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## **The Iraqi High Tribunal and Representation of the Accused**

### **A Human Rights Watch Briefing Paper**

Since October 19, 2005, Saddam Hussein and seven other former Iraqi officials have been on trial for crimes that took place in the town of al-Dujail in 1982. Government security forces allegedly detained and tortured hundreds of individuals from al-Dujail in retaliation for an assassination attempt on Saddam Hussein as his motorcade passed through the town, sixty kilometers north of Baghdad. One hundred and forty-eight individuals were allegedly executed as part of the attack on al-Dujail. The defendants are charged with crimes against humanity in relation to these events and are being tried in Baghdad before the Iraqi High Tribunal (“the Tribunal”).

At a court session on January 29, 2006, defendant Barzan al-Tikriti was removed from the court for disruptive conduct. A defense lawyer for Saddam Hussein rose to object and a heated exchange with the new Chief Judge Raouf Abdel Rahman followed. The exchange ended with the defense lawyer being ejected from the courtroom, and the defense lawyers for Barzan al-Tikriti, Saddam Hussein, Taha Yassin Ramadan and Awad al-Bandar then walked out in protest.

The court immediately appointed four new lawyers from the Tribunal’s Defense Office (who appear to have been waiting in a room next to the courtroom) in place of these four defendants’ counsel of choice. The defendants have rejected these lawyers, and refuse to instruct them or attend court. For their part, the chosen defense counsel for the defendants declared that they will not return to court until certain demands are met.

These dramatic developments bring the Tribunal to a critical juncture. Its independence is already under a cloud due to the resignation of Judge Amin, and the controversial removal of his deputy Judge Al-Hammashi due to the intervention of the National De-Baathification Commission.

With a new chief judge and in light of concerns about the Tribunal's independence, the court must move forward in a way that shows a full commitment to the defendants' fair trial rights and its own impartiality.

This briefing sets out some of the legal principles relevant to recent developments at the Tribunal.

## **The Right to a Lawyer of One's Own Choosing**

A fundamental fair trial guarantee is the right to defend oneself through legal counsel of one's own choosing.<sup>1</sup> Obviously, limited resources often mean that a defendant in a criminal case cannot always choose his or her own lawyer. But where a defendant can and does choose his or her own lawyer, that choice must be respected in all but the most exceptional circumstances. Imposing a lawyer on a defendant against the defendant's will raises a serious risk that the trial will be unfair and violate the defendant's rights. Special steps need to be taken to guard against this risk.

The right of a defendant to choose his or her own lawyer (provided he or she has the means to pay the lawyer or the lawyer works for free) is strongly protected because an effective defense requires a relationship of trust and confidence between a defendant and his or her lawyer.<sup>2</sup> If a defendant does not trust his or her lawyer and refuses to instruct him or her, it is very difficult for a lawyer to adequately represent the defendant. In some cases before international courts, lawyers whose clients refused to instruct them have asked the court to allow them to resign because they could not fulfill their professional duties under such conditions.<sup>3</sup>

At the same time, the right is not absolute: every lawyer is bound by the legal professional ethics code of the country they are working in, and serious violations of this code or other laws might lead a court to refuse to allow a lawyer to represent the defendant, even if the lawyer was freely chosen by the defendant. But widely accepted principles also require that a court not refuse to recognize a lawyer's right to represent

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<sup>1</sup> International Covenant on Civil and Political Rights (ICCPR), art. 14(3)(d). Iraq ratified the ICCPR in 1971 and is bound by it.

<sup>2</sup> *Prosecutor v. Nyiramasuhuko and Ntahobali*, Decision on Ntahobali's Motion for Withdrawal of Counsel, June 22, 2001 (International Criminal Tribunal for Rwanda, "ICTR").

<sup>3</sup> This occurred in the Milosevic case, and in certain cases before the Special Court for Sierra Leone.

someone, unless the lawyer has been “disqualified in accordance with national law and practice and in conformity with these principles.”<sup>4</sup>

Iraqi law requires that lawyers practicing in Iraqi courts must be respectful towards the court and not obstruct the course of justice or cause unreasonable delays.<sup>5</sup> The Iraqi code of legal professional ethics states that lawyers must appear in court on the set dates, should not try to delay the resolution of a case and must facilitate the task of the judge.<sup>6</sup> In the al-Dujail case, the defendants’ lawyers’ statement that they would boycott the case unless certain demands are met (such as the resignation of the new Chief Judge) would appear to contravene their professional obligations under Iraqi law.

