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After Saddam Hussein's Trial Begins, What Restrictions, If Any, Can The Supreme Iraqi Criminal Tribunal Place On Both Hussein And His Defense Counsel To Prevent Or Punish Statements Made In Or Out Of Court Inciting The Insurgency In Iraq?

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MEMORANDUM FOR
THE SUPREME IRAQI CRIMINAL TRIBUNAL

ISSUE:

AFTER SADDAM HUSSEIN'S TRIAL BEGINS, WHAT RESTRICTIONS, IF ANY, CAN THE SUPREME IRAQI CRIMINAL TRIBUNAL PLACE ON BOTH HUSSEIN AND HIS DEFENSE COUNSEL TO PREVENT OR PUNISH STATEMENTS MADE IN OR OUT OF COURT INCITING THE INSURGENCY IN IRAQ?

Prepared by Nicolette Lee
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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Issues[1]

On December 20, 2004, NBC Nightly News reported that Khaleel Abood Saleh Aldelami, Saddam Hussein's lawyer, made comments that "Saddam praised the resistance in Iraq, and he said the Iraqi people should resist the U.S. occupation in Iraq."[2] This memorandum examines whether the Supreme Iraqi Criminal Tribunal ("SICT" or "Tribunal")[3] can place any restrictions or enforce any punishments against either Saddam Hussein or his attorneys for making such comments during his impending trial, either to the press or in the courtroom.

B. Summary of Conclusions

1. The Supreme Iraqi Criminal Tribunal Can Place Restrictions on Hussein's Speech by Invoking its Inherent Power of Contempt

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[1] *See* E-mail from Eric H. Blinderman, Chief Legal Counsel, Regime Crimes Liaison Office, to Michael Scharf, Professor and Director, Frederick K. Cox International Law Center, Case Western Reserve University School of Law, IST Research: Additional 1st Question (Aug. 29, 2005, 15:46 EST) (on file with author). The focus of this paper derives from the E-mail, which states:

> Members of the defense team of Saddam Hussein frequently make statements to the international press which they attribute to their client. These statements often call on members of the insurgency to continue in their operations in Iraq and further incites [sic] violence. What restrictions can the Tribunal place on both the defendant (during trial) and his defense counsel to prevent the release of such statements? Is it consistent with international human rights law for the Tribunal to place a "gag order" on the defendant or his counsel? Can the Tribunal sanction the defendant or his counsel (either monetarily or with penal sanction) without violating international human rights law? In answering this question, please balance the legitimate needs of security against the equally legitimate needs for the Tribunal process to be open and fair and for the defendant to exercise his right to free speech granted to him by various international instruments.

[2] Transcript of NBC Nightly News, *Saddam Hussein's Lawyer's Impressions of Him After Their First Meeting*, Dec. 20, 2004, 18:30 EST, *available at* LEXIS, News & Business, News, All. [Reproduced in the accompanying notebook at Tab 86]. The news transcript identifies the lawyer as "Khalil al-Duleimi," which is most likely a misspelling. "Khaleel Abood Saleh Aldelami," the name listed on the Iraqi Special Tribunal website will be used here. Iraqi Special Tribunal, Defense Counsels of Record, http://www.iraq-ist.org/en/defense/counsel.htm (last visited Oct. 8, 2005) [Reproduced in the accompanying notebook at Tab 75].

[3] The Iraqi Special Tribunal (hereinafter "IST") was renamed the Supreme Iraqi Criminal Tribunal under a new law which was passed but not yet promulgated. HUMAN RIGHTS WATCH, THE FORMER IRAQI GOVERNMENT ON TRIAL: A HUMAN RIGHTS WATCH BRIEFING PAPER 3-4 n.8, *available at* http://hrw.org/backgrounder/mena/iraq1005/iraq1005.pdf (Oct. 16, 2005) [Reproduced in accompanying notebook at Tab 79]. In this paper, the Tribunal will be referred to by its new name; however, names of old statutes which refer to the IST will not be changed.

Article 19 of the International Covenant on Civil and Political Rights confers upon every individual the right to freedom of expression through any medium of his choice.[4] But, the right to free speech is not unlimited. Article 19(3) provides that free speech can be subject to certain restrictions if they are provided by law and necessary for the protection of the rights or reputations of others or for the protection of national security, public order, or public morals.[5] As a judicial body, the Tribunal has the ability to restrict speech via its inherent contempt powers in order to protect the administration of justice.

If Hussein makes comments or causes his lawyers to make comments to either the press or to the courtroom inciting the insurgency, the Tribunal will be able to restrict his speech without violating Article 19 of the ICCPR. First, if the Tribunal invokes its contempt power to restrict Hussein's speech, the restriction will be provided by law. Second, the restriction will be necessary in the new democratic society of Iraq. Despite the fact that Hussein's encouragement to crime is general, the surrounding circumstances, including his former position as the leader of Iraq and the increasing violence committed by the insurgency, make it likely that Hussein's speech will in fact incite violence.

Because national security is vital to the success of a new democracy like Iraq, restricting Hussein's speech will satisfy a pressing social need. Nevertheless, the Tribunal must assure that its restrictions on speech are proportionate to the threat, but since the threat of violent insurgency is so great, the Tribunal will have some leeway in imposing restrictions. Ultimately, then, speech from either Hussein or his attorneys inciting insurgency can be justifiably restricted via the contempt power of the Tribunal.

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[4] International Covenant on Civil and Political Rights, Dec. 19, 1996, 999 U.N.T.S. 171, art. 19(2), *entered into force* March 23, 1976 (hereinafter "ICCPR") [Reproduced in accompanying notebook at Tab 12].

[5] *Id.* at art. 19(3).

2. The Supreme Iraqi Criminal Tribunal Can Place Restrictions on Hussein's Lawyers' Speech by Invoking its Inherent Contempt Power

The IST Rules of Procedure and Evidence require defense counsel to zealously represent the accused[6] but still abide by the codes of practice and ethics governing their profession.[7] More specifically, the International Bar Association's ("IBA") International Code of Ethics requires lawyers to maintain the honor and dignity of their profession at all times, even in their private lives, [8] to maintain due respect towards the court,[9] and to never knowingly violate the law in defense of a client.[10] Many state bar associations have similar requirements.[11]

If Hussein's lawyers make comments inciting the insurgency either in the courtroom or out of the courtroom, the Tribunal will have the ability to restrict such comments via its inherent contempt power. If Hussein's speech can be permissibly restricted in contempt of court

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[6] IST R. PROC. & EVID. 49, *available at* http://www.iraq-ist.org/en/laws/rules.htm (hereinafter "IST Rules of Procedure and Evidence") [Reproduced in the accompanying notebook at Tab 14].

[7] *Id.* at Rule 48.

[8] International Bar Association, *International Code of Ethics*, Rule 2, *first adopted in* 1956 (1988) [Reproduced in accompanying notebook at Tab 10].

[9] *Id.* at Rule 6.

[10] *Id.* at Rule 10.

[11] *See, e.g.*, Israeli Bar Association, *Bar Association Rules (Professional Ethics)*, ch. 2 (1986), *available at* http://www.israelbar.org.il/english_inner.asp?pgId=10166&catId=372 ("An advocate shall represent his client loyally, faithfully and fearlessly. He shall at the same time preserve full integrity, professional honor and the respect for the Court) [Reproduced in accompanying notebook at Tab 15]; The Law Society of England and Wales, *Solicitors' Practice Rules of 1990*, at Rule 1, *last amended* Feb. 9, 2005, *available at* http://www.lawsociety.org.uk//documents/downloads/Profethics_PracticeRules.pdf (requiring a solicitor not do anything which impairs her independence or integrity, her duty to act in the best interests of the client, or her duty to the Court) [Reproduced in accompanying notebook at Tab 18]; The Bar Association of Yugoslavia, *Codex of Professional Ethics of Attorneys-at-Law*, at Rule 15-17 (1999), *available at* http://www.advokatska-komora.co.yu/english/act/codex.pdf (requiring an attorney to act professionally, abide by the law, and dedicate himself fully to the case at hand) [Reproduced in accompanying notebook at Tab 4].

proceedings, then likewise, Hussein's lawyers can also be restricted for uttering the speech on Hussein's behalf. Although lawyers have a duty to protect the rights of their client by speaking on his behalf, lawyers do not have the right to break the law in doing so. Also, lawyers, unlike criminal defendants, have a special duty to maintain the honor and dignity of their profession. Hussein's lawyers will have violated this duty if they make comments either to the media or to the court encouraging the insurgency, knowing such comments are likely to lead to increased violence in Iraq. As a result, comments Hussein's lawyers make during the pendency of trial encouraging the insurgency in Iraq can be permissibly restricted by the Tribunal pursuant to its inherent contempt power.

3. The Tribunal's Best Option for Limiting Hussein and his Lawyer's Speech is to Impose a "Gag Order" or Prior Restraint on Speech, But It Should Do So With Caution

Because of its overriding interest in protecting the administration of justice, the Tribunal will be able to restrict speech from either Hussein or his attorneys which attempts to incite the insurgency in Iraq pursuant to the Tribunal's inherent contempt powers. Any restriction on speech must meet the requirements of necessity and proportionality under Article 19 of the ICCPR and subsequent case law. Also, whether a particular option for restricting speech is appropriate will ultimately depend upon the result the Tribunal is seeking to achieve.

Hussein's lawyers' encouragement of the insurgency in Iraq would violate their professional duty; therefore, the Tribunal could ask the Iraqi Bar Association to bring disciplinary proceedings against them. Alternatively, the Tribunal may be able to bring disciplinary proceedings against the attorneys themselves. Even if the Tribunal did have the

power to bring disciplinary proceedings, however, such proceedings would not immediately prevent Hussein or his lawyers from inciting insurgency.

Sanctions, on the other hand, may be more effective in deterring future incitement because the Tribunal can impose them *sua sponte* during contempt proceedings pursuant to its general contempt power.[12] With sanctions, however, the principle of proportionality must be closely protected because courts are extremely wary of the chilling effect that sanctions might have on future speech.[13] In addition, as the former head of state, Hussein may not be easily deterred by a mere monetary fine, despite the fact that his known assets were seized by U.S. officials at the end of the war.

In the end, the Tribunal's best option for preventing future incitement of the insurgency during the trial is to place a "gag order" or other prior restraint on speech on Hussein or on his defense counsel, or both. Again, courts have the power to impose prior restraints on speech pursuant to their inherent contempt power.[14] But, most legal systems recognize that prior restraints on speech are extremely dangerous because they silence speech completely and therefore strongly erode an individual's right to free speech.[15] Still, there are circumstances, even under the more stringent U.S. standards, in which prior restraints on speech are permissible. In this case, in which the security of the nation is threatened by the speech in question and the other methods of restraining speech are unlikely to deter the dangerous speech, the Tribunal

[12] *See infra* note 200 and accompanying text.

[13] *See, e.g.*, Nikula v. Finland, [2002] ECHR 31611/96, at ¶ 54 ("It follows that it should be primarily for counsel themselves, subject to supervision by the bench, to assess the relevance and usefulness of a defense argument without being influenced by the potential 'chilling effect' of even a relatively light criminal sanction or an obligation to pay compensation for harm suffered or costs incurred.") [Reproduced in accompanying notebook at Tab 37].

[14] *See infra* note 210 and accompanying text.

[15] *See infra* note 211 and accompanying text.

should be able to place a prior restraint on either Hussein or his counsel's speech in order to prevent increased violence among insurgents.

II. FACTUAL BACKGROUND

Prior to being captured and charged before the SICT, Saddam Hussein ("Hussein") made an apparent call to arms on an Arab television station broadcast. He brought his fellow insurgents "good tidings that resistance and jihad cells have been formed on a wide scale inside Iraq and they are fighting the enemy and the occupation."[16] He called on citizens of Iraq "to provide cover for the heroic mujahidin and not to give the infidel invaders and their collaborators any information about them and their activities."[17] Later, when Hussein made his first appearance before an Iraqi judge, he seemed defiant, claiming that "this is all theatre by Bush to help him with his election campaign. The real criminal is Bush."[18]

Meanwhile, Hussein's lawyers[19] have been publicly making comments inciting insurgency, which they attribute to their client. In July 2004, former defense panel member Hussain Mjali, chairman of the Jordanian Bar Association, said he believed "there should be an attack team, not a defence team. We should attack those who stole Iraq, and want to eradicate its nationalists."[20] At the end of the year, NBC Nightly News reported that Khaleel Abood Saleh

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[16] Tim Reid, *Saddam Tape Battle Cry to Iraqi People*, TIMES (London), July 5, 2003, at 1, *available at* LEXIS, News & Business, News, All [Reproduced in the accompanying notebook at Tab 83].

