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**CHAOS IN THE COURTROOM:
CONTROLLING DISRUPTIVE DEFENDANTS AND
CONTUMACIOUS COUNSEL IN WAR CRIMES TRIALS**

*Michael P. Scharf**

I. INTRODUCTION

The Saddam Hussein Trial will no doubt be remembered as one of the messiest trials in legal history. During the eight-month long “Dujail” trial (October 2005–August 2006), Saddam Hussein, his seven co-defendants, and their dozen lawyers regularly disparaged the judges, interrupted witness testimony with outbursts, turned cross-examination into political diatribes, and staged frequent walk-outs and boycotts.¹ The first Presiding Judge, Rizgar Amin, was pressured to resign due to the perception that he had lost the battle of the wills against Saddam Hussein, and the replacement judge, Ra’ouf Abdul Rahman, often shouted angrily at the defendants and repeatedly tossed them and their lawyers out of the courtroom. The trial was the first ever to be televised gavel-to-gavel in any Middle Eastern country, enabling the world to witness the daily scenes of chaos in the courtroom.

I was one of the members of the team of experts assembled by the Regime Crimes Liaison Office and the International Bar Association to train the Iraqi High Tribunal judges. During the training sessions in the fall of 2004 and spring of 2005, we spent a great deal of time discussing a number of ways to respond to the defendants’ and defense counsel’s likely disruptive antics. Needless to say, things did not go as we had hoped.

A month after the conclusion of the Dujail trial, in September 2006, I was invited by Luis Moreno-Ocampo, the Prosecutor of the International Criminal Court, to speak to his staff in The Hague about the lessons from the Dujail Trial concerning maintaining order in the courtroom during a war crimes trial. Drawn from my Hague lecture, this article examines some of history’s previous messy trials and the strategies judges have employed with

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¹ Christopher Allbritton, *Saddam’s Trial: Behind the Scene*, *TIME*, Feb. 13, 2006, at 50–51.

varying degrees of success to respond to disruptive conduct by trial participants. It then describes the various tactics employed by the judges in the Dujail trial and analyzes why they were not more successful. The article concludes with a detailed prescription for maintaining order in future war crimes trials.

II. THE NEED FOR ORDERLY JUSTICE IN WAR CRIMES TRIALS

Disruptive conduct may be defined as any intentional conduct by the defendant or defense counsel in the courtroom "that substantially interferes with the dignity, order and decorum of judicial proceedings."² There are six main types of disorder:

- (1) passive disrespect, for example, the refusal to address the judge as "Your Honor" or refusal to stand when the judge enters the courtroom;
- (2) refusal to cooperate with the essential ground rules of the judicial proceedings (e.g., constantly insisting on making political speeches instead of asking questions during cross-examination);
- (3) a single obscenity or shout;
- (4) repeated trial interruptions, ranging from insulting remarks to loud shouting or cursing;
- (5) in a televised trial, attempting to incite acts of mass violence; and
- (6) resorting to physical violence in the courtroom.³

Former leaders and their counsel in war crimes trials are especially likely to engage in such forms of disruption. Because of the political context and widespread publicity, leaders on trial are more likely than ordinary defendants to have concluded that they do not stand a chance of obtaining an acquittal by playing by the judicial rules. Instead, they seek to derail the proceedings, hoping for a negotiated solution (e.g., amnesty) outside the courtroom; to hijack the televised proceedings, hoping to transform themselves through political speeches into martyrs in the eyes of their followers; and to discredit the tribunal by provoking the judges into inappropriately harsh responses which will make the process appear unfair.

As Robert Jackson, the Chief Prosecutor at the Nuremberg trial, observed sixty years ago, war crimes trials, whether before international tribunals or domestic courts, seek to establish a credible historic record of abuses and elevate the rule of law over the force of might, thereby facilitating the

² NORMAN DORSEN ET AL., DISORDER IN THE COURT: REPORT OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON COURTROOM CONDUCT 91 (1973).

³ *Id.* at 91.

restoration of peace and the transition to democracy.⁴ While tolerating dissent is a healthy manifestation of a democratic government, “a courtroom is not an arena in which dissension, particularly of a disruptive nature, may supplant, or even take precedence over, the task of administering justice.”⁵ This is especially true in a war crimes trial.

Unlike other forms of acceptable political expression, a disruptive defendant or defense lawyer who interferes with the “grandeur of court procedure” (as Hannah Arendt once described the judicial process)⁶ threatens the proper administration of criminal justice in several fundamental ways. First, disruptive conduct renders it more difficult for the defendant and any co-defendants to obtain a fair trial. Second, it hampers the court’s ability to facilitate the testimony of victims and other witnesses. Third, it undermines the public’s confidence in and respect for the legal process.

