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THE SADDAM TRIAL: CHALLENGES TO MEETING INTERNATIONAL STANDARDS OF FAIRNESS WITH REGARD TO THE DEFENSE

Mark S. Ellis*

I. INTRODUCTION

It is an unfortunate fact that the Saddam trial will likely be remembered more for its chaotic nature and inefficiencies than for its contribution to establishing accountability for international crimes. Yet, the Supreme Iraqi Criminal Tribunal ("Iraqi Tribunal") addressed a number of important legal issues during the Dujail trial.

The Iraqi Tribunal dealt with many issues touching on the relationship between the Iraqi Tribunal and the defense. For instance, the Iraqi Tribunal regularly removed defendants from the trial proceedings because of disruptive behavior. Defense counsel, too, were dismissed from the trial proceedings. The Iraqi Tribunal also took the unique step of imposing counsel on defendants against their wishes.

Were these steps consistent with Iraqi and international law? From the perspective of the defense these Iraqi Tribunal actions were improper and made the subsequent proceedings illegal. The counter view is that the tribunal had the legal authority to take these actions in the interest of justice. This article will review key Iraqi Tribunal decisions relating to the defense, and determine whether the defendants' rights were violated. Because the Iraqi Tribunal relies on international law, this assessment will include a review of international treaty law, decisions from existing international war crimes courts, and Iraqi law.

II. WAS THE IRAQI TRIBUNAL CORRECT IN REFUSING DEFENDANTS THE RIGHT TO SELF-REPRESENTATION?

The Statute for the Iraqi High Tribunal establishes a series of rights afforded to defendants to ensure that they receive a "just [and] fair trial."

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2 Id. art. 19(4).
defendant in the Iraqi Tribunal receives extensive procedural and substantive protections, including the following minimum guarantees:

A. To be informed promptly and in detail of the content nature and cause and of the charge against him;
B. To have adequate time and facilities for the preparation of his defense and to communicate freely with counsel of his own choosing and to meet with him privately. The accused is entitled to have non-Iraqi legal representation, so long as the principal lawyer of such accused is Iraqi;
C. To be tried without undue delay;
D. To be tried in his presence, and to use a lawyer of his own choosing, and to be informed of his right [to] assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance and to have the right to request such aid to appoint a lawyer without paying the fees, case if he does not have sufficient means to pay for it; if he does not have the financial ability to do so.
E. The accused shall have the right to request the defense witnesses, the witnesses for the prosecution, and to discuss with them any evidence that support his defense in accordance with the law.
F. The defendant shall not be forced to confess and shall have the right to remain silent and not provide any testimony and that silen[ce] shall not be interpreted as evidence of convection or innocence.3

Noticeably absent from the Statute is any provision for the right to self-representation,4 making the Iraqi Tribunal the only “international or internationalised” tribunal that does not ensure such a right.5 The right to self–representation is guaranteed by a number of international and regional conventions6 and is seen as a fundamental right.7 However, a defendant’s

3 Id.
7 See Milosevic v. Prosecutor, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, ¶¶ 18–19 (Appeals Chamber, Nov. 1, 2004).
right to self-representation is not absolute; it is a qualified right that can be restricted or even denied in certain circumstances.

The International Criminal Tribunal for the Former Yugoslavia (ICTY) has wrestled with the issue of such representation during most of its life cycle. Although the ICTY's Statute guarantees the right of the accused to conduct his or her own defense, this has been restricted by the tribunal's own decisions.

In the case of Prosecutor v. Slobodan Milosevic,\(^9\) the prosecutor requested that counsel be assigned against the wishes of Mr. Milosevic. Although the tribunal denied the prosecutor's request, it nonetheless emphasized that international and regional treaties "plainly articulate a right to defend oneself in person."\(^{10}\) However, the tribunal declared that "the right to defend oneself in person is not absolute ... there may be circumstances ... where it is in the interests of justice to appoint counsel."\(^{11}\) In short, the accused "under customary international law ... has a right not to have counsel."\(^{12}\)

The ICTY later confirmed its position that the right to self-representation could be limited or denied under appropriate circumstances. Once again, the issue was whether the tribunal could order the appointment of defense counsel to assist Mr. Milosevic, even though he did not want the assistance. The tribunal structured its decision on the position that appointed legal representation was imperative for a fair trial.\(^{13}\) The tribunal ruled that it was "plain from the medical reports" that the accused was not fit to de-

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\(^{9}\) Prosecutor v. Milosevic, Case No. IT-02-54, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel (Trial Chamber, Apr. 4, 2003).