[17] *Id.*

[18] *Key Excerpts from Saddam in Court*, BBCNEWS.COM, July 2, 2004, http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/middle_east/3858919.stm (last visited Oct. 8, 2005) [Reproduced in the accompanying notebook at Tab 80].

[19] In August 2005, Hussein fired all but one of his lawyers, Khaleel Abood Saleh Aldelami, who now serves as Hussein's sole legal counsel. Associated Press, *Iraqi Court: Saddam Fires Lawyers*, FOXNEWS.COM, Aug. 24, 2005 [Reproduced in accompanying notebook at Tab 72]; Iraqi Special Tribunal, *Defense Counsels of Record*, *supra* note 2 [Reproduced in accompanying notebook at Tab 75].

[20] Ahmed Janabi, *Saddam's Trial Divides Iraqi Opinion*, ALJAZEERA.NET, July 15, 2004, http://english.aljazeera.net/

Aldelami, Saddam Hussein's lead lawyer of record,[21] told NBC News that "Saddam praised the resistance in Iraq, and he said the Iraqi people should resist the U.S. occupation in Iraq."[22]

While the Tribunal cannot punish either Hussein or his attorneys for comments made before the beginning of his trial, this memo will consider the possibility that such comments may be punished if made during the trial, either in public or in the courtroom itself.

III. THE TRIBUNAL'S POWER TO RESTRICT COMMENTS

A. Tribunal's Legislatively-Granted Powers

The IST Rules of Procedure and Evidence confer certain powers upon the judges of the Tribunal to punish the misconduct of counsel. Under Rule 50(a), a Judge or Chamber can, after a warning, impose sanctions against counsel if his conduct remains offensive or abusive, demeans the dignity of the Tribunal, or obstructs the proceedings.[23] A Judge or Chamber may also, with the approval of the President, communicate misconduct of counsel to the professional body, such as a bar association, which regulates conduct of counsel in his state of admission.[24] Rule 50, however, does not mention if the conduct must occur within the courtroom or whether counsel can be punished for their conduct outside of the courtroom. Most likely, this is because Rule 50 merely codifies the court's inherent contempt power, under which a court can restrict behavior occurring inside or outside of the court if it interferes with the administration of

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NR/exeres/BDE07C95-F791-49C3-A087-4569B9C68697.htm (last visited Oct. 8, 2005) [Reproduced in the accompanying notebook at Tab 78].

[21] Iraqi Special Tribunal, Defense Counsel of Record, *supra* note 2 [Reproduced in the accompanying notebook at Tab 75].

[22] Transcript of NBC Nightly News, *supra* note 2 [Reproduced in the accompanying notebook at Tab 86].

[23] IST R. PROC. & EVID., *supra* note 6, at Rule 52(a) [Reproduced in the accompanying notebook at Tab 14].

[24] *Id.* at 52(b).

justice.[25] Also, the Tribunal has the power to prosecute anyone who 1) attempts to manipulate the judiciary or influence its functions, 2) conspires against the security of the homeland or sabotages the regime, or 3) abuses his position and pursues policies that may lead to the threat of war.[26]

B. Tribunal's Inherent Powers

In addition to these legislatively-granted powers, many state courts have recognized the judiciary's inherent power to punish all forms of contempt.[27] The crime of contempt is "sui generis and is not within the ordinary process and scheme of the criminal law."[28] The power to punish contempt is one of those powers essential to the administration of justice and the maintenance of the rule of law.[29]

A court's power to punish a party or his counsel for contempt, however, may be limited depending on to whom the speech is aimed. Most notably, courts draw a distinction between comments made concerning the prosecution of a case and comments directly attacking the court itself. Because competent defense counsel should be critical of the prosecution, they have more leeway in criticizing the prosecutor's tactics and will not be seen as interfering with justice. In contrast, direct verbal attacks on the court process itself are usually restricted because they have

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[25] *See, e.g.*, Ahnee v. Dir. Pub. Prosecutions, [1999] 2 LRC 676 (P.C.) (finding that the power to punish all forms of contempt is one of the definitive features of superior courts and underscores the judiciary's essential role in protecting the due administration of justice) [Reproduced in the accompanying notebook at Tab 23]; Pounders v. Watson, 521 U.S. 982, 987 (1997) ("Longstanding precedent confirms the power of courts to find summary contempt and impose punishment.") [Reproduced in the accompanying notebook at Tab 39]. *Cf.* Re Kennedy (No. 2), [2004] 3 HKC 411, 413 (C.F.I.) ("Contempt proceedings should only be brought as a last resort when no alternative powers of the court could be invoked.") [Reproduced in the accompanying notebook at Tab 42].

[26] Statute of the Iraqi Special Tribunal, art. 14, *available at* http://www.iraq-ist.org/en/about/statute.htm (hereinafter "IST Statute") [Reproduced in the accompanying notebook at Tab 20].

[27] See *supra* note 19 and accompanying text.

[28] *Ahnee*, [1999] 2 LRC, at *3 [Reproduced in the accompanying notebook at Tab 23].

[29] *Id.* at 6.

less value and are more likely to threaten the proceedings. The distinction between the role of a prosecutor and a judge "is manifested in common law jurisdictions by the fact that the crime of contempt is largely aimed at statements or behavior directed at the court rather than an opponent or a prosecutor."[30] Notably, courts in South Africa, Denmark, the Netherlands, and Italy all make a distinction between criticism directed at the court and at a prosecutor, at least when the prosecutor functions as an opponent in court.[31]

For example, in *Nikula v. Finland*, the European Court of Human Rights held that the applicant's right to freedom of expression had been violated when she was punished for claiming that the prosecutor deliberately abused his discretion in a case in which she represented the defendant.[32] In so holding, the court emphasized that the applicant's criticism was of the prosecution's strategy, as opposed to criticism focusing on the prosecutor's professional or personal qualities.[33] But the court dismissed the notion that a defense counsel's freedom of expression is unlimited,[34] and it reiterated the distinction between the role of the prosecutor as the opponent of the accused and the role of a judge.[35] The difference provides increased

[30] Brief for Interights as Amicus Curiae Supporting Petitioner, Nikula v. Finland, [2002] ECHR 31611/96, at ¶ 4.13, *available at* http://www.interights.org/page.php?dir=News&page=Nikulabrief.php (noting that the distinction between the role of a prosecutor and a judge "is manifested in common law jurisdictions by the fact that the crime of contempt is largely aimed at statements or behavior directed at the court rather than an opponent or a prosecutor.") [Reproduced in the accompanying notebook at Tab 73]. Notably, courts in South Africa, Denmark, the Netherlands, and Italy all make a distinction between criticism directed at the court and at a prosecutor, at least when the prosecutor functions as an opponent in court. *Id.*

[31] *Id.*

[32] [2002] ECHR 31611/96, at ¶ 56 [Reproduced in the accompanying notebook at Tab 37].

[33] *Id.* at ¶ 51.

[34] *Id.* at ¶ 49.

[35] *Id.* at ¶ 50.

protection for the accused and his or her attorney when they criticize a prosecutor, as opposed to when they verbally attack the judge or the court as a whole.[36]

Similarly, the Tribunal also has the inherent power to punish either defendants or counsel for comments which directly criticize the operation of the judiciary or threaten the administration of justice. Exactly what type of punishments or deterrents the Tribunal can impose in contempt proceedings will be addressed later in this memorandum.

IV. RIGHT TO FREE SPEECH

A. Right to Free Speech in Iraq

1. Before the War

Due to various factors, including the polarization of Iraqi politics and the economic sanctions which served to close much of the Iraqi population off from the rest of the world, the rule of law in Iraq was uncertain even before the most recent war.[37] Despite the existence of a political environment hostile to individual rights, Section 26 of the Iraqi Interim Constitution of 1990 guaranteed its citizens freedom of opinion, press, assembly, and association.[38] However, even though many sections of the previous Iraqi Constitution assured citizens fundamental human rights, they were often denied in practice.[39]

2. After the War

Article 13 of the current Provisional Constitution of Iraq protects the right to free expression, free peaceable assembly, and freedom of thought, conscience, and religious

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[36] *Id.*

[37] Sabah Al Mukhtar, *The Rule of Law in Iraq: Does it Exist?*, in THE RULE OF LAW IN THE MIDDLE EAST AND THE ISLAMIC WORLD 71 (Eugene Cotran & Mai Yamani, eds. 2000) [Reproduced in accompanying notebook at Tab 59].

[38] INTERIM CONSTITUTION OF IRAQ (1990), art. 26, *available at* http://www.oefre.unibe.ch/law/icl/iz01000_.html [Reproduced in accompanying notebook at Tab 9].

[39] Al Mukhtar, *supra* note 37, at 78-79 [Reproduced in accompanying notebook at Tab 59].

practice.[40] However, there is some concern from human rights groups that human rights will continue to be unprotected in the new Iraqi regime.[41] Until the new Iraqi government can promulgate new criminal statutes, Iraq continues to be governed by the 1969 Penal Code, which allows the government to place significant restrictions on an individual's free speech to prevent political dissent.[42] Most likely, however, the new Iraqi government would not want to follow the lead of the old, repressive regime. Instead, the new government will probably create new penal laws which offer greater substantive protection to the right of free speech.

B. International Right to Free Speech

1. Free Speech as Customary International Law?

"Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."[43] Some scholars question whether freedom of expression is protected by customary international law.[44] Article 19, a human rights organization specifically formed to promote freedom of expression worldwide[45] and named after

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[40] Law of Administration for the State of Iraq for the Transitional Period, art. 13, *available at* http://www.cpa-iraq.org/government/TAL.html (hereinafter "TAL") [Reproduced in accompanying notebook at Tab 17].

[41] *See, e.g.*, Memorandum from Article 19, *Freedom of Expression Essential to Iraq's Future: Iraq Media Law Analysis* (Feb. 2004), http://www.article19.org/pdfs/analysis/iraq-media-law-analysis.pdf (calling for changes in Iraq's free expression laws in order to bring it into line with international standards) [Reproduced in accompanying notebook at Tab 81].

[42] IRAQI PENAL CODE, art. 208, 214, 215 (1969) [Reproduced in accompanying notebook at Tab 13].

[43] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 102(2) (1987) [Reproduced in accompanying notebook at Tab __].

[44] *E.g.*, Leslie R. Strauss, Case Note, *Press Licensing Violates Freedom of Expression*—Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, *5 Inter-Am. Ct. H.R. (ser. A) (1986)*, 55 U. CIN. L. REV. 891, 897 (1987) ("There is no clear customary international law regarding freedom of expression, particularly with regard to journalists.") [Reproduced in accompanying notebook at Tab 69]; LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 4 (2005) ("The human right of freedom of expression is a posited, debatable legal right, not a timeless moral right that preexists the instruments of international law.") [Reproduced in accompanying notebook at Tab 54].

[45] Article 19, About Us Overview, http://www.article19.org/about/index.html (last visited Oct. 8, 2005) [Reproduced in accompanying notebook at Tab 71].

the provision in the Universal Declaration of Human Rights protecting free speech, [46] argues that the right to freedom of expression is universally recognized as a crucial underpinning of democratic society.[47] According to Article 19 of the UDHR, "[e]veryone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

The United States Supreme Court has recognized that at least some provisions of the Universal Declaration of Human Rights, though not inherently binding, have become binding through state practice.[48] Some scholars have even explicitly argued that "[t]he right of free speech stands as a general norm of customary international law."[49]

While most international agreements and state constitutions protect the freedom of expression, the type and severity of restrictions which can be placed on that right varies from state to state.[50] This variance may prevent any rules about the restrictions on free speech from becoming customary international law. Still, it is telling that the constitutions of many Islamic nations, including Iraq and Iran, recognize the right to freedom of expression.[51] To at least some

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[46] The Universal Declaration of Human Rights, art. 19, *adopted by General Assembly* Dec. 19, 1948 [Hereinafter "UDHR"] [Reproduced in accompanying notebook at Tab 22].

[47] Memorandum from Article 19, *supra* note 41, at 1 [Reproduced in accompanying notebook at Tab 80].

[48] Filartiga v. Pena-Irala, 630 F.2d 876, 883 (1980) [Reproduced in accompanying notebook at Tab 28].

[49] THOMAS DAVID JONES, HUMAN RIGHTS: GROUP DEFAMATION, FREEDOM OF EXPRESSION AND THE LAW OF NATIONS 37 (1998) [Reproduced in accompanying notebook at Tab 57].