There are those who would argue that a defendant has a right, through his own (or through his lawyer’s) disruptive and obstructionist conduct, to an unfair trial, but modern war crimes tribunals have held that the defendant’s right to employ disruptive tactics which seek to discredit the judicial process must give way to the tribunal’s obligation to protect “the integrity of the proceedings” and “to ensure that the administration of justice is not brought into disrepute.”⁷ The duty of a war crimes tribunal to ensure that a trial is fair has been interpreted as including concerns that go beyond just those of the accused.

II. HISTORY’S MOST TUMULTUOUS TRIALS

A. *From the Chicago Seven to Zacarias Moussaoui*

The administration of justice has always endured a degree of disorder and there have been many notable occasions when trial participants have been particularly unruly and disrespectful to judicial authority. A list of history’s most disruptive defendants would include Sir Walter Raleigh (tried in Britain for high treason in 1603), William Penn (tried in Britain for

⁴ Robert H. Jackson, Report to the President, June 7, 1945, *quoted in* MICHAEL P. SCHARF, *BALKAN JUSTICE* 37 (1997) (“We must establish incredible events by credible evidence.”); *see also* Robert H. Jackson, Opening Speech for the Prosecution at Nuremberg, Nov. 21, 1945 *quoted in* TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL NUREMBERG, Vol. II 98–99 (1946).

⁵ *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972) (Aams, J., concurring and dissenting).

⁶ Hannah Arendt, *Civil Disobedience*, in *IS LAW DEAD?* 212 (Eugene V. Rostow ed., 1971).

⁷ *See e.g.*, *Prosecutor v. Norman et al.*, Decision on the Application of Samuel Hinga Norman for Self-Representation under Article 17(4)(d) of the Statute of the Special Court, Case No. SCSL-04-14-T, ¶ 28 (Jan. 17, 2005).

unlawful assembly in 1670), Auguste Vaillant (tried in France for blowing up the Chamber of Deputies in 1894), Michele Angiolillo (tried in Spain for assassinating the Spanish premier in 1897), and Gaetano Bresci (tried in Italy for killing Italian King Humbert in 1899).⁸ But by far the most notorious disorderly trial in modern history was the Chicago Seven conspiracy trial of 1969–1970.

The Chicago Seven trial is particularly relevant to the Saddam Hussein trial because Hussein's chief American Lawyer, former U.S. Attorney General Ramsey Clark, had also been an advisor to the defense team in that notorious trial three decades earlier. In the Chicago Seven case, the leaders of the anti-Vietnam war movement—Bobby Seale, David Dellinger, Abbie Hoffman, Jerry Rubin, Rennie Davis, Tom Hayden, Lee Weiner, and John Froines—were charged with conspiring, organizing, and inciting riots during the 1968 Democratic National Convention in Chicago.⁹ The trial drew considerable public notice because of the defendants' notoriety and their courtroom antics.

On the first day of the trial, when the presiding judge, Julius Hoffman, refused to issue a postponement so that Bobby Seale's attorney would have time to recover from a gall bladder operation,¹⁰ Seale said to the judge, "If I am consistently denied this right of legal defense counsel of my choice who is effective by the judge of this Court, then I can only see the judge as a blatant racist of the United States Court."¹¹ This brought a strong rebuke from Judge Hoffman.¹² That same day, Judge Hoffman reprimanded Tom Hayden for giving a clenched fist salute to the jury and Abbie Hoffman for blowing kisses at the jurors.¹³ A few days later, the defendants tried to drape the counsel table with a North Vietnamese flag in celebration of Vietnam Moratorium Day, drawing another round of sharp words from the judge.¹⁴

Throughout the trial, the defendants refused to rise at the beginning or close of court sessions.¹⁵ On two occasions, defendants Abbie Hoffman and Jerry Rubin wore judicial robes in court onto which were pinned a Jewish yellow star, meant to imply that Judge Hoffman was running his courtroom like the courts of Nazi Germany.¹⁶ The defendants frequently called

⁸ Dorsen, *supra* note 2, at 24–32.

⁹ Although there were initially eight defendants, Bobby Seale was severed from the case before it went to the jury.

¹⁰ See *United States v. Seale*, 461 F.2d 345, 358 (7th Cir. 1972).

¹¹ *Id.* at 374.

¹² *Id.*

¹³ See Pnina Lahav, *Theater in the Courtroom: The Chicago Conspiracy Trial*, 16 CARDOZO STUD. L. & LIT. 381, 387 (2004).

¹⁴ See *id.*

¹⁵ 461 F.2d at 382, 386.

¹⁶ Lahav, *supra* note 13, at 430.