Iraqi law allows a judge to appoint a lawyer to the defendant for the session that the defendant’s own lawyer does not appear.<sup>7</sup> But Iraqi law is silent on whether a court can dismiss the defendant’s chosen lawyer altogether. Disciplinary proceedings (such as disqualification) against lawyers are taken through the Iraqi Bar Association.<sup>8</sup> Iraqi practice requires that, in principle, the defendant’s wishes must be considered if the court appoints a lawyer to him.<sup>9</sup>

In international criminal tribunals, courts have disallowed a defendant’s chosen counsel if the lawyer has previously been convicted of contempt of court,<sup>10</sup> or the lawyer has failed to turn up more than once to a court hearing without a valid excuse.<sup>11</sup> When a new lawyer is appointed as a replacement, the courts have emphasized the importance of taking into account the defendant’s wishes about who should represent him or her. Once again, this is because a defendant’s willingness to trust his or her lawyer is essential to effective legal representation.

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<sup>4</sup> Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27 to September 7, 1990, art. 19.

<sup>5</sup> Law of the Legal Profession, No. 173 of 1965, art. 50.

<sup>6</sup> Lawyer’s Professional Code of Conduct, June 16, 1987, art. 9 (Annexed to the Law of the Legal Profession).

<sup>7</sup> Code of Criminal Procedure, No. 123 of 1971, art. 144.

<sup>8</sup> Law of the Legal Profession, arts. 108-122.

<sup>9</sup> Human Rights Watch interview with Judge Luqman Thabet Al-Samarra’i, President, Central Criminal Court of Iraq, Baghdad, November 27, 2005.

<sup>10</sup> *Prosecutor v. Kunarac, Kovac and Vukovic*, Decision on the Request of the Accused Radomir Kovac to Allow Mr. Milan Vujin to Appear as Co-Counsel Acting Pro-Bono, March 14, 2000 (International Criminal Tribunal for the Former Yugoslavia, “ICTY”).

<sup>11</sup> *Prosecutor v. Akayesu*, Decision Concerning Replacement of an Assigned Defense Counsel, October 31, 1996 (ICTR); *Prosecutor v. Musema*, Decision to Withdraw Assigned Counsel, November 18, 1997 (ICTR).

Overall, disallowing a defendant's self-funded choice of counsel is a drastic step and should be a last resort where there is no other way to safeguard the proceedings. The European Commission on Human Rights has pointed out that excluding a defense lawyer who is chosen by the defendant "may intimidate other potential defense counsel or cast discredit on the defense in general ... [A] succession of defense lawyers may be damaging to the presentation of the case and introduce great uncertainty into the [lawyer's] role as the watchdog of procedural regularity."<sup>12</sup>

Of course, lawyers cannot be allowed to obstruct proceedings. But a court also has to consider whether other measures are available to discipline a defendant's chosen lawyers short of barring them from the courtroom. If the court does dismiss the defendant's lawyers, it should give a defendant the option of selecting new lawyers of his or her own choice, and consider whether these new lawyers need further time to prepare the case.

### **Imposing a Lawyer Against the Will of a Defendant**

What if the court disallows the defendant's chosen lawyer and the defendant rejects any other lawyer appointed by the court? International fair trial guarantees allow a lawyer to be appointed to a defendant "where the interests of justice so require."<sup>13</sup> Courts have sometimes imposed a lawyer against the will of a defendant, as a last resort, in order to assist the court and ensure that the defendant's interests are properly represented.

International criminal tribunals have decided that, in some cases, "the interests of justice" dictate that the defendant *must* be represented by an experienced lawyer in order to make sure the defendant receives a fair trial.<sup>14</sup> A competent and experienced lawyer assists not only the defendant, but also the court, by ensuring all possible defenses and legal issues are fully argued, and that the trial is efficient.

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<sup>12</sup> *G. Ensslin, A. Baader and J. Raspe v. Federal Republic of Germany*, App. No. 7572/76, 7586/76 & 7587/76, Decision of July 8, 1978, para. 20.

<sup>13</sup> ICCPR, art. 14(3)(d).

<sup>14</sup> *Prosecutor v Barayagwiza*, Decision on Defense Counsel Motion to Withdraw, 2 November 2000 (ICTR); *Milosevic v Prosecutor*, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, November 1, 2004 (confirming power of court to impose counsel but overruling decision to do so) (ICTY); *Prosecutor v Norman, Fofana and Kondewa*, SCSL-2004-14-T, Decision on the Application of Samuel Hinga Norman for Self-Representation under Article 17(4)(d) of the Statute of the Special Court, June 8, 2004 (Special Court for Sierra Leone); *Prosecutor v. Sesay, Kallon and Gbao*, July 6, 2004, Decision on Application to Withdraw Counsel; affirmed on appeal, *Gbao – Decision on Appeal Against Decision on Withdrawal of Counsel*, November 23, 2004 (Special Court for Sierra Leone); *Croissant v Germany*, 13611/88, September 25, 1992, para.29 (European Court of Human Rights).

Nevertheless, imposing a lawyer against the will of a defendant also carries very serious risks. The presence of a defense lawyer in the court room may help a trial *look* fair, but if the defendant refuses to instruct the lawyer and does not trust him or her, then the trial may still be unfair because an effective defense is impossible. Also, the lawyer appointed by the court must have sufficient expertise and experience to provide an effective defense for the kinds of crimes charged, and must be independent enough to vigorously defend a client who rejects his or her assistance.