[50] *See infra* notes 37-68 and accompanying text.

[51] JONES, *supra* note 49, at 40 n.81 (citing art. 24 of the 1979 Constitution of the Islamic Republic of Iran, art. 26 of the 1970 Iraqi Interim Constitution, art. 36 of the 1962 Constitution of the State of Kuwait, art. 23 of the 1973 Constitution of the State of Bahrain, art. 15 of the Constitution of the Hashemite Kingdom of Jordan, art. 30 of the 1971 Provisional Constitution of the United Arab Emirates, art. 13 of the Provisional Constitution of Qatar, art. 13 of the 1969 Constitutional Proclamation of the Socialist's People's Libyan Arab Jamihiriya (Libya), and art. 8 of the

extent then, freedom of expression seems to transcend cultural and religious norms and has become a right common to modern legal systems. Moreover, most human rights agreements protect an individual's freedom of expression.[52] Perhaps, then at least the basic concept of an individual freedom to expression has become customary international law, but the Tribunal must look elsewhere for an enforceable rule on restrictions on speech.

2. International Standard for Freedom of Speech: UDHR, ICCPR, American Convention, European Convention, African Charter

a. Right to Free Speech Generally

In contrast to the UDHR, the International Covenant on Civil and Political Rights is a treaty which imposes formal legal obligations on state parties to respect the provisions therein.[53] Over 150 states are parties to the ICCPR, including Iraq, which signed the ICCPR on February 18, 1969 and ratified it on January 25, 1971.[54] According to Article 19, "[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek receive and impart information and ideas of all kinds."[55] Therefore, Iraq is obligated under the treaty "to respect and ensure to all individual within its territory and subject to its jurisdiction" the right to freedom of expression.[56]

General People's Congress Law No. 20 of the 1991 Consolidation of Freedoms) [Reproduced in accompanying notebook at Tab 57].

[52] *See infra* notes 43-47 and accompanying text.

[53] ICCPR, *supra* note 4, at art. 19 [Reproduced in accompanying notebook at Tab 12].

[54] Office of the High Commission on Human Rights, Ratification Status of ICCPR, *available at* http://www.ohchr.org/english/countries/ratification/4.htm (last updated Oct. 7, 2005) [Reproduced in accompanying notebook at Tab 82].

[55] ICCPR, *supra* note 4, at art. 19 [Reproduced in accompanying notebook at Tab 12].

[56] *Id.* at art. 2.

Regional human rights instruments protect the freedom of expression in similar terms. According to Article 10 of the European Convention on Human Rights, "Everyone has the right to freedom of expression," including "freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."[57] Article 13 of the American Convention on Human Rights protects the freedom to "seek, receive, and impart information of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice."[58] Finally, Article 9 of the African Charter on Human and Peoples' Rights simply provides that "[e]very individual shall have the right to receive information" and "every individual shall have the right to express and disseminate his opinions within the law."[59]

b. Permissible Restrictions on the Right to Free Speech

i. Common Restrictions on Speech

Freedom of expression in international law, however, is not unlimited. In fact, it may be restricted more easily than freedom of speech in the U.S.[60] The ICCPR recognizes that the rights

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[57] European Convention on the Protection of Human Rights and Fundamental Freedoms, April 11, 1950, E.T.S. No. 5, art. 10, *text completed by* Protocol No. 2, E.T.S. No. 44, May 6, 1963 and *amended by* Protocol No. 3, E.T.S. No. 45, May 6, 1963, Protocol No. 5, E.T.S., Jan. 20, 1966, and Protocol No. 8, E.T.S. No. 118, March 19, 1985 [hereinafter "European Convention"] [Reproduced in accompanying notebook at Tab 8].

[58] American Convention on Human Rights ("Pact of San Jose, Costa Rica"), Nov. 22, 1969, 1144 U.N.T.S. 123, art. 13, *entered into force* July 18, 1978 [hereinafter "American Convention"] [Reproduced in accompanying notebook at Tab 3].

[59] African (Banjul) Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58 (1982), art. 9, *entered into force* Oct. 21, 1986 [Hereinafter "African Charter"] [Reproduced in accompanying notebook at Tab 1].

[60] *E.g.*, Winfried Brugger, *Ban on or Protection of Hate Speech? Some Observations Based on German and American Law*, 17 TUL. EUR. & CIV. L.F. 1 (2002) (discussing the differences between American law, in which hate speech is viewed as a form of speech, and international law and many other legal systems, in which greater protection is given to the dignity, honor, and equality interests of the targets of hate speech) [Reproduced in accompanying notebook at Tab 65]; J. Brian Gross, *Russia's War on Political and Religious Extremism: An Appraisal of the Law "On Counteracting Extremist Activity,"* 2003 BYU L. REV. 717, 738 (2003) (pointing out that Russian law tends to adhere to the European approach to restrictions on speech which afford greater protection to dignity and honor of the hearer than the U.S. approach) [Reproduced in accompanying notebook at Tab 66].

to freedom of expression carry with them special duties and responsibilities. The ICCPR, the European Convention,[61] the American Convention,[62] the African Charter[63] and many state constitutions[64] specify similar conditions under which the right to free speech can be restricted. Under the ICCPR, speech "may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights and reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health and morals."[65]

These types of provisions in the ICCPR, the European Convention, and the American Convention have been interpreted as requiring restrictions on speech to meet a three-part test. First, the court will look for an interference with the petitioner's right to free speech. If there is an interference with free speech, then the court asks whether the interference is justified. The interference is justified if it is 1) prescribed by law, 2) supported by a legitimate aim, and 3)

[61] European Convention, *supra* note 57, at art. 10(2) [Reproduced in accompanying notebook at Tab 8].

[62] American Convention, *supra* note 58, at art. 13(2) [Reproduced in accompanying notebook at Tab 3].

[63] Although the African Charter does not itself specify the conditions for placing restrictions on speech, the requirements for restrictions were enunciated by the African Commission on Human and Peoples' Rights. African Commission on Human and Peoples' Rights, Declaration of Principles on Freedom of Expression in Africa, art. 2, *adopted on* October 17-23, 2002, *available at* http://www.achpr.org/english/_doc_target/documentation.html?../declarations/declaration_freedom_exp_en.html (specifying that "any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and [sic] in a democratic society) [Reproduced in accompanying notebook at Tab 2].

[64] *E.g.*, Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, sec. 1, *enacted as* Schedule B to Canada Act 1982, ch. 11 (U.K.) [Reproduced in accompanying notebook at Tab 5], *as interpreted in* Little Sisters Book and Art Emporium v. Minister of Justice, 9 BHRC 409, at ¶ 143 (Can. 2000) [Reproduced in accompanying notebook at Tab 35]; CONSTITUTION OF THE REPUBLIC OF NAMIBIA, art. 21(2) [Reproduced in accompanying notebook at Tab 6]; New Zealand Bill of Rights Act 1990, 1990 No. 109, sec. 5 [Reproduced in accompanying notebook at Tab 19].

[65] ICCPR, *supra* note 4, at art. 19(3) [Reproduced in accompanying notebook at Tab 12].

necessary to secure that aim.[66] In this context, "necessary" means that there must be a "pressing social need" for the restriction. The State's justification of the restriction must be "relevant and sufficient," and the restriction must be proportionate to the aim pursued.[67]

ii. Fewer Restrictions on Speech Permitted Under American Convention

Arguably, the American Convention provides greater protection for an individual's freedom of expression than either the European Convention or the ICCPR. According to Section 2 of Article 13 of the American Convention, prior censorship is never permissible; liability can be imposed only subsequently in certain enumerated circumstances.[68] The Inter-American Court interpreted Article 13(2) of the American Convention as imposing four requirements for allowable restrictions on speech: 1) the existence of previously established grounds for liability, 2) the express and precise definition of these grounds by law, 3) the legitimacy of the ends sought to be achieved, and 4) a showing that these grounds are "necessary to ensure" the ends.[69]

iii. Attempt at Codification: The Johannesburg Principles

In an attempt to solidify international and legal standards relating to freedom of expression, a group of experts in international law, national security, and human rights adopted

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[66] *E.g.*, Shin v. Republic of Korea, Communication No. 926/2000, U.N. Doc. CCPR/C/80/D/926/2000, at ¶ 7.2 (HRC 2004) [Reproduced in accompanying notebook at Tab 46]; Incal v. Turkey, 4 BHRC 476, at ¶ 39-59 (Eur. Ct. H.R. 1998) [Reproduced in accompanying notebook at Tab 31]; Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85, at ¶ 39 (Series A, No. 5) (Inter-Am. Ct. H.R. 1985) [Hereinafter "Compulsory Membership"] [Reproduced in accompanying notebook at Tab 26]. *See also*, Human Rights Committee, *CCPR General Comment No. 10: Freedom of Expression (Art. 19)*, ¶ 4, (1983) [Reproduced in accompanying notebook at Tab 74].

[67] *Supra* note 53.

[68] American Convention, *supra* note 58, at art. 13(2) [Reproduced in accompanying notebook at Tab 3].

[69] *Compulsory Membership*, *supra* note 66, at ¶ 39 [Reproduced in accompanying notebook at Tab 26].

the Johannesburg Principles on National Security, Freedom of Expression and Access to Information on October 1, 1995.[70] Mr. Abid Hussain, the UN Special Rapporteur on Freedom of Opinion and Expression had endorsed the Principles in reports to the 1996, 1998, 1999, and 2001 sessions of the UN Commission on Human Rights, and the Commission has referred to the Principles in their annual resolutions on freedom of expression every year since 1996.[71] In forming the Principles, the framers took into account relevant provisions of the UDHR, the ICCPR, the African Charter, and American Convention, the European Convention, and the UN Basic Principles on the Independence of the Judiciary.[72]

Under the Johannesburg Principles, as under the ICCPR, European Convention, and American Convention, a state cannot impose a restriction on an individual's freedom of expression unless it can demonstrate that the restriction is prescribed by law and necessary to protect a legitimate national security interest.[73] In contrast to the other international and regional agreements, however, the Johannesburg Principles focus specifically on the circumstances under which national security can be used as a justification for restrictions on free speech.

3. Broadest Protections for Freedom of Speech in the U.S.

Various courts and scholars have recognized that U.S. law offers the greatest protection for free speech.[74] Generally, the First Amendment of the U.S. Constitution gives individuals a

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[70] The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Article 19, *adopted on* Oct. 1, 1995 (hereinafter "Johannesburg Principles") [Reproduced in accompanying notebook at Tab 16].

[71] *Id.*

[72] *Id.* at Preamble.

[73] *Id.* at principle 1(d).

[74] *See, e.g.*, Kauesa v. Minister of Home Affairs, 1995 SACLR LEXIS 273, at *46-47 (Namibia) (recognizing that the U.S. Supreme Court criteria for limiting free speech is narrower in its operation than restrictions authorized by most modern constitutions, including the Namibian Constitution) [Reproduced in accompanying notebook at Tab 34]. *But see* Gerald N. Rosenberg, *The Sorrow and the Pity: Kent State, Political Dissent, and the Misguided*

broad free speech right, and speech can be regulated by the states only in a few limited circumstances. Discrimination against speech solely because of its content is presumed unconstitutional,[75] and U.S. courts are particularly wary of viewpoint discrimination.[76] One of the more infamous U.S. free speech cases is *Village of Skokie v. National Socialist Party of America*, in which the court held that the Nazi party could not be enjoined from displaying a swastika symbol during a public demonstration.[77] The court noted that it is firmly settled in the U.S. Constitution that public expression of ideas may not be prohibited simply because they are offensive to some of their hearers.[78]

Brandenburg v. Ohio continues to provide the rule for determining whether restrictions on speech are permissible.[79] In *Brandenburg*, the U.S. Supreme Court held that the constitutional guarantee of free speech does not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where 1) such advocacy is intended to incite imminent lawless action, and 2) it is likely to incite or produce such action.[80]

To satisfy the first prong of the test, an individual must do more than merely advocate a position. This issue was addressed in *Brandenburg*, in which a Ku Klux Klan leader was

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Worship of the First Amendment, in THE BOUNDARIES OF FREEDOM OF EXPRESSION & ORDER IN AMERICAN DEMOCRACY 17, 32 (Thomas R. Hensley ed., 2002) (arguing that First Amendment interpretations and protections in the U.S. vary with the strength of political currents) [Reproduced in accompanying notebook at Tab 62].

[75] Rosenberger v. Rector, 515 U.S. 819, 828 (1995) [Reproduced in accompanying notebook at Tab 42].