Judge Hoffman derogatory names, accused him of racism and prejudice, and made sarcastic comments to him, such as asking "How is your war stock doing?" The most serious disorder occurred two weeks into the trial, when Judge Hoffman learned that a few minutes before the commencement of the court session, Bobby Seale had addressed the audience of his supporters in the courtroom, telling them that if he were attacked "they know what to do."¹⁷ Judge Hoffman responded by having Seale bound and gagged. Defense counsel William Kunstler then scolded the Court, saying "This is no longer a court of order, your Honor; this is a medieval torture chamber. It is a disgrace."¹⁸

At the conclusion of the trial, Judge Hoffman issued a total of 159 citations to the defendants and their lawyers for contempt in response to these incidents of disruption and disrespect. The Seventh Circuit Court of Appeals, however, reversed the contempt convictions on the ground that the judge cannot wait until the end of the trial to punish the defendants and their lawyers for misconduct. It also reversed the convictions on the substantive charges, in part due to the prejudicial remarks and actions of the trial judge and inflammatory statements by the prosecutor during the trial.¹⁹ It should come as no surprise that the Chicago Seven trial is universally seen as a low point in American courtroom management. Rather than viewing Judge Hoffman as a brave hero fighting anarchy, history remembers him more as an accomplice who unwittingly fanned the flames of disorder. Slobodan Milosevic and Saddam Hussein, both of whom were advised by Ramsey Clark, set out to do the same thing to the judges of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Iraqi High Tribunal.

Just a few months after the Chicago Seven trial, the U.S. Supreme Court held in *Illinois v. Allen* that an unruly defendant could be excluded from the courtroom during his trial if his disruptive behavior threatened to make orderly and proper proceedings difficult or wholly impossible.²⁰ Allen had been tried in a state court in 1957 for armed robbery of a tavern owner. During his trial, Allen threatened the judge's life, made abusive remarks to the court and announced that under no circumstances would he allow his trial to proceed. The court responded by removing him from the courtroom, after appropriate warning, and Allen was convicted in his absence.

The Supreme Court affirmed Allen's conviction, ruling that removal after a warning was permissible and far less objectionable than use of

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *United States v. Seale*, 461 F.2d 345 (7th Cir. 1972); *United States v. Dillinger*, 472 F.2d 340 (7th Cir. 1972).

²⁰ *Illinois v. Allen*, 397 U.S. 337 (1970). The Court explained that it was "essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmark of all court proceedings in our country." *Id.* at 343.

restraints. In a passage that was obviously inspired by the publicity surrounding the Chicago Seven trial, the Supreme Court stated:

Trying a defendant for a crime while he sits bound and gagged before the judges and jury would to an extent comply with that part of the Sixth Amendment's purposes that accords the defendant an opportunity to confront the witnesses at the trial. But even to contemplate such a technique, much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort. Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.²¹

Yet the Court declined to rule that physical restraints may never be used, saying: "However, in some situations which we need not attempt to foresee, binding and gagging might possibly be the fairest and most reasonable way to handle a defendant who acted as Allen did here."²²

The first major chaotic trial to arise after the Supreme Court's *Allen* decision was that of Charles Manson who, along with three women members of his cult, was tried from June 1970 to March 1971 for the gruesome murder of movie actress Sharon Tate and five others. During the trial, Manson constantly interrupted proceedings by shouting, chanting, turning his back on the judge, assuming a crucifixion pose, and singing (actions often parroted by the three women co-defendants).²³ The court responded by repeatedly having the defendants removed from the courtroom. In one instance, the judge removed Manson after he leaped over the defense table to attack the judge with a pencil, shouting "In the name of Christian justice, someone should cut your head off."²⁴

More recently, in February 2006, accused al-Qaeda terrorist Zacarias Moussaoui, was thrown out of the courtroom by U.S. District Judge Leonie Brinkema, and then temporarily banned from returning to court, due to his disruptive and belligerent outbursts. "This trial is a circus . . . God curse you and America," Moussaoui shouted at the judge as he was led away. "You are the biggest enemy of yourself," Judge Brinkema replied, ordering that Moussaoui watch the remainder of the proceedings via closed-

²¹ *Id.* at 344.

²² *Id.*

²³ Robert Dardenne, *The Case of Charles Manson, in THE PRESS ON TRIAL* 159, 167 (Lloyd Chiasson Jr. ed. 1991).

²⁴ *Id.*

circuit feed from a jail cell inside the courthouse. Media outlets reported that most legal scholars agreed that Judge Brinkema acted appropriately.²⁵

B. Disorder in The Hague

Slobodan Milosevic was the first former head of state to be tried in an international war crimes trial. Although assisted by an army of defense counsel including Ramsey Clerk, Milosevic asserted his right to act as his own lawyer in the televised proceedings before the Yugoslavia Tribunal, as this would enable him to make lengthy opening and closing statements and turn cross-examinations into opportunities for unfettered political diatribes. As the trial unfolded, Milosevic exploited his right of self-representation to treat the witnesses, prosecutors, and the judges in a manner that would earn ordinary defense counsel expulsion from the courtroom. He often strayed from the forensic case into long vitriolic speeches and he was frequently strategically disruptive.²⁶

On numerous occasions, the presiding judge, Richard May, tried to reign in Milosevic with little success. A defendant who is represented by a lawyer is ordinarily able to address the court only when he takes the stand to give testimony during the defense's case-in-chief. And in the usual case, the defendant is limited to giving evidence that is relevant to the charges, and he is subject to cross-examination by the prosecution. While a judge can control an unruly lawyer by threatening fines, jail time, suspension, or disbarment, there is little a judge can do to effectively regulate a disruptive defendant who is acting as his own counsel.

