each.

106. Michael Newton and Michael Scharf make this argument in criticizing Human Rights Watch for being critical of the seventeen page length of the Dujail appeal verdict. *See* ENEMY OF THE STATE, *supra* note 80, at 192–93.

in the twenty-eight page judgment issued by the Cassation Chamber. Indeed, it was not.

The Cassation Chamber decision primarily: recites the convictions against each defendant; lists some, but not all, of the arguments raised on appeal by the defendants; and recites what appear to be the Trial Chamber's conclusions as to the role each defendant played with respect to the Anfal campaign (without analyzing issues of individual criminal responsibility). It also mentions some of the elements of the crimes, either parts of the "chapeau" and/or underlying crimes (but with no analysis as to whether the elements were satisfied or not).[107] The Cassation Chamber decision does not: i) seriously grapple with procedural and/or fair trial challenges; ii) examine the elements of any of the crimes and whether or not they were proven; iii) examine the elements of individual criminal responsibility and whether or not it was proven; iv) respond to a plethora of the defendants' arguments raised on appeal; or v) examine whether the sentences were properly imposed—for example whether Sultan Ahmad and Hussein Rashid, if they were "aiders and abettors" of genocide[108]—should have received the death penalty. These are no trivial flaws.

It may not have been past practice in Iraq to render lengthy written decisions, but when: i) a statute incorporates the fair trial protections of the International Covenant on Civil and Political Rights (ICCPR) as the IHT Statute does; ii) a tribunal wants to establish that it stands for respect for the rule of law following on the heals of a regime that did not respect it; iii) the crimes are extremely serious, involving an estimated 182,000 victims who deserve to have a real accounting of what occurred; and iv) the punishments available are as serious as the death penalty and life in prison, there is clearly a need for a seriously reasoned written opinion at both the trial and appellate levels. The lack of serious appellate review that is suggested by the Cassation Chamber Judgment may rise to the level of a violation of the right to review by a higher tribunal.[109]

V. CONCLUSION

To summarize, first, there can be no doubt that horrific crimes were committed as part of the Anfal campaign. There was convincing eye-witness

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107. *See generally Cassation Chamber Judgment, supra* note 5.

108. The Author does not mean to suggest that aiding and abetting genocide is not an extremely serious crime; rather, that aiding and abetting is generally seen as a lesser form of responsibility for sentencing purposes. *See Brdanin, supra* note 65.

109. The right to review by a higher tribunal has been construed to require a "genuine review of the issues in the case." Amnesty Int'l USA [AIUSA], *The Right to Appeal, Fair Trials Manual: Genuine Review*, at 26.3, *available at* http://www.amnestyusa.org/international-justice/the-right-to-a-fair-trial/page.do?id=1104744 (last visited Feb. 24, 2009).

testimony presented at trial as to the crimes, persuasive documentary evidence was introduced, and Majid's own intentions were captured on audio-tape played at trial; this was an inherently strong case. Second, the Trial Chamber judges persuasively marshaled this evidence and generally matched it to the elements of the crimes fairly well, analyzing the "chapeau" of the three crimes at issue as well as each underlying crime as to each defendant. While the judges were somewhat opaque about what form of individual criminal responsibility they found, as to each defendant, that linkage generally appears to be present.[110] Third, the Trial Chamber does not appear to take fair trial issues seriously enough or has not created a reasoned, written record of having done so. Fourth, the Cassation Chamber does not appear to take appellate review seriously at all, or so one might conclude from review of the Cassation Chamber Judgment.

One should not be unmindful of the serious difficulties of starting up a tribunal, particularly during a period of civil war, and suddenly demanding that the judges adjudicate extremely complex crimes and forms of individual criminal responsibility, while adhering to internationally accepted fair trial standards. The IHT judges had a hugely challenging task handed to them, and they acted bravely to even adjudicate these cases at all, at no small personal risk to themselves.[111] Credit should be given to them where it is due, but also criticism where it is warranted. If the IHT is to be seen as a credible institution (and the jury is still out as this assessment is rather a mixed verdict), it will have to improve.

110. A full analysis of individual criminal responsibility can be found in Trahan, *supra* note 1. It appears that as to most crimes, the IHT found what is referred to as a "type 1" joint criminal enterprise. As to a few crimes, it appears to have found a "type 3" joint criminal enterprise. As to the genocide convictions other than Majid's it should have found "aiding and abetting" responsibility.

111. There were five IHT-related fatalities during the Dujail trial alone. *See* DUJAIL: TRIAL AND ERROR?, *supra* note 2, at 8.