[76] *Id.* at 829 ("Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.").

[77] 373 N.E.2d 21, 26 (Ill. 1978) [Reproduced in accompanying notebook at Tab 51].

[78] *Id.* at 23. *But see* ARYEH NEIER, "*Poisonous Evenhandedness*," in DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM 69 (1979) (highlighting the drawbacks of protecting the speech of exclusionary groups) [Reproduced in accompanying notebook at Tab 60].

[79] 395 U.S. 444 (1969) [Reproduced in accompanying notebook at Tab 24].

[80] *Id.* at 447.

convicted under the Ohio Criminal Syndicalism Act. The Act punished those who "advocate or teach the duty, necessity, or propriety" of violence "as a means of accomplishing industrial or political reform, or those who "justify" the commission of violent acts "with the intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism."[81] The court held the statute was unconstitutional because it punished mere advocacy, rather than focusing on incitement to imminent lawless action.[82]

Under the second prong of the test, the speech must at least be clear enough to result in a particular action. The issue of causation was taken up in *Hess v. Indiana,* in which the Supreme Court overturned the disorderly conduct conviction of an anti-war demonstrator, who said, "We'll take the fucking street later" or "We'll take the fucking street again."[83] The Court found that the speech was not really advocating any specific action,[84] and at most, it amounted only to advocacy of an illegal action at some indefinite time in the future, which was not enough to satisfy *Brandenburg's* imminence requirement.[85]

In addition, any government regulation of the content of expression is subject to strict scrutiny—the regulation will be permitted only if it is narrowly tailored to further a compelling governmental interest, and the government must have no less restrictive alternative.[86] If,

[81] *Id.* at 448.

[82] *Id.* at 448-449.

[83] 414 U.S. 105, 107 (1973) [Reproduced in accompanying notebook at Tab 30].

[84] *Id.* at 109.

[85] *Id.* at 108.

[86] *E.g.,* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Board, 502 U.S. 105, 118 (1991) [Reproduced in accompanying notebook at Tab 45].

however, the regulation is content-neutral, then a test considering the time, place, and manner of the restriction is the appropriate measure of its constitutionality.[87]

It is less clear, however, under what circumstances threats can be restricted in accordance with first amendment jurisprudence.[88] In *Watts v. United States*, the Supreme Court overturned Watts' conviction for willfully threatening to take the life of the President.[89] Although Watts said, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.,"[90] the court found that the utterance was just a crude way of stating political opposition to the President on subject of the draft and the Vietnam War.[91] Consequently, the constitutionality of the anti-threat legislation was never reached. Surely there would be circumstances in which a threat would be so imminent and threatening that the U.S. Supreme Court would be willing to restrict the threatening speech, but as of yet, the Court has not addressed the issue specifically.

V. RESTRICTIONS ON THE RIGHT TO FREE SPEECH

As already discussed, most international human rights documents and many state constitutions put limits on the protection of free speech. So, in the ICCPR, the American Convention, and the European Convention, restrictions can be placed upon an individual's right to free speech if it is 1) prescribed by law, 2) supported by a legitimate aim, and 3) necessary to secure that aim.[92]

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[87] Hill v. Colorado, 530 U.S. 703, 713 n19 (2000) [Reproduced in accompanying notebook at Tab 31].

[88] *See* Holly Coates Keehn, *Terroristic Religious Speech: Giving the Devil the Benefits of the First Amendment Free Exercise and Free Speech Clauses*, 28 SETON HALL L. Rev. 1230, 1248-1249 (1998) (noting that almost every state and the federal government have passed laws criminalizing the making of threats, but these laws have not yet faced rigorous First Amendment review) [Reproduced in accompanying notebook at Tab 67].

[89] 394 U.S. 705, 708 (1969) [Reproduced in accompanying notebook at Tab 52].

[90] *Id.* at 706.

[91] *Id.* at 708.

[92] *See supra* notes 25-26 and accompanying text.

A. Prescribed by Law

As stated earlier, the court can restrict an individual's freedom of speech by invoking its contempt power to protect public order and the administration of justice.[93] The contempt power is inherent to the judiciary since courts need to be able to protect the process occurring in their courtroom.[94] The court's contempt power is relatively broad; however, it is still subject to the limitations of Article 19(2) of the ICCPR. In other words, a court cannot hold someone in contempt for their speech unless the contempt proceedings are supported by a legitimate aim and are necessary to secure that aim.[95] Most courts have found that a court can only limit an individual's right to free speech when the restriction is necessary to protect the administration of justice or public order.[96]

In *Lovell v. Australia*, Lovell, an industrial advocate of a trade union, publicly revealed the contents of documents involved in the litigation, even though the documents were never introduced into evidence.[97] The court held that the restriction was supplied by the law of contempt of court and was necessary for achieving the aim of protecting the rights of others and for protecting the public order. Therefore, the author's conviction for contempt was a permissible restriction on his freedom of expression, and the court had not violated Article 19 of the ICCPR.

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[93] *See supra* notes 19-24 and accompanying text.

[94] *See, e.g.*, Ahnee v. Dir. Pub. Prosecutions, [1999] 2 LRC 676, at *6 (P.C.) [Reproduced in accompanying notebook at Tab 23].

[95] ICCPR, *supra* note 4, at art. 19(2) [Reproduced in accompanying notebook at Tab 12]; Ahnee, [1999] 2 LRC at *8 [Reproduced in accompanying notebook at Tab 23].

[96] *See, e.g.*, Ahnee, [1999] 2 LRC at *6 [Reproduced in accompanying notebook at Tab 23]; Police v. O'Connor, 1991 NZLR LEXIS 796, at *37 (N.Z.) [Reproduced in accompanying notebook at Tab 39].

[97] Communication No. 920/2000, at ¶ 2.1 (H.R.C. 2004) [Reproduced in accompanying notebook at Tab 36].

Similarly, in *Ahnee v. the Director of Public Prosecutions*, the Privy Council of Mauritius upheld a journalist's conviction for contempt for publishing an article which accused a judge of impropriety in an ongoing case.[98] The court found that the Mauritius Constitution gave the trial court such powers as were necessary to discharge their functions, and it was necessary for the judiciary to have the power to enforce order and to protect the administration of justice against contempt.[99] Because the specific offense of scandalizing the court was narrowly defined and existed solely to protect the administration of justice and the public interest, the offense was necessary in a democratic society.[100]

B. Necessary in a Democratic Society

In practice, the outcome of most court cases turn on the necessity of the restriction imposed on speech, specifically whether there is a pressing social need and whether the government's means are proportionate to their ends. Essentially, courts engage in a balancing test, weighing the individual's right to freedom of expression against the state's interest in national security and in protecting morals.

One of the most widely cited cases in which the European Court of Human Rights upheld a restriction on freedom of speech is *Handyside v. United Kingdom*.[101] In that case, Handyside was punished for publishing a children's guidebook, "The Little Red Schoolbook," which contained information about sexuality, drugs, and authority.[102] Looking at the book as a whole,

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[98] [1992] 2 AC 294, at * 9 (Mauritius P.C. 1999) [Reproduced in accompanying notebook at Tab 23].

[99] *Id.* at *7.

[100] *Id.* at *8. Also, although the form of contempt known as scandalizing the court was an offense *sui generis* and not part of the criminal law, its meaning was explained in the case law and the range of appropriate penalties were apparent from the decisions of the Supreme Court. *Id.*

[101] [1976] ECHR 5493/72 [Reproduced in accompanying notebook at Tab 29].

[102] *Id.* at ¶ 20-21.

the lower court found that it tended to deprave and corrupt a significant number of children likely to read it.[103] Affirming, the European Court of Human Rights held that even the government's decision to seize copies of the book was justified "as a temporary means of protecting the young against a danger to morals."[104] As one of the first cases in which the European Court of Human Rights upheld a restriction of speech, *Handyside* was important in defining

1. Pressing Social Need

i. Generally

A state government cannot restrict an individual's freedom of expression unless there is a pressing social need for it to do so. A general concern with the effect of political dissent does not constitute a pressing social need. Usually, the speech must pose a very specific threat to public morals or national security in order for the state to be justified in restricting it.

In *Shin v. Republic of Korea*, a professional artist was convicted for an alleged breach of a National Security law for painting a canvas-mounted picture entitled "Rice Planting (*Monaeki*)."[105] The painting contained certain political imagery, and the government thought the picture constituted "enemy-benefiting expression."[106] Although the state had identified a national security justification for the limits on Shin's speech, the court held that the State must specifically demonstrate the exact nature of the threat caused by the author's conduct, "as well as why seizure of the painting and the author's conviction were necessary."[107] In the absence of an

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[103] *Id.* at ¶ 33.

[104] *Id.* at ¶ 53.

[105] Communication No. 926/2000, U.N. Doc. CCPR/C/80/D/926/2000, at ¶ 2.1 (H.R.C. 2004) [Reproduced hereinafter at Tab 46].

[106] *Id.* at ¶ 2.2.

[107] *Id.* at ¶ 7.3.

individualized justification for why the measures taken here were necessary, the Committee found a violation of Shin's right to freedom of expression under Article 19, paragraph 2 of the ICCPR.[108]

ii. Incitement

In incitement cases in particular, courts will often focus on the nature of the threat created in order to determine whether placing restrictions on it is necessary. The dangers of incitement lie "in the potential for a series of these acts to create an overall environment conducive to criminal activity and violence, where terror and subversion of the rule of law and the democratic order reign." [109]Some of the factors relevant to whether speech urging the commission of a crime can be limited are 1) the success or likely success, 2) the seriousness of the crime encouraged, 3) the public nature of the encouragement, 4) the nature of its appeal, and 5) the mood of the audience.[110] In Israel, a country which has a long, turbulent history with terrorism, a publication allegedly inciting terrorism or violence can only be restrained when there is a "near certainty" of real harm to national security.[111]

Two common circumstances under which courts are willing to uphold a restriction on free speech is when the individual in question is specifically inciting violence or the climate is

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[108] *Id.*

[109] Mordechai Kremnittzer & Khaled Ghanayim, *Incitement, not Sedition*, in FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY 147, 164 (David Kretzmer & Francine Kershman Hazan eds., 2000) [Reproduced in accompanying notebook at Tab 58].

[110] KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 115 (1992) [Reproduced in accompanying notebook at Tab 56].

[111] H.C.J. 680/88 Schnitzer v. Chief Military Censor [1988] 42(4) P.C. 617, 25 (interpreting Defence Regulation 87(1)) [Reproduced in accompanying notebook at Tab 44]. *See also* Zeev Segal, *Security Censorship: Prior Restraint (After the Schnitzer Decision)*, in FREE SPEECH AND NATIONAL SECURITY 217 (Shimon Shetreet, ed. 1990) (discussing the importance of the Schnitzer Decision in strengthening protections of the individual's right to free speech in the face of important national security concerns) [Reproduced in accompanying notebook at Tab 63].

such that even general encouragement is likely to result in violence. Generally, courts and legal scholars draw a distinction between general urgings to commit crime and specific incitement.

Not surprisingly, the second category of incitement—general incitement—is usually the most contested. General urgings to crimes are usually less likely to produce results than specific encouragements, and when they do lead to crime, their influence may be hard to trace.[112] Still, it is possible that some general encouragements, "say to murder public officials or members of a racial minority or to forcibly overthrow the government, will be extraordinarily dangerous and will warrant a narrow prohibition."[113]

Courts must look closely at the circumstances surrounding a particular case to decide if a general encouragement to commit a crime is threatening enough to justify restrictions on an individual's freedom of speech. In many courts, a general incitement cannot be restricted unless the surrounding circumstances make the speech likely to incite violence.

a. When General Incitement Cannot Be Restricted

The case law from state courts, regional courts, and international judicial bodies supports the proposition that general urgings to crime usually do not pose a specific enough threat to national security to justify limiting an individual's right to free speech. For example, protests with violent overtones are rarely restricted because the threat they usually pose is general.

In *Police v. O'Connor*, the trial judge made an order prohibiting the reporting the trial proceedings because the criminal defendants in the case were allegedly committing their crimes in protest of abortions. The trial judge became aware that the defendants were employing a tactic of remaining silent in order to gain press. When each defendant was sentenced and asked

[112] GREENAWALT, supra note 110, at 121 [Reproduced in accompanying notebook at Tab 56].