While Milosevic's antics did not win him points with the judges, they had a significant impact on public opinion back home in Serbia. Rather than discredit his nationalistic policies, the trial had the opposite effect. His approval rating in Serbia doubled during the first weeks of the trial, and two years into the trial he easily won a seat in the Serb parliament in a nation-

²⁵ MICHAEL P. SCHARF, *Did the Dujail Trial Meet International Standards of Due Process*, in SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL 162, 163 (Michael P. Scharf & Gregory S. McNeal, eds. 2006); see generally Neil A. Lewis, *Judge Ejects 9/11 Suspect After Outburst*, N.Y. TIMES, Feb. 15, 2006, at A20; Kelli Arena & Kevin Bohn, *Al Qaeda Conspirator Barred from Court*, CNN.com, Feb. 14, 2006, <http://www.cnn.com/2006/LAW/02/14/moussaoui.trial/index.html>.

²⁶ For references by the Tribunal of Milosevic misusing hearings and cross examinations as a platform for making political speeches, see Prosecutor v. Milosevic, Case No. IT-02-54-T, Initial Appearance (July 3, 2001); Prosecutor v. Milosevic, Case No. IT-02-54-T, Status Conference, (Oct. 30, 2001); Prosecutor v. Milosevic, Case No. IT-02-54-T, Open Session, (Nov. 10, 2004); Prosecutor v. Milosevic, Case No. IT-02-54-T, Hearing, (Nov. 10, 2004); Prosecutor v. Milosevic, Case No. IT-02-54-T Pre-Defense Conference, (June 17, 2004); see also Jerrold M. Post & Lara K. Panis, *Tyranny on Trial: Personality and Courtroom Conduct of Defendants Slobodan Milosevic and Saddam Hussein*, 38 CORNELL INT'L L. J. 823, 832 (2005).

wide election. In addition, opinion polls indicated that a majority of Serbs felt that he was not getting a fair trial, and that he was not actually guilty of any war crimes.²⁷ Suspicion surrounding the circumstances of Milosevic's death just before the conclusion of his trial has only reinforced these widely held views.

Six months after Milosevic's death, another Serb leader, Vojislav Seselj, decided that he, too, would utilize the right of self-representation as a means of disrupting his trial before the ICTY. Seselj made his unruly intentions clear on the eve of trial when he published three books in Serbia entitled *Genocidal Israeli Diplomat Theodor Meron* (about the President of the ICTY), *In the Jaws of the Whore Del Ponte* (about the Chief Prosecutor of the Tribunal), and *The Lying Hague Homosexual, Geoffrey Nice* (about the lead trial prosecutor).²⁸ Seselj tried repeatedly to provoke the judges at pre-trial hearings and made numerous obscene and improper statements in his pre-trial motions, including one submission which stated, "You, all you members of The Hague Tribunal Registry, can only accept to suck my cock."²⁹

On the eve of trial in August 2006, the Trial Chamber revoked Seselj's right to self-representation.

While it is clear that the conduct of the Accused brings into question his willingness to follow the "ground rules" of the proceedings and to respect the decorum of the Court, more fundamentally, in the Chamber's view, this behaviour compromises the dignity of the tribunal and jeopardizes the very foundations upon which its proper functioning is based.³⁰

The Appeals Chamber agreed that the Trial Chamber could revoke the right to self-representation where the Trial Chamber found "that appropriate circumstances, rising to the level of substantial and persistent obstruction to the proper and expeditious conduct of the trial exist."³¹ The Appeals Chamber, however, held that the Trial Chamber had to first give the defendant an explicit warning. The Trial Chamber subsequently did so, and in light of Seselj's continuing disruptive behavior, appointed counsel over his objection to represent him for the trial.

²⁷ Michael P. Scharf & Christopher M. Rassi, *Do Former Leaders Have an International Right to Self-Representation in War Crimes Trials?*, 20 OHIO ST. J. DISPUTE RESOLUTION 3, 6 (2005).

²⁸ Prosecutor v. Seselj, Case No. IT-03-67-PT, Decision on Assignment of Counsel, ¶ 30 (Aug. 21, 2006).

²⁹ *Id.* ¶ 48.

³⁰ *Id.* ¶ 77.

³¹ Prosecutor v. Seselj, Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel, IT-03-67-AR73.3, Oct. 20, 2006, at para. 21.