\(^{10}\) Id. ¶ 36.

\(^{11}\) Id. ¶ 40.


\(^{13}\) Prosecutor v. Milosevic, Case No. IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, ¶¶ 32–33 (Trial Chamber, Sept. 22, 2004). Nina H.B. Jorgensen elaborates: "the key point is perhaps that the right to a fair trial obligates the Court to be protective of the legitimacy of its own processes and to consider fairness globally." Nina H.B. Jorgensen, The Problem of Self-Representation at International Criminal Tribunals: Striking a Balance between Fairness and Effectiveness, 4 J. INT'L CRIM. JUST. 64, 69 (2006).
fend himself and that allowing him to defend himself was delaying the trial.\textsuperscript{14}

In its decision, the ICTY judges looked to European Court of Human Rights (ECHR) jurisprudence to clarify when the right of self-representation can be limited.\textsuperscript{15} The tribunal concluded that the fact that the law of some States precludes a defendant in a criminal case from representing himself, requiring that a lawyer assist him with his defense, is not incompatible with the ECHR.\textsuperscript{16} Thus, in the case of \textit{Croissant v. Germany},\textsuperscript{17} the European Court of Human Rights held that where the accused had appointed two counsel of his own choosing, the Regional Court’s insistence upon the appointment of a third in spite of the accused’s strong objection to that appointment did not violate Article 6(3)(c) of the Convention for the Protection of Human Rights and Fundamental Freedoms. Specifically, this appointment did not violate the minimum right of an accused “to defend himself in person or through legal assistance of his own choosing.” The court stated that

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it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. When appointing defence counsel the national courts must certainly have regard to the defendant’s wishes. . . . However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.\textsuperscript{18}
\end{quote}

The court specifically noted that “avoiding interruptions or adjournments corresponds to an interest of justice which is relevant in the present case and may well justify an appointment against the accused’s wishes.”\textsuperscript{19}

The tribunal concluded that Articles 20 and 21(4)(d) of the the ICTY Statute allowed for the assignment of counsel.\textsuperscript{20} The tribunal ruled

\begin{itemize}
  \item \textsuperscript{14} \textit{Milosevic}, Case no. IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, ¶ 1 (Sept. 22, 2004).
  \item \textsuperscript{15} \textit{Id.} ¶ 43.
  \item \textsuperscript{16} \textit{Id.}
  \item \textsuperscript{18} \textit{Id.} ¶ 29 (emphasis added).
  \item \textsuperscript{19} \textit{Id.} ¶ 28.
  \item \textsuperscript{20} Article 20(1) reads: “The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.” ICTY Statute, \textit{supra} note 8, art. 20(1). Article 21(4)(d) secures the right of the accused “to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.” \textit{Id.} art. 21(4)(d).
\end{itemize}
that the overarching right to a fair trial including the right to a defense, may lead to the assignment of counsel to conduct the defense for the accused.\textsuperscript{21} Furthermore, the need for the trial to continue overrode the importance of respecting the right of the accused to represent himself.\textsuperscript{22}

The assigned counsel for Milosevic appealed the decision of the Trial Chamber and argued that the right to self-representation constituted "a fundamental principle" protected by both European and international law and that the trial chamber erred in its interpretation of the ICTY Statute.\textsuperscript{23} Defense also argued that the trial chamber did not correctly adhere to past decisions by the ICTY and the International Criminal Tribunal for Rwanda (ICTR). Defense argued that

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[t]he circumstances in which counsel have been assigned to an unwilling defendant at the ICTY and ICTR have been limited to circumscribed situations, largely concerning obstructionist behaviour by defendants. This is not the case in the present situation, where the sole possible justification for considering the imposition of counsel relates to the health of the accused, who has consistently asserted his right to represent himself from the time he was transferred into the custody of the ICTY.\textsuperscript{24}
\end{quote}