[113] *Id.*

to stand as their name was called, the defendants remained silent but the accused held up a picture of a 12-week-old fetus and said, "We must not forget about this little fellow."[114] The court believed that denial of publicity could deter future re-offending by other pro-life activists.[115] Section 138 of the Criminal Justice Act gave the court power to forbid the publication of reports of trial proceedings and even to exclude certain persons from the courtroom in the interests of justice, or of public morality, or of the security or defense of New Zealand.[116]

However, the New Zealand High Court at Auckland struck the ban down as contrary to freedom of expression.[117] The court reasoned that most people who viewed the courtroom protests would understand that there are legitimate means of seeking legal change, and they would not necessarily be incited to violence simply by viewing the protests.[118] However, the court noted that "[t]he possibility exists at some future date courtroom protagonists may adopt tactics so extreme in their purpose or abuse of the Court process that the public interest would not be served by permitting the tactics to be publicized."[119] In other words, while the defendants may have been encouraging violence against abortion clinics on a general level, their silent

[114] 1991 NZLR LEXIS 796, at *20-21 (H.C.) [Reproduced in accompanying notebook at Tab 39].

[115] *Id.*, at *20-22

[116] *Id.* at *8-9.

[117] *Id.* at *56. Again, it is worth noting that the right to freedom of expression under the New Zealand Bill of Rights Act is not absolute. "By virtue of s[ection] 5 of the Act itself, they are expressly subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Again, any particular right must be balanced against other rights referred to in the Act." *Id.* at *36. *See also* New Zealand Bill of Rights Act 1990, 1990 No. 109, sec. 5 [Reproduced in accompanying notebook at Tab 19].

[118] *Id.*

[119] *Id.* at *53-54.

protests did not pose a specific enough threat to national security or the administration of justice to justify restrictions on their freedom of speech.

Similarly, in *Surek v. Turkey*, the European Court of Human Rights found that views of PKK (*Partiya Karkerên Kurdistan*)[120] members published in a local newspaper constituted political speech and could not be construed as incitement to violence.[121] One of the articles in question reported an interview with the PKK's second-in command, who alleged that the Turkish State was massacring Kurds, and said "we [the PKK] will fight in order to stay where we are."[122] The court reasoned that, when taken as a whole, the texts did not incite violence, but were merely a reflection of the resolve of an opposing political group to pursue its goals.[123] The court noted that under Article 10(2) of the European Convention, there is little scope for restrictions on political speech or debate on questions of public interest.[124]

Even the Nuremburg Tribunal was unable to convict Hans Fritzsche, a radio commentator for the Nazi regime, for inciting crimes against humanity by deliberately falsify news to arouse hatred against Jews in the German population.[125] Ultimately, the Tribunal

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[120] "The Kurdistan Workers Party…is an armed anti-government organization claiming to defend the rights of the Kurdish people in Turkey. Its main objective is the creation of an independent Kurdish state in Kurdistan, a territory that is currently southeastern Turkey, northeastern Iraq, northeast Syria and northwestern Iran." Wikipedia, *Kurdistan Workers Party*, http://en.wikipedia.org/wiki/PKK (last modified Oct. 6, 2005) [Reproduced in accompanying notebook at Tab 87].

[121] Surek v. Turkey, 7 BHRC 339, at ¶ 61 (Eur. Ct. H.R. 1999) [Reproduced in accompanying notebook at Tab 48].

[122] *Id.* at ¶ 10(1).

[123] *Id.* at ¶ 61.

[124] *Id.* at ¶ 60.

[125] Wibke Kristin Timmermann, *The Relationship Between Hate Propaganda and Incitement to Genocide: A New Trend in International Law Towards Criminalization of Hate Propaganda?*, 18 LEIDEN J. INT'L L. 257, 261 (2005) [Reproduced in accompanying notebook at Tab 70].

decided to acquit Fritzsche because although he clearly encouraged anti-Semitism, his "speeches did not urge persecution or extermination of the Jews."[126]

b. When General Incitement Can Be Restricted

General incitement can be restricted when the surrounding circumstances are such that even a general encouragement to violence will be likely to result in actual violence.

In *Zana v. Turkey*, Mehdi Zana, a former mayor of Diyarbakir, told journalists in an interview, "I support the PKK[127] national liberation movement; on the other hand, I am not in favour of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake."[128] Since 1985, disturbances raged in south-east Turkey between the government's security forces and members of the PKK, and ten of the eleven provinces of south-east Turkey have been subject to emergency rule since 1987.[129] Ultimately, the Diyarbakir National Security Court sentenced Zana to twelve months imprisonment for defending an act punishable by law as serious crime and endangering public safety.[130]

Upholding the judgment, the European Court of Human Rights found that "a State faced with a terrorist situation that threatened its territorial integrity had to have a wider margin of appreciation than it would have if the situation in question had consequences only for

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[126] *Id.* While some have interpreted the holding in Fritzsche as confirming that incitement requires both a direct call for extermination and a causal link between such call and the act incited, Wibke Kristin Timmermann argues that the Nuremburg Tribunal really left no clear precedent regarding the crime of incitement to genocide. *Id.* at 261-262. She points out that since the new rule for incitement to genocide was hardened in the *Nahimana* case in the International Criminal Tribunal for Rwanda (ICTR), which held that the potential of the communication to cause genocide makes it incitement. *Id.* at 267 (citing Prosecutor v. Nahimana, Case No. ICTR-99-52-T (2003)).

[127] For background on PKK, see Wikipedia, *supra* note 120 [Reproduced in accompanying notebook at Tab 87].

[128] [1997] ECHR 1894/91, at ¶ 9, 12 [Reproduced in accompanying notebook at Tab 53].

[129] *Id.* at ¶ 10-11.

[130] *Id.* at ¶ 26.

individuals."[131] The court admitted that the language in Zana's statement was contradictory because he was both supporting the PKK, "a terrorist organization which resorts to violence to achieve its ends," and opposing massacres.[132] But, the comment had to be looked at in the context. Given the history of terrorism in Turkey, "the support given to the PKK by a former mayor of Diyarbakir, the most important city in south-east Turkey, in an interview in a majority national daily newspaper, had to be regarded as likely to exacerbate an already explosive situation in that region."[133] As a result, the penalty imposed on Zana was proportionate to the legitimate aims pursued, and Turkey had not violated Article 10 of the European Convention.[134]

1. Proportionality

Whenever a government is fashioning a restriction to an individual's right to free speech, it must ensure that the restriction is proportional to the interest sought to be attained. So, for example, if the court places a sanction on a man because his speech threatens national security, the sanction must not be disproportionate to the national security threat posed by the speech.

For example, in *Kauesa v. Minister of Home Affairs*, the Supreme Court of Namibia invalidated a restriction on speech because it was not carefully designed to achieve the state's objective. In *Kauesa*, a policeman participated in a panel discussion on affirmative action and restructuring of the police force in Nambia.[135] Soon after, he was charged with contravening the

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[131] *Id.* at ¶ 53. Although not easy to define, the margin of appreciation doctrine, originally developed in the European Human Rights Commission, governs the latitude the courts will give member states in their observance of the European Convention. If the margin of appreciate is wide, there is an initial presumption in favor of the state. When it is narrow, the European Court will closely scrutinize the state's decisions. Thomas A. O'Donnell, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights*, 4 HUM. RTS. Q. 474, 475 (1982) [Reproduced in accompanying notebook at Tab 68].

[132] *Zana*, [1997] ECHR at ¶ 58 [Reproduced in accompanying notebook at Tab 53].

[133] *Id.* at ¶ 60.

[134] *Id.* at ¶ 62.

[135] 1995 SACLR LEXIS 273, at *12 (Namibia) [Reproduced in accompanying notebook at Tab 34].

Police Regulations, which imposed a disciplinary offense on a police officer who commented unfavorably on the administration in public.[136] The Supreme Court of Namibia applied a three-part proportionality test: 1) the measures adopted must be carefully designed to achieve the objective, 2) the measures must not be arbitrary, unfair, or irrational, and 3) there must be proportionality between the effects of the measures and the objective.[137] Ultimately, the court found that the regulation was overly broad.[138] Even police officers had a right to enter into a debate about matters of great concern to the public.[139]

VI. CAN THE TRIBUNAL INTERFERE WITH SADDAM HUSSEIN'S RIGHT TO FREE SPEECH?

A. Application of the International Standard

Since Iraq is a party to the ICCPR,[140] it makes most sense to apply the standard promulgated by Article 19 to any restriction that the Tribunal might place on Hussein's right to free speech. Under the ICCPR standard, a court will first consider whether the government action constitutes a limitation on speech. If it does, the court will only consider the limitation justified if it is prescribed by law and necessary in a democratic society. A restriction is

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[136] *Id.*

[137] *Id.* at *25. It should be noted that Article 21(2) of the Namibian Constitution permits restrictions on the freedom of expression similar to those in the international and regional agreements discussed earlier. Under the Namibian Constitution, the right to freedom of expression "shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by said sub-article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence." CONSTITUTION OF THE REPUBLIC OF NAMIBIA, art. 21(2) [Reproduced in accompanying notebook at Tab 6].

[138] *Kauesa*, 1995 SACLR LEXIS at *49 [Reproduced in accompanying notebook at Tab 34].

[139] *Id.*

[140] Office of the High Commission on Human Rights, *supra* note 54 [Reproduced in accompanying notebook at Tab 82].

necessary only if there is a rational connection between the restriction and the objective, a pressing social need for the restriction, and the restriction is proportional to the threat posed.[141]

1. Limitation on Speech

If the Tribunal invokes its inherent contempt power to place a "gag order" restriction on Hussein's speech or imposes a monetary fine on Hussein to punish him for speech already uttered, there is little question that it will be imposing a limitation on Hussein's speech.

2. Prescribed by Law

In order to place restrictions on Hussein's right to free speech, the Tribunal must first have power to restrict speech at all. Like any other judicial body, the Tribunal has inherent contempt power to punish behavior that jeopardizes the administration of justice.[142] Although some states believe that contempt proceedings should only be used as a last resort,[143] the Tribunal could argue that it has few other powers to prevent the interference with justice that Hussein's speech will cause.

Under Article 14 of the IST Statute, the Tribunal can prosecute Hussein for attempting to manipulate the judiciary or conspiring against the security of the homeland, but prosecution is unlikely to deter Hussein's speech since he is already being prosecuted on other charges. As a result, the Tribunal's best means to prevent interference with the administration of justice in a timely manner is to invoke its contempt powers. Ultimately, any restriction that the Tribunal places on Hussein's speech will be prescribed by the law of contempt of court.

3. Necessary in a Democratic Society

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[141] *See supra* notes 53-55 and accompanying text.

[142] *See supra* notes 21-28 and accompanying text.

[143] *See, e.g.*, Re Kennedy (No. 2), [2004] 3 HKC 411, 413 (C.F.I.) [Reproduced in accompanying notebook at Tab 42].

The more complex issue is whether it is necessary to restrict Hussein's speech in a democratic society. So far, Hussein has not made a direct incitement to violence; in other words, he has not called on the insurgency to kill particular people at a particular time. Rather, his calls to violence have been general encouragements of the insurgents in Iraq. In order to find that a restriction on such general urging to crime is necessary to protect national security, the Tribunal will have to prove that because of the attendant circumstances, the speech is likely to incite violence.

1. Pressing Social Need

Many courts have recognized that national security is a pressing social need, especially in a country with a history of combating terrorism.[144] Like Turkey, Iraq has had a long history with both internal and external conflict. Most recently, groups of Iraqi insurgents have staged bombings and attacks in response to the U.S. invasion and the overthrow of the former Iraqi regime. The insurgent attacks have been escalating over the last few months, and U.S. government officials expect their continued escalation.[145] Meanwhile, the government in Iraq is in limbo, with the vote on a new constitution pending, and some citizens still question the government's legitimacy.[146] Given the volatility of the situation in Iraq, speech encouraging the

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[144] *See, e.g.*, Incal v. Turkey, 4 BHRC 476, at ¶ 57 (Eur. Ct. H.R. 1998) [Reproduced in accompanying notebook at Tab 31]; Zana v. Turkey, [1997] ECHR 18954/91, at ¶ 60-61 [Reproduced in accompanying notebook at Tab 53]; *See also* Johannesburg Principles, *supra* note 70, at principle 7 (implicitly recognizing that there are at least some circumstances when expression threatening national security creates a pressing social need) [Reproduced in accompanying notebook at Tab 16].