C. *Disarray in the Dujail Trial*

On August 11, 2005, the democratically elected Iraqi National Assembly adopted the Statute of the Iraqi High Tribunal with some modifications. Notably, the Assembly replaced the clause providing for a right of self-representation with a clause that said that all defendants before the Tribunal had to be represented by Iraqi Counsel, who could be assisted by foreign lawyers.³² During the training sessions, I strongly advocated for such an amendment in order to ensure that Saddam Hussein would not be able to use self-representation as a means of hijacking and disrupting the IHT. What I did not comprehend at the time, however, was that this legislative change would not accomplish the goal if the judges decided to follow the unique Iraqi legal tradition of permitting a defendant to cross-examine each witness after his lawyer had done so.³³

During the Dujail trial, Saddam Hussein and the other defendants were constantly disruptive and prone to political theater. Hussein's disruptive conduct often coincided with the most emotionally compelling testimony of victims. He engaged in frequent angry outbursts. He yelled at the judge to "go to hell" and called the judge a homosexual, a dog, and a whore-monger. He made wild accusations of mistreatment by his American jailers. He insisted on prayer breaks in the middle of witness testimony, went on hunger strikes, and repeatedly refused to attend trial sessions. Most troubling, he took advantage of the Iraqi legal tradition that permits the defendant to cross-examine each witness after his lawyer has finished his cross-examination by making frequent political speeches and impelling his followers—who were watching the television broadcasts of the proceedings—to kill American occupiers and Iraqi government collaborators.

Meanwhile, Hussein's co-defendant, Barzan al-Tikriti, who served as head of the Internal Security Agency, competed with Hussein for the most offensive insults directed at the bench. On one occasion, he appeared

³² Qanoon Al-Mahkamat Al-Jeena'eyyat Al-Eraqiyyat Al-Mukhtas [Statute of the Iraqi High Tribunal] art. 19(d), Oct. 18, 2005, *available at* www.law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf (Iraq), *reproduced in* MICHAEL P. SCHARF & GREGORY S. MCNEAL, SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL 283 (2006); English Translation of the Iraqi High Tribunal Rules of Procedure and Evidence (2005), Rule 29, *id.* at 313.

³³ There is also some international tribunal precedent for the approach of the IHT. After assigning counsel over the accused's objection, the ICTY permitted the accused Krajisnic "as an exception to the usual regime, to supplement counsel's cross-examination with his own questions." *Prosecutor v. Krajisnic*, Reasons for Oral Decision Denying Mr. Krajisnik's Request to Proceed Unrepresented by Counsel, Case No. IT-00-39-T, 18 August 2005, para. 3.

in court wearing only his pajamas,³⁴ and another time, he insisted on sitting on the courtroom floor with his back to the judge.³⁵

For their part, Saddam Hussein's retained lawyers, in particular Lebanese defense attorney Bushra al-Khalil and Jordanian lawyer Salah al-Armouti, frequently made outrageous political speeches and acted in outright contempt of the Iraqi High Tribunal. They engaged in tactics such as insulting Judge Ra'ouf, holding up photos of U.S. prison abuses at Abu Ghraib,³⁶ and on one occasion pulling off their defense counsel robes and hurling them at the bench.³⁷ Saddam Hussein's retained lawyers also staged a walk-out in the middle of a trial session and boycotted the majority of the trial sessions including the closing arguments.³⁸ These acts violated Iraqi law and the Iraqi Code of Legal Professional Ethics, which provide that lawyers practicing in Iraqi courts must be respectful toward the court, must appear in court on the set dates, should not try to delay the resolution of a case, and must facilitate the task of the judge.³⁹

The first presiding judge, Rizgar Amin, attempted to deal with such disruptive behavior by ignoring it.⁴⁰ Although human rights groups applauded Judge Rizgar's calm demeanor in conducting the trial, the Iraqi population felt that he was losing the "battle of the wills" against the former dictator, and he resigned under the weight of mass public criticism.⁴¹ The new presiding judge, Ra'ouf Abdul Rahman, employed a number of tactics to regain control of his courtroom.⁴²

³⁴ Edward Wong, *The Reach of War: The Trial; Hussein, Gleeeful, Badgers the Judge and Declares a Hunger Strike Over His Treatment*, N.Y. TIMES, Feb. 15, 2006, at A10.

³⁵ Robert F. Worth, *Prosecutors of Hussein Press Charges of Execution*, N.Y. TIMES, Feb. 14, 2006, at A8.

³⁶ Edward Wong, *Saddam Admits He Swiftly Doomed 148 Villagers*, INT'L HERALD TRIB., April 2006.

³⁷ Hussan M. Fatah, *For a Shiite, Defending Hussein is a Labor of Love*, N.Y. TIMES, June 24, 2006, at A4.