So, when the court takes the step of appointing a lawyer against the defendant's will, it becomes the guardian of the defendant's fair trial right to effective legal assistance.<sup>15</sup> In other words, the court takes on the burden of ensuring that the defense lawyer mounts an effective and competent defense. A court has to keep in mind that the lawyer might be acting without cooperation from his or her client.<sup>16</sup> This might mean that the court has to be proactive to make sure the defense lawyer thoroughly responds to the charges against the defendant.

A court also has to ensure that the defense lawyer appointed in the middle of a trial has sufficient expertise and has had adequate time to prepare the case, even if this means additional delays. This is a particular challenge for the trials at the Iraqi High Tribunal.

While the Iraqi High Tribunal is an Iraqi court, it is hearing international criminal law charges against the defendants. These are complex and lengthy cases, which are a challenge to any legal system. As one international criminal law expert points out, "the gamut of legal skills used in ordinary domestic criminal cases is insufficient for the trial of an accused war criminal. Defense counsel must be fluent in substantive and procedural aspects of international humanitarian law, comparative law, and trial and written advocacy skills ... [M]ounting a defense to an international crimes charge has proven quite daunting ..."<sup>17</sup>

The Iraqi legal profession's thirty-year isolation from developments in international criminal law means that even senior Iraqi criminal lawyers have no experience in such cases and almost no knowledge of substantive international criminal law.

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<sup>15</sup> *Daniel Pinto v. Trinidad & Tobago*, Communication 232/1987, July 18, 1989, para. 12.5; *Wright and Harvey v. Jamaica*, Communication 459/1991, October 27, 1995, para. 10.5; *Kelly v Jamaica*, Communication 250/1987, para. 11.4 (United Nations Human Rights Committee).

<sup>16</sup> *Gbao – Decision on Appeal Against Decision on Withdrawal of Counsel*, November 23, 2004 (Special Court for Sierra Leone), para. 52.

<sup>17</sup> Michael Scharf, *Self-Representation versus Assignment of Defense Counsel before International Criminal Tribunals*, Case Research Paper Series in Legal Studies, October 2005, p.10.

An Iraqi defendant is fully entitled to choose an Iraqi lawyer who does not have expertise in international criminal law: this is the exercise of his or her right to legal assistance of his or her own choice. But if the court imposes a lawyer on a defendant against his or her will, it assumes a degree of responsibility for the competence of the lawyer.

Lawyers working for the Tribunal's Defense Office ("Defense Office") stated to Human Rights Watch in October 2005 that they had received one or two training sessions in international criminal law and procedure. As of October 2005, the Defense Office was not fully functional and only a handful of lawyers had been appointed and given this limited training. It is questionable whether the new lawyers recruited by the Defense Office between October 2005 and the present have been adequately trained.

From its observation of trial proceedings between October and December 2005, Human Rights Watch has real concerns about the capacity of Defense Office lawyers to effectively defend their clients, given the lack of training. Although two defendants in the al-Dujail trial were represented by Defense Office lawyers since the beginning of the trial, these defense lawyers were completely passive in court and did not ask a single question of witnesses, at any session between October 19, 2005 and January 29, 2005. One of these lawyers stated to Human Rights Watch in October 2005 that he had not met with his client, even though he had been appointed a month earlier.

It is also doubtful that the defense lawyers appointed for the defendants on January 29, 2006, have had adequate time to prepare their clients' defense. The Defense Office received copies of the trial dossier at the same time as the defendant's chosen lawyers. However, being in receipt of documents, and being actively engaged in the preparation of a defendant's case – in consultation with the defendant – are quite different things. Simply following the proceedings on video and reading the case file do not amount to adequate preparation for the defense of a lengthy trial for crimes against humanity.

## **Conclusion**

The Tribunal faces a critical situation. If the defendants' chosen counsel continue to refuse to appear in court, the Tribunal might well conclude that the lawyers are seeking to obstruct the proceedings and take disciplinary action against them. However, firing a defendants' chosen counsel should be a last resort and cannot be allowed to jeopardize the fairness of the proceedings. Sanctions short of dismissal need to be explored.

If the Tribunal does dismiss the defendants' lawyers, each defendant must be given a chance to nominate new counsel of their own choosing. Should they reject any other lawyers, including court-appointed lawyers, the Tribunal – acting in the “interests of justice” – can appoint lawyers against the defendants' will, but the court then takes on a new burden: it must superintend the competence and diligence of the lawyers, to ensure that the defendants' fair trial guarantees are protected. The Tribunal also has to make sure that any new lawyers have adequate time to prepare their cases – even though this could result in delays.

A trial without a vigorous and properly prepared defense will not only violate basic fair trial guarantees; it will look like a sham. In the insecurity and political uncertainty that characterizes Iraq at the moment, the Iraqi High Tribunal cannot afford an unfair trial, nor even the perception of it, if it is to redeem its promise to provide justice and not vengeance.