[145] Holly Rosenkrantz, *Bush Says He Expects More Attacks in Iraq Before Vote (Update1)*, BLOOMBERG.COM, Oct. 1, 2005, http://www.bloomberg.com/apps/news?pid=10000087&sid=aIrhcD.4Aa50&refer=top_world_news# (quoting President Bush, who said "The terrorists have a history of escalating their attacks before Iraq's major political milestones," so he expects more insurgent attacks in Iraq before citizens vote on the new constitution) [Reproduced in accompanying notebook at Tab 84].

[146] In fact, Hussein's lawyers have repeatedly questioned the legitimacy of the government in Iraq, especially the authority of the SICT. *See, e.g.*, Ahmed Janabi, *Saddam's Lawyers Cite Death Threats*, ALJAZEERA.NET, Jan. 24, 2005, http://english.aljazeera.net/NR/exeres/C3A10A2C-A92E-4B67-9CF8-6A17A1EC0A92.htm (last visited Oct. 8, 2005) ("Saddam's legal team says that the Iraq Special Tribunal…is illegal and that the trial itself will be

insurgency even in general terms will be more likely to incite actual violence, specially coming from the former President of Iraq. All of these circumstances would add to the imminence and dangerous of Hussein's speech, creating a pressing social need to restrict his speech.

However, Hussein will argue that words such as "praising" the resistance in Iraq or telling Iraqi people to "resist" the U.S. occupation are too vague to create any real dangers and therefore any pressing social need to restrict such speech. But, as the various cases from Turkey point out, context makes all of the difference. In *Surek v. Turkey*, a restriction on speech was struck down because in the context of a newspaper article interview and lacking any direct encouragement to violence, the speech constituted political speech rather than incitement.[147] On the other hand, in *Zana v. Turkey*, a restriction on speech was upheld when a former mayor was the speaker, the comments were made at a public press conference, and the violent language was ambiguous.[148]

The Tribunal will be able to argue that Hussein's speech falls more in line with the speech in *Zana* than that in *Surek*. Although Hussein's words are relatively vague, he is encouraging the insurgency in Iraq, which is widely known to be a violent, not peaceful movement. The insurgency is a political group in so far as they advocate changing the current political structure of Iraq by expelling U.S. and other foreign forces and reinstating the former Iraqi regime. However, their reputation for violence and terrorism is as well-known as that of the PKK in Turkey. Moreover, Hussein's former position as president increases the

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invalid.") [Reproduced in accompanying notebook at Tab 76]; Janabi, *Saddam Lawyers Face More Pressure*, *supra* note 203 (quoting Hussein's former chief lawyer Muhammad al-Rashdan as saying that Hussein was the "legitimate president of Iraq") [Reproduced in accompanying notebook at Tab 77]. *See also* Janabi, *Saddam's Trial Divides Iraqi Opinion*, *supra* note 20 (reporting that the Hussein trial has created a rift between those calling for his release and those calling for his execution) [Reproduced in accompanying notebook at Tab 78].

[147] Surek v. Turkey, 7 BHRC 339, at ¶ 61-64 (Eur. Ct. H.R. 1999) [Reproduced in accompanying notebook at Tab 48].

[148] Zana v. Turkey, [1997] ECHR 1894/91, at ¶ 58-62 [Reproduced in accompanying notebook at Tab 53].

persuasiveness of his speech, just as Zana's speech was more influential because he was the mayor of a strategically important Turkish town.

Also, the court's power to restrict Hussein's speech might depend on the venue in which he chooses to voice it. For example, if Hussein encourages insurgency in the courtroom, the Tribunal will have a stronger argument that Hussein is interfering with the administration of courtroom proceedings since his actions will directly affect the proceedings themselves.

Out of the courtroom, though, the Tribunal will have a harder time arguing that they have the power to restrict Hussein's speech to protect the due administration of justice, but the argument is not impossible to make. On the other hand, inciting the insurgency outside of court does not directly attack Hussein's ongoing courtroom proceedings. However, it does interfere with them insofar as the speech essentially calls for the overthrow of the current government. To some extent, inciting insurgency does insinuate that the Tribunal itself is illegitimate and must be overthrown to obtain true justice. Also, if Hussein encourages insurgency in a public forum, like a press conference, the speech might be equally or even more threatening as doing so in the courtroom since it can reach a wider audience. In fact, encouraging the insurgency in a public forum may be strong evidence of intent to incite violence by choosing a forum which reaches the maximum number of hearers.

Ultimately, then, the Tribunal should be able to make a strong case that, although Hussein's speech appears to be a general call to combat the foreign forces in Iraq, it is more than mere political speech. Given the escalation of violence among insurgent groups in Iraq and the instability of the current transitional government and Iraqi Constitution, a call from Hussein even encouraging the insurgency is likely to pose a real and pressing threat to the national security of

Iraq. As a result, the Tribunal would have a pressing social need to either prevent Hussein from uttering such speech or punish him for speech already uttered.

2. Proportionality

In order for the Tribunal to impose any restriction on Hussein's speech, the restriction must be proportional to the interest in security being protected. Of course, whether a measure is proportional will depend upon which restriction the court chooses to impose (a "gag order," sanction, etc.), the circumstances in which the speech arises, and the nature of the speech itself. Still, the Tribunal should have some room to place substantive restrictions on Hussein's speech because it is so threatening to the new democratic order in Iraq. By encouraging the insurgency, Hussein is potentially threatening the existence of the judiciary itself as well as the current state of democracy in Iraq. Even a "gag order," a prior restraint on speech, would be justified to prevent such a great threat from ripening into harm.[149] Of course, there are some limits on the restrictions the Tribunal could place on Hussein's speech. Strong punitive measures, such as fines or even detainment, may not be permissible unless Hussein repeatedly ignores the Tribunal's orders limiting his speech. The availability of specific restrictions on speech will be discussed later in this memorandum.

B. Derogation Clause in ICCPR

According to Article 4 of the ICCPR, a state has the right to derogate from the protection of free speech in a time of a public, declared emergency which threatens the life of the nation.[150] However, the derogation must be strictly required by the exigencies of the situation and must not

[149] For more discussion on this issue, see *infra* notes 186-191 and accompanying text.

[150] ICCPR, *supra* note 4, at art. 4 [Reproduced in accompanying notebook at Tab 12].

be inconsistent with the state's other obligations under international law.[151] Finally, the state availing itself of the right of derogation must inform other state parties through the Secretary-General of the United Nations.[152] One of the most common derogations made from rights protected under the ICCPR is from Article 19.[153] Generally, states are given a wide margin of appreciation in determining whether a national emergency exists; however, one must be declared in order for a derogation to be justified.[154]

Although the Tribunal could argue that Iraq remains in a state of national emergency given the high level of insurgency and as a result, it has the right to derogate from the Article 19 of the ICCPR, this argument is unlikely to prevail. There is no evidence that Iraq has reported a state of national emergency to the UN Secretary-General, and it is essential for states to give a legal justification for declaring a state of emergency, which Iraq has not done.[155] But, even if Iraq declares national emergency and provides a valid justification for doing so, Iraq should be wary of suspending its human rights protections for an indefinite period of time. Since Iraq is a new, developing democratic state, it would jeopardize its legitimacy as a democracy if it were to suspend vital civil liberties, such as the right to freedom of speech, at this early stage in its development.[156]

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[151] *Id.*

[152] *Id.*

[153] Report of Mr. Leandro Despouy, United Nations Special Rapporteur, U.N. Doc. E/CN.4/Sub.2/1997/19, at ¶ 158, *available at* http://www.hri.ca/fortherecord1997/documentation/subcommission/e-cn4-sub2-1997-19.htm [Reproduced in accompanying notebook at Tab 85].

[154] *See, e.g.,* Ireland v. United Kingdom, (1978) ECHR 5310/71, at ¶ 207 (finding that Article 15(1) of the European Convention leave state authorities a wide margin of appreciation in deciding both the presence of an emergency and the nature and scope of derogations necessary to avert it) [Reproduced in accompanying notebook at Tab 33].

[155] *Id.* at ¶ 36.

[156] *See*, GEOFFREY R. STONE, *The War on Terrorism*, in PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 550, 554-555 (2004) ("A war of indefinite duration, however,

C. Application of U.S. Standard

It is less likely that the Tribunal could permissibly restrict Hussein's speech under U.S. free speech jurisprudence, which only permits the restriction of speech which is 1) intended to incite imminent lawless action and 2) likely to incite or produce such action.[157]

Under the first prong, it may be difficult to define Hussein's speech as inciting imminent lawless action rather than just advocating general action or even simply a political view. Even during times of war, the U.S. Supreme Court has interpreted the use of violent language simply as a way of expressing political opposition.[158] Here, too, the U.S. standard might call for a more permissive approach to Hussein's speech. Given that it will be made during his criminal prosecution in opposition to what he believes are illegal invading forces, the court might find that Hussein's speech is essentially political, not violent. Similarly, while Hussein may be inciting the insurgency in general, so far, his pleas have not advocated imminent lawless action: he never names a particular time or day for the attack nor has he singled out specific targets. Rather, his calls for violence are generalized, and not much different than Hess' utterance of "We'll take the fucking street later."[159]

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compounds the dangers both by extending the period during which civil liberties are 'suspended' and by increasing the risk that 'emergency' restrictions will become a permanent fixtures of American [here Iraqi] life.") [Reproduced in accompanying notebook at Tab 64]. *See also*, ALAN M. DERSHOWITZ, *Safety and Civil Liberties Need not be in Conflict* (2001), in SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE 478, 478 (2002) (arguing that law enforcement officials and civil libertarians should work together during times of crisis to ensure that every shift in the balance between national security and liberty is both necessary and effective) [Reproduced in accompanying notebook at Tab 55].

[157] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) [Reproduced in accompanying notebook at Tab 23].

[158] *See, e.g.*, Hess v. Indiana, 414 U.S. 105, 108 (1973) (holding that even a man demonstrating against the Vietnam War yelling "We'll take the fucking street later" was not really advocating any specific action) [Reproduced in accompanying notebook at Tab 30].

[159] *Id.* at 107.

Even if the Tribunal finds that Hussein's call to continue the insurgency is an imminent call to lawless action, it will have a more difficult time proving that such a call is likely to produce such lawless action. Since the insurgency has continued to escalate its attacks before Hussein's trial, it will be hard to prove that any particular call to arms he makes will lead to increased attacks or make violence more likely.

Finally, any contempt proceedings against Hussein for inciting insurgency will constitute a regulation of the content of Hussein's speech and will consequently be subject to strict scrutiny.[160] So, the Tribunal will have to prove that invoking its contempt power to restrict Hussein's speech will be necessary to satisfy a compelling state interest. Surely, preventing the escalation of insurgency attacks would be a compelling state interest, but the Tribunal will have to prove that the means it will use to restrict Hussein's speech is the least restrictive.

Regardless of the barriers to restrictions on speech in U.S. law, the Tribunal should not adopt the U.S. standard because it does not enjoy the same international following of the ICCPR standard. The European Convention, American Convention, and the African Charter all follow the ICCPR standard for limitations on speech. Moreover, some state courts have explicitly acknowledged the differences in the U.S. standard and rejected it in favor of the more commonly followed international standard.[161] Many of the differences between American free speech law and other legal systems stem from the particular histories of each country. The Founders of the U.S. were particularly concerned about protecting the speech they could not voice under British rule, while countries like Germany and South Africa feel more comfortable restricting speech in

[160] E.g., Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Board, 502 U.S. 105, 118 (1991) [Reproduced in accompanying notebook at Tab 45].

[161] *See, e.g.*, Kauesa v. Minister of Home Affairs, 1995 SACLR LEXIS 273, at *46-47 (Namibia) (rejecting the U.S. Supreme Court criteria for limiting free speech in favor of the restrictions authorized by most modern constitutions, including the Namibia Constitution) [Reproduced in accompanying notebook at Tab 34].

their respective battles against bigotry and racism.[162] Given the previous conflicts among various groups in Iraq, it seems logical that it too would adopt the international standard's more permissive approach to free speech restrictions.

VII. THE SPECIAL ROLE OF THE LAWYER

A. Duty to Argue Zealously for Client

Perhaps the most essential role of the lawyer in the judicial system is to argue zealously for his client.[163] If the lawyer is deprived of his ability to passionately defend his client's interests, an individual's right to a fair trial will be jeopardized.[164] In order to give the lawyer some leniency in arguing for his client, most domestic bar associations, international, and regional bodies create rules to protect a lawyer's right to argue zealously for his client.