³⁸ See Nehal Bhuta, *JUDGING DUJAIL: THE FIRST TRIAL BEFORE THE IRAQI HIGH TRIBUNAL* 71 (Human Rights Watch, 2006) (discussing the role of Defense Office lawyers after privately-retained defense counsel began boycotting the Dujail trial in February of 2006).

³⁹ Law of the Legal Profession, No. 173 of 1965, art. 50; Lawyer's Professional Code of Conduct, June 16, 1987 (annexed to the Law of the Legal Profession), art. 9, *cited in* Bhuta, *supra* note 38, at 70.

⁴⁰ See Michael Scharf, *Who Won the Battle of Wills in the December Proceedings of the Saddam Trial?*, in *SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL* 129, 130 (Michael P. Scharf & Gregory S. McNeal, 2006).

⁴¹ See Michael Scharf, *A Changing of the Guard at the Iraqi High Tribunal*, in *SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL* 136, 136-37 (Michael P. Scharf & Gregory S. McNeal, 2006).

⁴² See Michael Scharf, *The Battle of the Wills—Part Two*, in *SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL* 143, 143-44 (Michael P. Scharf & Gregory S. McNeal, 2006).

Judge Ra'ouf began his first day as presiding judge by sternly warning defendants and counsel that outbursts and insults would not be tolerated. A few minutes later, he demonstrated his resolve by evicting defendant Barzan al-Tikriti and defense counsel Bushra al-Khalil when they failed to heed to his admonishment. When the retained defense counsel responded by boycotting the trial *en masse*, Judge Ra'ouf appointed public defenders to replace them. Notably, when the retained defense counsel later asked to return, Judge Ra'ouf permitted them to do so. He never imposed fines or other sanctions on them for their misbehavior, despite the fact that they resorted to such tactics again and again throughout the trial. Nor did he revoke the defendants' right to question the witnesses or to address the court, despite the fact that it was frequently abused.

III. REMEDIES FOR DISRUPTION

A. *Limiting Self-Representation*

Permitting a former leader to assert the right of self-representation in a war crimes trial is a virtual license for abuse. There is no customary international law right to self-representation, and many countries of the world require that defendants be represented by counsel in all cases involving serious charges.⁴³ The Iraqi National Assembly was prudent to require that defendants before the Iraqi High Tribunal be represented by Iraqi lead counsel, who the Tribunal could control through various sanctions available under Iraqi law.

It was a huge mistake, however, for the presiding judges of the Iraqi High Tribunal to allow the defendants to question witnesses following their lawyers' cross-examinations, as this completely undermined the objective of the National Assembly's revisions to the IHT Statute. Instead, the judges should have recognized that departures from traditional Iraqi practices are warranted in an extraordinary trial of this nature, especially as the traditional practice was neither required by Iraqi nor international law.

In the United States, courts have held that a defendant who is represented by a lawyer has no right to act as co-counsel by, for example, cross-examining witnesses or addressing the bench. The rule limiting the defendant's participation is necessary "to maintain order, prevent unnecessary consumption of time or other undue delay, to maintain the dignity and decorum of the court and to accomplish a variety of other ends essential to the due administration of justice."⁴⁴

Even in a tribunal such as the ICTY, whose statute provides for the right of self-representation, the Appeals Chamber decision in the *Seselj* case

⁴³ Scharf & Rassi, *supra* note 27, at 13–15 (2005).

⁴⁴ *United States v. Foster*, 9 F.R.D. 367, 372 (S.D.N.Y. 1949).

recognizes that such a right is a qualified one. Abuse it and you lose it.⁴⁵ Drawing from international tribunal precedent, defense counsel should be imposed on a defendant who seeks to represent himself where: (1) the defendant attempts to boycott his trial;⁴⁶ (2) the defendant's self-representation would prejudice the fair trial rights of co-defendants;⁴⁷ (3) the defendant is being persistently disruptive or obstructionist;⁴⁸ or (4) self-representation would unreasonably prolong the trial.⁴⁹

Since most war crimes tribunal courtrooms are partitioned by sound-proof glass, a judge may effectively deal with minor disruptions by simply turning off the defendant's microphone. In the case of persistent disruptions, the judge must give a specific warning before revoking the right of self-representation. In addition, the defendant must be accorded at least a chance to reclaim the right if he manifests a willingness to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

B. Standby Public Defenders

Whether in a situation where a defendant is representing himself, or where he is represented by retained counsel, a war crimes tribunal must have standby counsel ready to step in when needed.⁵⁰ Such occasions would include situations where the defendant or his counsel engage in persistently disruptive or obstructionist behavior, or where they stage a walk-out or a boycott of the proceedings

Just as a war crimes tribunal should appoint at least one alternate judge who observes the trial from its commencement in case one of the judges should need to be replaced for health or other reasons, so too should

⁴⁵ See *Prosecutor v. Seslj*, Case No. IT-03-67-AR73.4, Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel, ¶ 21 (Oct. 20, 2006).

⁴⁶ *Prosecutor v. Barayagwiza*, Case No. ICTR-07-19-T Decision on Defense Counsel Motion to Withdraw, ¶ 24 (Nov. 2, 2000); see also *Diaz v. United States*, 223 U.S. 442, 458 (1912) (holding that a trial could continue where the defendant refused to appear in the courtroom . . . to hold otherwise would enable the defendant to "paralyze the proceedings of courts and juries and turn them into a solemn farce").

⁴⁷ *Prosecutor v. Norman et al.*, Case No. SCSL-4-14-T, Decision on the Application of Samuel Hinga Norman for Self-Representation under Article 17(4)(d) of the Statute of the Special Court, ¶ 14 (Jan. 17, 2005).

⁴⁸ *Prosecutor v. Seslj*, Case No. IT-03-67-AR73.4, Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel, ¶ 21 (Oct. 20, 2006).

⁴⁹ *Prosecutor v. Milosevic*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, ¶ 17 (Nov. 1, 2004).

⁵⁰ The concept of standby counsel refers to an attorney who is appointed to assist a self-represented defendant. Daniel Klein, Annotation, *Right, under Federal Constitution, of accused to represent himself or herself in criminal proceeding—Supreme Court cases*, 145 L.Ed. 2d 1177 (2004).

standby public defenders be present from the beginning of the trial. Such counsel should be highly qualified, receive the same international training as prosecutors and judges, and be assisted by international experts. The very presence of standby public defenders can have a deterrent effect on misconduct by a self-represented defendant or by retained defense counsel because they will recognize that their disruptive actions will not successfully derail the trial, which can proceed without pause with standby counsel.

Ironically, the Iraqi High Tribunal did, in fact, appoint standby public defenders, but failed to provide timely notice to the media of their appointment, to describe their credentials, or to explain their function. Consequently, several print and broadcast media outlets erroneously reported that Saddam Hussein was not represented by any counsel during those periods in which his retained counsel were boycotting the proceedings. Similarly, human rights organizations, which were publicly critical of the skills and experience of the public defenders, failed to recognize that they were, in fact, being assisted by international experts obtained and paid by the International Bar Association.⁵¹

C. *Expulsion and Other Sanctions*

The ICTY Appeals Chamber indicated in the *Milosevic* case that the principle of proportionality must always be taken into account in crafting an appropriate response to disruption or delay.⁵² With this admonition in mind, a war crimes tribunal should deal with the six categories of defendant misconduct identified above as follows:

First, passive disrespect should generally be ignored unless it substantially interferes with the proceedings. The essential dignity and decorum of a courtroom does not turn on whether the defendant stands or addresses the judge as “Your Honor.”

Second, a judge should inquire as to why a defendant is refusing to cooperate with the fundamental ground rules of court proceedings. Often such behavior is in response to perceived unfair decisions by the bench.⁵³ The defendant should be assured that his rights will be protected, and warned that he faces exclusion from the courtroom or other appropriate and proportional actions.

⁵¹ See Eric Blinderman, *Judging Human Rights Watch*, 39 CASE W. RES. J. INT’L L. (2007).

⁵² See Prosecutor v. Milosevic, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, ¶¶ 17–18 (Nov. 1, 2004).

⁵³ In the case of the Saddam Hussein trial, this perception was in part caused by the judges’ ill-conceived decision to defer pronouncement of most pre-trial motions until after the trial’s conclusion.

Third, a single obscenity or outburst should be met with a warning that continued disruptions of this kind will lead to sanctions, including expulsion from the courtroom.

Fourth, repeated interruptions of a trial may be dealt with by expulsion after appropriate warnings have been given. Where the defendant is excluded from his trial the court should make reasonable efforts to enable him to keep apprised of the progress of the trial and to communicate with his attorney.

Fifth, since a televised trial gives the defendant the opportunity to communicate directly with the population at large, the judge must be particularly vigilant not to permit the defendant to use the courtroom as a stage to incite mass violence.⁵⁴

Sixth, physical violence in the courtroom cannot be tolerated and a court may deal with it by immediate expulsion or use of physical restraints.

Following the first incident of disruption, the judge should issue a warning, explicitly describing the sanction that will be imposed if the disruptive conduct continues. The warning should explain that the defendant's conduct is disruptive and will not be tolerated. It should also alert the defendant that future occurrences will result in expulsion from the trial for as long as his disruptive posture is maintained and that the trial will continue in his absence. The warning should explain that in addition to exclusion, the judge may impose other sanctions on the defendant, such as relocating him to a smaller cell, decreasing the time he gets for recreation, or reducing his access to other prisoners and family.