Rule 49 of the IST Rules of Procedure and Evidence require defense counsel to zealously represent the accused.[165] Similarly, the UN Congress on the Prevention of Crime and the Treatment of Offenders adopted Basic Principles on the Role of Lawyers, under which lawyers have a duty to assist their clients in every appropriate way,[166] and they must always loyally respect the interests of their clients.[167] Also, most state's bar associations impose similar duties upon lawyers to represent their clients to the best of their professional ability.[168]

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[162] *See* Brugger, *supra* note 60, at 11, 21 (recognizing the special history of the Holocaust in Germany as a reason Germany permits more restrictions on speech than America) [Reproduced in accompanying notebook at Tab 65].

[163] *E.g.*, Nikula v. Finland, [2002] ECHR 31611/96, at ¶ 54 [Reproduced in accompanying notebook at Tab 37].

[164] *See id.*

[165] IST R. PROC. & EVID. 49, *supra* note 8 [Reproduced in accompanying notebook at Tab 14].

[166] United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Role of Lawyers*, sec. 13(b) (1990), *available at* http://www.ohchr.org/english/law/lawyers.htm [Reproduced in accompanying notebook at Tab 21].

[167] *Id.* at sec. 15.

[168] *See supra* note 11 and accompanying text.

With this strong duty to protect their clients' interests, lawyers are also given considerable leeway to argue zealously for their clients in and out of the courtroom. However, in exercising these rights, lawyers must always conduct themselves in accordance with the law and the recognized standards and ethics of the profession.[169]

The European Court of Human Rights protected a defense counsel's right to free speech in *Nikula v. Finland*, despite the fact that Nikula wrote a scathing memorandum criticizing the prosecution entitled "Role manipulation and unlawful presentation of evidence."[170] The court reasoned that, as defense counsel, Nikula had a right to express such options, and the prosecutor was obliged to tolerate such criticism.[171] Moreover, Nikula's comments were confined to the courtroom, as opposed to criticism voiced in the media.[172] The court believed that it should primarily be the counsel's responsibly, with supervision by the bench, to assess the usefulness of a defense argument without the influence of a potential "chilling effect" of even a relatively light sanction or an obligation to pay compensation or costs.[173] In the end, the restrictions on Nikula failed to answer any pressing social need and ordering her to pay damages and costs was not proportionate to the legitimate aim sought to be achieved.[174]

The Basic Principles also recognize that lawyers, like other citizens, have the right to take part in public discussion of matters concerning the law without suffering restrictions on their

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[169] *Id.*

[170] [2002] ECHR 31611/96, at ¶ 10 [Reproduced in accompanying notebook at Tab 37].

[171] *Id.* at ¶ 51. As an aside, the court noted that even if Nikula was not a member of the Bar and so not subject to disciplinary proceedings, she was still subject to the supervision of the court. *Id.* at ¶ 53.

[172] *Id.* at ¶ 52.

[173] *Id.* at ¶ 54.

[174] *Id.* at ¶ 55-56.

lawful actions.[175] The Council of Europe's Recommendation on the Freedom and Exercise of the Profession of Lawyers even more strongly asserts that all necessary measures should be taken to protect and promote the lawyer's freedom of exercise without improper interference from authorities.[176] Courts have also traditionally protected a lawyer's right to demonstrate in public. In *Ezelin v. France*, the applicant, a lawyer, who was also Vice-Chairman of the Trade Union of the Guadeloupe Bar, decided to participate in a protest by carrying a placard.[177] Other demonstrators were chanting slogans hostile to the police and the judiciary and defaced several public buildings with graffiti,[178] but it was impossible to identify those responsible.[179] The court held, however, that "the freedom to take part in a peaceful assembly…is of such importance that it cannot be restricted in any way, even for an avocat, so long as the person concerned does not himself commit any reprehensible act on such an occasion."[180] In other words, the sanction, however minimal, was not necessary in a democratic society since Ezelin himself did not pose an immediate threat and any threat he did pose was outweighed by the public's strong interest in the freedom to protest government policy.[181]

B. Duty of Professionalism

Most countries and international organizations recognize the special role which the lawyer plays in the administration of justice. Under the IST Rules of Procedure and Evidence,

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[175] *Id.* at sec. 24.

[176] Council of Europe, Committee of Ministers, *Recommendation on the Freedom and Exercise of the Profession of Lawyers*, Recommendation No. R(2000)21, Principle 1, sec. 1 [Reproduced in accompanying notebook at Tab 7].

[177] [1991] ECHR 11800/85, at ¶ 9-10 [Reproduced in accompanying notebook at Tab 27].

[178] *Id.* at ¶ 11.

[179] *Id.* at ¶ 16.

[180] *Id.* at ¶ 53.

[181] *Id.*

defense counsel is subject to any codes of practice and ethics governing their profession and, if applicable, any Code of Professional Conduct established by the President.[182]

As a result, defense lawyers coming before the SICT would presumably be subject to IBA rules. Under the IBA's International Code of Ethics, lawyers must at all times maintain the honor and dignity of their profession, even in their private lives.[183] Following the common law tradition, the IBA rules also require that lawyer maintain due respect towards the Court at all times.[184] Finally, the loyal defense of a client's case can never cause a lawyer to be more than perfectly candid or to knowingly go against the law.[185]

The Basic Principles on the Role of Lawyers promulgated by the United Nations impose similar restraints on lawyers. Most notably, the Basic Principles specifically require lawyers to uphold human rights and fundamental freedoms in protecting the rights of their client.[186] In addition, lawyers must act in accordance with recognized standards and ethics of the legal profession.[187] The Council of Europe's Recommendation on the Freedom of the Exercise of the Profession of Lawyers requires bar associations to establish professional standards and codes of

[182] IST R. PROC. & EVID. 48, *supra* note 8 [Reproduced in accompanying notebook at Tab 14].

[183] International Bar Association, *International Code of Ethics*, *supra* note 8, Rule 2 [Reproduced in accompanying notebook at Tab 10].

[184] *Id.* at Rule 6.

[185] *Id.* at Rule 10.

[186] United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *supra* note 166, at sec. 14 [Reproduced in accompanying notebook at Tab 21].

[187] *Id.*

conduct to regulate the behavior of lawyers.[188] Also, state bar associations usually require lawyers to act professionally in the conduct of their work.[189]

Included in a lawyer's duty of professionalism is a duty of respect toward the court and judicial process. As mentioned earlier, lawyers can be sanctioned by the court for interfering with the administration of justice, even if this means restricting a lawyer's right to free speech.[190] In punishing lawyers' speech, courts also make a distinction between speech directed at the prosecution and speech directed at the court process. Courts are more willing to uphold punishments of attorneys who make disrespectful comments directed at the judiciary such comments are more likely to interfere with justice than comments directed at the prosecution.[191]

In *Schopfer v. Switzerland*, the applicant held a press conference, during which he declared that the laws and human rights were flagrantly being disregarded at the district authority offices.[192] He claimed he was speaking to the press as a last resort.[193] The court found that "lawyers' statements to the press always had to be not only of real public interest…but also objective and moderate in tone."[194] In this case, the human rights violations were unacceptably exaggerated for a lawyer, especially given the fact that judicial proceedings were pending against his client.[195] Given the modest fine imposed on Schopfer, the court found that the authorities did

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[188] Council of Europe, *supra* note 176, at Principle III, sec. 1 [Reproduced in accompanying notebook at Tab 7].

[189] *See supra* note 11 and accompanying text.

[190] *See supra* notes 22-29 and accompanying text.

[191] *See supra* notes 23-29 and accompanying text.

[192] 4 BHRC 623, at ¶ 8 (Eur. Ct. H.R. 1998) [Reproduced in accompanying notebook at Tab 47].

[193] *Id.*

[194] *Id.* at ¶ 16.

[195] *Id.* at ¶ 26.

not exceed their margin of appreciation in punishing him, and there was no breach of Article 10 of the European Convention.[196]

VIII. CAN THE TRIBUNAL INTERFERE WITH HUSSEIN'S LAWYERS' RIGHT TO FREE SPEECH?

Because lawyers are under a special duty to uphold justice, the Tribunal can more easily restrict the speech of Hussein's lawyers than even the speech of Hussein himself. Mostly likely, Hussein's lawyers will argue that any comments they make to the press or in the courtroom are made solely in zealous defense of their client. For instance, in Khaleel Abood Saleh Aldelami's comment to NBC Nightly News, he made it clear that he was speaking for Hussein, not himself.[197] In addition, Hussein's lawyers will likely argue that since Hussein has had such limited access to the outside world, then they have an even greater duty to communicate for him.

But, while lawyers have a duty to assist their clients in any way, they can never violate the law to do so. If Hussein is adjudged guilty of contempt of court for comments he is asking his lawyers to make, then his lawyers will also be guilty of engaging in such illegal action on behalf of their client.

Moreover, one could argue that encouraging the insurgency in Iraq goes beyond the permissible bounds of aiding the client even if Hussein is not found guilty of contempt. As rational lawyers, they should have known that the statement Hussein wanted them to make would likely further encourage violent insurgency given the current state of politics in Iraq. While the lawyers could have legally advocated Hussein's political opposition to the U.S. invasion, overthrow of the former government, and installment of a new government, the

[196] *Id.* at ¶ 34.

[197] Transcript of NBC Nightly News, *supra* note 2 [Reproduced in accompanying notebook at Tab 86].

statements encouraging insurgents who have a history of terrorism are vastly different from such a mere political statement.

Courts have focused not just on the content of lawyers' speech, but also on the tone.[198] In this case, the Tribunal could find that the tone of the lawyers' comments was not objective and moderate; therefore, the lawyers have violated their duty of professionalism under the IST Rules of Procedure and Evidence via the IBA's International Code of Ethics. The tone of Hussein's lawyers language is questionable since it was made in front of the press in the context of an ongoing and escalating insurgency in Iraq. However, Aldelami's speech was filtered through the press, and the majority of the public was unable to hear Aldelami speak himself, so it is difficult to evaluate his tone.

In the end, the Tribunal will have to determine the weight of the lawyers' tone from the totality of the surrounding circumstances. But, if Hussein's lawyers again make a public statement encouraging the insurgency in the context of a trial, the Tribunal will be able to make a strong case for restricting their speech based on their unprofessional tone. If the comments are made in court, the Tribunal will have to go through a similar analysis, but in those circumstances, it might be easier to find that Hussein's lawyers are interfering with the administration of justice by questioning the legitimacy of the current Iraqi government, which includes the Tribunal itself.

IX. AVAILABLE PUNISHMENT

If the Tribunal does decide to place restrictions on Hussein's or his counsel's speech, it will have available three tentative options: 1) asking the Iraqi Bar Association to bring disciplinary proceedings against Hussein's counsel, 2) sanctioning or fining either Hussein or his

[198] *See, e.g., Schopfer*, 4 BHRC at ¶ 16 [Reproduced in accompanying notebook at Tab 47].

counsel, or 3) placing a "gag order" or other prior restraint on Hussein or his counsel's speech to prevent them from inciting the insurgency again in the future. Of course, these restrictions are not necessarily exclusive; the Tribunal might be able utilize one or more of them for the defendant or his counsel. Which options are ultimately available will depend in part on the circumstances in which the speech arises and on the balance between the severity of the threat and the severity of the restriction. And, of course, the result the Tribunal is seeking to achieve will determine the appropriateness of a particular option.

A. Disciplinary Proceedings

Where lawyers neglect to act in accordance with their professional standards, appropriate measures should be taken against them, including disciplinary proceedings.[199] According to the International Bar Association, every lawyers' association should establish rules for the commencement and conduct of disciplinary proceedings which incorporate rules of natural justice.[200] Disciplinary proceedings against lawyers can be brought before an impartial disciplinary committee established by a bar association, before an independent statutory authority, or before a court, and it must be subject to an independent judicial review.[201]

Because of their direct and continuous contact with their members, local Bar authorities and a country's courts might be in a better position than an international court to determine how, at a given time, the right balance can be struck between the punishment for certain speech and

[199] Council of Europe, *supra* note 176, at Principle VI, sec. 1 [Reproduced in accompanying notebook at Tab 7].

[200] International Bar Association, *Standards for the Independence of the Legal Profession*, Rules 21-22 (1990) [Reproduced in accompanying notebook at Tab 11].

[201] U.N. Congress on the Prevention of Crime and the Treatment of Offenders, *supra* note 166, at sec. 28 [Reproduced in accompanying notebook at Tab 21].

severity of the crime.[202] Since the SICT is in part both a domestic and an international court, there might be some benefit in allowing the Iraqi Bar Association to bring disciplinary hearings against Hussein's attorneys. However, the Iraqi Bar Association was recently disbanded and reformed,[203] so it may not be in the position to bring disciplinary proceedings in a timely fashion. The IST Statute refers to a disciplinary committee created to deal with disciplinary proceedings against employees of the court,[204] but it is unclear whether this committee would have power over independent defense counsel. Also, the IST Statute does not explicitly confer upon the Tribunal the power to bring disciplinary proceedings against independent counsel appearing before it.