While the judicial process may well proceed more smoothly without the defendant in the courtroom, his absence may diminish the educative function of the trial. During Saddam Hussein's boycott of the Dujail trial, for example, print and broadcast media attention quickly dwindled, denying the public a chance to learn about some of the most important documents and testimony admitted into evidence. Thus, there are good reasons to avoid the sanction of expulsion if possible. Consequently, if disruptive conduct persists despite the initial warning, the judge should issue a firmer warning, recess to discuss the matter with the defendant and his lawyer, or briefly adjourn the proceedings to allow for a cooling-off period. Further disruption should result in temporary exclusion, followed by a calibrated response proportionate to the degree and persistence of disruption.

⁵⁴ Most war crimes tribunals have employed a twenty-minute delay in the broadcast of the trial proceedings to enable them to edit out such dangerous outbursts, but the judge should firmly communicate that such statements will be met with the sanction of exclusion. In the Dujail trial, the judge reportedly told Saddam Hussein it was one thing to encourage supporters to kill Americans, but it was utterly unacceptable for him to encourage the killing of Iraqis.

D. Responding to Contumacious Counsel

With respect to disorderly defense counsel, the judge should clearly set the ground rules of the trial from the beginning, warning that disruptive conduct will not be tolerated and describing the sanctions that will be imposed in response to such transgression. Although the demeanor and conduct of counsel that is deemed acceptable may vary somewhat from country to country, most of the world's legal professions follow the basic principle that a lawyer must be "respectful, courteous and above-board in his relations with a judge" before whom he appears.⁵⁵ Especially in a major war crimes trial, deferential courtroom behavior is necessary to ensure that the judge's decisions are not perceived to be based on emotional reactions to insult.

Following the lead of the Special Court for Sierra Leone, all war crimes tribunals should adopt a Code of Professional Conduct, which spells out the rules of courtroom decorum applicable to both the prosecution and defense counsel. Consistent with such a code, after an appropriate warning, persistent insults and disrespectful comments should be met with sanctions, including fines, jail time, suspension, and even disbarment. Because a judge has inherent power to remove a disruptive defendant from the courtroom, he also possesses the inherent power to deal with a disruptive lawyer in the same way and to temporarily or permanently replace him with standby counsel.

It is important in this regard to stress that the obligations of a defense counsel are not just to his client, but also to the court and to the larger interests of justice that the court is serving. Defense counsel are not merely agents of their client, permitted and perhaps even obliged to do for the accused everything he would do for himself were he trying his own case. As the American Bar Association has explained, "[i]t would be difficult to imagine anything which would more gravely demean the advocate or undermine the integrity of our system of justice than the idea that a defense lawyer should be simply a conduit for his client's desires."⁵⁶ If a client insists on his attorney asking improper questions, making irrelevant speeches, insulting the bench, or staging walk-outs or boycotts, the lawyer must reject those instructions, for he cannot excuse his own professional misconduct on the ground that his client demanded it.

Moreover, the defense counsel should seek to dissuade his client from improper courtroom behavior, including explaining to him the sanctions that may be imposed by the judge and the probable prejudice to his case if he disrupts the proceedings. A defense counsel who encourages

⁵⁵ *E.g.*, MODEL CODE OF PROF'L RESPONSIBILITY, EC 7-36 (1980).

⁵⁶ STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 146 (ABA Project on Standards for Criminal Justice, 1971).

courtroom misconduct may be punished under the rules that establish his own responsibility for maintaining courtroom decorum. If he advises a client to act disruptively (or suggests methods for doing so), the court has authority to discipline counsel.

IV. CONCLUSION: FAIR TRIAL VERSUS INTEREST OF JUSTICE

Revoking the right of self-representation, replacing retained counsel with standby public defenders, or expelling the defendant or defense lawyer from the courtroom may initiate a number of practical difficulties. After the revocation of Slobodan Milosevic's right of self-representation, for example, the defendant refused to cooperate with the assigned counsel, and witnesses for the defendant refused to appear in court or to answer questions until the defendant's control of his case was restored.⁵⁷ Similarly, Saddam Hussein not only refused to cooperate with the public defenders during the boycott of his retained counsel, but he attempted (without success) to prevent the public defenders from delivering a closing argument on his behalf.⁵⁸

Such a situation obviously impacts negatively on the defendant's fair trial rights, but the international tribunals have interpreted the duty to ensure that a trial is fair to include concerns that go beyond just those of the defendant. The narrow fair trial rights of the defendant must be considered in the context of broader interests of justice which require "that the trial proceeds in a timely manner without interruptions, adjournments or disruptions."⁵⁹

⁵⁷ See generally *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Open Session (Nov. 10, 2004) (submissions by the prosecution, referring to the accused being implicated in refusal of witnesses to testify).

⁵⁸ See *Blinderman*, *supra* note 51.

⁵⁹ *Prosecutor v. Seselj*, Case No. IT-03-67-PT, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj with His Defense, ¶ 21 (May 9, 2003).