Regardless of the Tribunal's ambiguous power to begin disciplinary proceedings, disciplinary proceedings may be an inappropriate remedy to address the immediate risk of inciting the insurgency in Iraq. Disciplinary proceedings are usually a way of dealing with a lawyer's inappropriate speech after the fact. Here, however, the Tribunal will most likely want to ensure that Hussein's lawyers refrain from encouraging the insurgency during the pendency of trial. While disciplinary proceedings are intended to deter unprofessional conduct, they do not serve as immediate deterrents. The actual punishment will not be handed down until the end of the proceedings, which are shorter than full trials, but still involve a certain amount of process. In other words, Hussein's lawyers' speech will not be punished until long after it is actually uttered, given the lawyers (or their future replacements) time to continue inciting the insurgency

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[202] Schopfer v. Switzerland, 4 BHRC 632, at ¶ 33 (Eur. Ct. H.R. 1998) [Reproduced in accompanying notebook at Tab 47].

[203] Ahmed Janabi, *Saddam Lawyers Face More Pressure*, ALJAZEERA.NET, July 13, 2004, http://english.aljazeera.net /NR/exeres/6919C25E-CE21-4F45-BFCE-39C88E1E5C23.htm (last visited Oct. 8, 2005) (reporting that the Iraqi government issued a decree disbanding the Iraqi Bar Association and calling an election of a new council) [Reproduced in accompanying notebook at Tab 76].

[204] IST Statute, *supra* note 26, at art. 5, fifth (B), (E) [Reproduced in accompanying notebook at Tab 20].

in Iraq. Consequently, the Tribunal will probably want to avoid using disciplinary proceedings in favor of a punishment that is more likely to deter future speech.

B. Sanctions

The power of courts to impose sanctions for contempt of court is usually concurrent with its general contempt power and also seen as an inherent power of the judiciary.[205] The principle of proportionality should be respected when determining sanctions for a disciplinary offense committed by a lawyer.[206] Of course, the Tribunal must also respect the principle of proportionality under Article 19 of the ICCPR when restricting an individual's right to free speech.[207]

For example, the court in *Schopfer v. Switzerland* noted that because of the modesty of the fine imposed upon the defense attorney, the state authorities did not violate his right to free speech.[208] In contrast, the court in *Nikula v. Finland* held that it was only in exceptional cases that a restriction of defense counsel's freedom of expression, even by way of a lenient criminal sanction, could be accepted as necessary in a democratic society.[209]

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[205] *E.g.*, Chambers v. NASCO, 501 U.S. 32, 43 (1991) (holding that even statutes and the Federal Rules of Civil Procedure addressing sanctions did not limit a court's ability to use its inherent power to impose sanctions for contempt of court; they merely supplemented it) [Reproduced in accompanying notebook at Tab 25]; Prosecutor v. Blaskic, Decision on the Objection of the Republic of Croatia to the Issuance of *Subpoenae Duces Tecum*, at ¶ 62, *available at* http://www.un.org/icty/blaskic/trialc1/decisions-e/70718SP2.htm (ICTY 1997) (noting that the court could consider using its inherent contempt power or that provided for in Rule 77 against individuals who fail to comply) [Reproduced in accompanying notebook at Tab 41].

[206] Council of Europe, *supra* note 176, at Principle VI, sec. 4 [Reproduced in accompanying notebook at Tab 7].

[207] ICCPR, *supra* note 4, at art. 19(3) [Reproduced in accompanying notebook at Tab 12], *as interpreted by* Shin v. Republic of Korea, Communication No. 926/2000, U.N. Doc. CCPR/C/80/D/926/2000, at ¶ 7.2 (H.R.C. 2004) [Reproduced in accompanying notebook at Tab 46].

[208] *Schopfer*, 4 BHRC at ¶ 34 [Reproduced in accompanying notebook at Tab 47].

[209] [2002] ECHR 31611/96, at ¶ 55 [Reproduced in accompanying notebook at Tab 37].

So, the Tribunal should be able to impose sanctions against both Hussein and his attorneys in order to restrict comments encouraging the insurgency in so far as such sanctions are proportional to the threat that the speech poses. Because the court can issue the sanction *sua sponte* under its contempt powers, a sanction is a more expedient punishment for incitement than disciplinary proceedings.

Again, though, sanctions are usually used as punitive measures when an individual fails to comply with a court order, so they will not prevent the threatening speech from being uttered in the first place. On the other hand, monetary sanctions may effectively deter undesirable behavior if the cost on the defendant and his attorneys is high enough but no so high as to violate the principle of proportionality. Also, as the former President of Iraq, Hussein probably has more than enough money to afford the cost of sanctions. Even though the assets found by the U.S. were frozen, Hussein probably had other assets hidden with family and friends; as a result, sanctions may not deter his behavior at all. So, while the Tribunal could use sanctions to punish Hussein and his attorneys for inciting insurgency, sanctions alone will not prevent the parties from encouraging violence again in the future.

C. Gag Orders

The Tribunal has the power to impose a "gag order" upon parties and lawyers in a case pursuant to its contempt power.[210] The best way to assure that neither Hussein nor his counsel makes comments to the press inciting the insurgency would be to put a "gag order" or a prior restraint on such speech. Generally, most legal systems recognize that prior restraint on speech

[210] *See, e.g.*, Little Sisters Book and Art Emporium v. Minister of Justice, 9 BHRC 409, at ¶ 235 (Canada 2000) (citing Canada v. Taylor, in which a prior restraint was only imposed after the appellants were held in contempt of a prior court order) [Reproduced in accompanying notebook at Tab 35].

is extremely dangerous because it amounts to censorship and strongly erodes an individual's right to free speech.[211]

Under the Johannesburg Principles, which are an attempt to codify international law on free speech, expression cannot be subject to prior censorship in the interests of protecting national security unless the country is in a state of public emergency which threatens the life of the country.[212] While the Principles do not explicitly require the state to declare a state of public emergency, the framers might have intended to require such notice since they were relying in part on the ICCPR, which does require declaration of a national emergency before it can be used an excuse to derogate from Article 19's protection of free speech.[213]

However, this prohibition against prior restraint on speech except in times of national emergency does not seem internationally to be accepted. The European Court of Human Rights found that "Article 10 of the [European] Convention does not in terms prohibit the imposition of prior restrains on publication, as such."[214] Also, in one of the Court's most cited cases dealing with restrictions on free speech, the Court found that copies of a book could be confiscated by the government and publishing could be stopped temporarily because of the government's overriding interest in protecting social morals.[215] In fact, prior restraints on speech appear to be

[211] Id. at ¶ 231 ("If such a fundamental right [freedom of speech] is to be restricted, it must be done with care. This is particularly the case when the nature of the interference is one of prior restraint, not subsequent silencing through criminal sanction."). *See also* Observer v. U.K., [1991] ECHR 13585/88, at ¶ 60 ("[T]he dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the court.") [Reproduced in accompanying notebook at Tab 38].

[212] Johannesburg Principles, *supra* note 70, at principle 23 [Reproduced in accompanying notebook at Tab 16].

[213] ICCPR, *supra* note 4, at art. 4 [Reproduced in accompanying notebook at Tab 12].

[214] Observer, [1991] ECHR 13585/88, at ¶ 60 [Reproduced in accompanying notebook at Tab 38].

[215] Handyside v. United Kingdom, [1976] ECHR 5493/72, at ¶ 53 [Reproduced in accompanying notebook at Tab 29].

more permissible under the ICCPR, European Convention, and the American Convention than in the U.S. because the treaties themselves explicitly allow for restrictions on speech.[216]

In the U.S., there is a strong presumption against prior restraints on speech, but the presumption is less strong with defendants and lawyers than with the press. Demonstrating that a lawyer's comments create substantial likelihood of material prejudice, as opposed to clear and present danger, is constitutionally sufficient to justify placing restrictions on those comments.[217]

And, despite its strong presumption in favor of free speech, even the U.S. has permitted some prior restraints on speech where the restraint was narrowly tailored and the threat posed by the speech was great. For example, in *United States v. Koubriti*, in which the defendants were appealing a conviction of terrorist-related activities, the court held that the only remedial measure which would prevent prejudice to the parties' fair trial rights was the imposition of a limited gag order on the lawyers and the parties given the history of leaks which had undermined the review of the case.[218]

Whether a gag order is appropriate in this case, however, will depend on the circumstances in which the speech arises in court. In many cases in which the court sanctions a prior restraint of speech, there has been a history of leaking sensitive or prejudicial information, as in *Koubriti*. Since the Hussein trial is just beginning, there is as of yet no history of Hussein or his attorneys inciting insurgency, and the Tribunal cannot find that comments made before trial interfered with justice before the fact. The speech must be uttered before the Tribunal can weigh the type of threat it poses to courtroom proceedings. Ultimately, the Tribunal may have to

[216] Observer, [1991] ECHR 13585/88, at ¶ 60 [Reproduced in accompanying notebook at Tab 38].

[217] U.S. v. Brown, 218 F.3d 415, 426 (5th Cir. 2000) [Reproduced in accompanying notebook at Tab 49].

[218] 307 F. Supp. 2d 891, 900 (E.D. Mich. 2004) [Reproduced in accompanying notebook at Tab 50].

wait until Hussein or his attorneys make comments encouraging the insurgency either in court or in front of the press before they can issue a "gag order" to prohibit such behavior in the future.

If Hussein or his attorneys do make comments inciting the insurgency in Iraq, then the Tribunal will have to consider whether the threat posed by them is great enough to warrant such a serious restriction on speech. Given the current situation of political uncertainty and escalating violence in Iraq, the Tribunal should be able to make a strong argument that the threat of even greater escalation in insurgency violence warrants a limited restraint on Hussein and his attorneys' speech. Of course, the restraint must be narrowly tailored to the circumstances, which usually means it should be limited in time and application.

X. CONCLUSION

Ultimately, if Hussein or his defense counsel make comments either in court or out of court, the Tribunal should be able either to punish such statements or to prevent the release of such statements in the future via its inherent contempt powers. Given the volatile situation in Iraq with insurgency violence on the rise, even Hussein's vague encouragement of the insurgency will be likely to incite further violence. As a result, it is necessary to restrict Hussein's freedom of speech in the greater interest of national security and stability of the new democracy of Iraq. However, the Tribunal must ensure that whatever measures it takes are proportional to the threat posed. But, since the threat of the overthrow of the current, democratic government in Iraq is great, the Tribunal should have some leeway in imposing strong restrictions on Hussein's speech. Of course, they cannot restrict vague encouragement as much as they could direct incitement.

The Tribunal has even greater power to restrict the speech of Hussein's attorneys because they owe a special duty to the administration of justice and a special deference to the court.

Whether Hussein's lawyers make comments in or out of court inciting the insurgency, they are still putting the administration of justice at risk in so far as the insurgents seek to get rid of the Tribunal altogether. While attorneys owe a special duty to argue zealously for their client, Hussein's lawyers are never permitted to violate their duties of professionalism. The tone of speech inciting insurgency alone is unbecoming of a professional advocate; therefore, the Tribunal should be able to restrict Hussein's lawyers' speech as necessary to protect the due administration of justice during Hussein's trial.

Finally, the Tribunal has three choices of restrictions to impose on either Hussein or his attorneys for speech inciting the insurgency in Iraq. The Tribunal may ask the Iraqi Bar Association to bring disciplinary proceedings against Hussein's attorneys, but since the Bar Association was recently disbanded, this may not be a feasible option. Not to mention, disciplinary proceedings will not have a quick deterrent effect. The Tribunal may also sanction Hussein or his attorneys *sua sponte* for contempt of court. While the Tribunal can impose sanctions more quickly than disciplinary proceedings, sanctions, too, might lack the desired deterrent effect because, as a former head of state, Hussein undoubtedly has the money to pay them.

Perhaps the best way to prevent the utterance of speech inciting the insurgency in and out of the courtroom is to place a limited "gag order" or prior restraint on speech on both Hussein and his attorneys. While prior restraints on speech are meant to be the last resort in restricting speech, it is the only way to prevent both Hussein and his attorneys from making further comments to the press and the courtroom encouraging the insurgency. In imposing a prior restraint on speech, though, the Tribunal must take care to narrowly tailor the restraint in time and content covered.