On appeal, the tribunal affirmed in part and reversed in part the trial chamber's decision to impose defense counsel.\textsuperscript{25} Although the appeals chamber found that the trial chamber's restriction to self-representation failed a proportionality test, it stated that the right to a fair trial may, where appropriate, lead to the assignment of counsel for the accused. The right to self-representation "may be curtailed on the grounds that a defendant's self-representation is substantially and persistently obstructing the proper and expeditious conduct of his trial."\textsuperscript{26}

\begin{footnotes}
\item[21] Milosevic, Case No. IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, ¶ 51.
\item[22] Id. ¶ 33.
\item[23] Prosecutor v. Milosevic, Case No. IT-02-54-AR73.7, Appeal Against the Trial Chamber's Decision on Assignment of Defence Counsel, ¶¶ 44–45 (Appeals Chamber, Sept. 29, 2004).
\item[24] Id. ¶ 57.
\item[25] Milosevic v. Prosecutor, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, ¶¶ 12–14 (Appeals Chamber, Nov. 1, 2004). The appeals chamber concluded that the trial chamber had not abused its discretion in restricting Milosevic's right to self-representation. However, they stated that the trial chamber should have applied the "proportionality principle" and imposed a more "carefully calibrated set of restrictions" on Milosevic's trial participation. Id. ¶¶ 15–18.
\item[26] Id. ¶ 13.
\end{footnotes}
III. WAS THE IRAQI TRIBUNAL CORRECT IN IMPOSING STANDBY COUNSEL ON THE DEFENDANTS?

Addressing previous discussions as to whether counsel can be assigned to obstructionist defendants, the ICTY trial chamber in Prosecutor v. Šešelj answered in the affirmative. The tribunal ruled that standby counsel could be assigned to a defendant despite his objection. Finding that the defendant’s attitude and actions were obstructionist, the tribunal determined that the appointment of standby counsel was in the interest of justice and the best way to maintain the integrity of the proceedings. The tribunal ruled that

[the phrase “in the interests of justice” potentially has a broad scope. It includes the right to a fair trial, which is not only a fundamental right of the Accused, but also a fundamental interest of the Tribunal related to its own legitimacy. In the context of the right to a fair trial, the length of the case, its size and complexity need to be taken into account. The complex legal, evidential and procedural issues that arise in a case of this magnitude may fall outside the competence even of a legally qualified accused, especially where that accused is in detention without access to all the facilities he may need. Moreover, the Tribunal has a legitimate interest in ensuring that the trial proceeds in a timely manner without interruptions, adjournments or disruptions.]

The Šešelj tribunal tempered the effect of standby counsel on the fundamental right of self-representation by having standby counsel serve simply as a “legal assistant” to the defendant. The tribunal suggested that standby counsel should help the accused prepare his case in both the pre-trial and trial phases. This would include, among other things, (1) reviewing copies of all documents relating to the case, (2) being present in the courtroom during the trial proceedings, and (3) questioning witnesses, if required. However, the tribunal was clear in stating that the defendant should maintain control over the content of the questioning.

In an August 2006 decision, the Šešelj trial chamber referred to decisions of the ECHR in ruling that counsel should be assigned to Šešelj, thereby terminating his self-representation. In the case of Saday v. Tur-

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27 See Prosecutor v. Šešelj, Case No. IT-03-67-PT, Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defense (Trial Chamber II, May 9, 2003).
28 Id. ¶¶ 2, 29.
29 See id. ¶¶ 26–27.
30 Id. ¶ 21.
31 Id. ¶ 30.
32 Prosecutor v. Šešelj, Case No. IT-03-67-PT, Decision on Assignment of Counsel ¶ 16, 24 (Trial Chamber I, Aug. 21, 2006).
The ECHR stated that personal verbal attacks against a judge may warrant sanctions if they create an atmosphere detrimental to the orderly functioning of justice. The court noted:

that as the function of tribunals is to grant justice, and their role is fundamental in states where rule of law is guaranteed, they have an interest in winning respect from the public and that magistrates must, in order to carry out their functions, enjoy such credibility without obstacle. It is therefore necessary while they are in the service to protect them from offensive verbal attacks.

In its decision, the Šešelj tribunal also took careful notice of a number of states that allow for the mandatory assignment of defense counsel. The French Code of Criminal Procedure allows substantial participation in case strategy by defendants on whom counsel has been imposed, provided the proceedings are not disrupted by unseemly conduct. In Italy, a person subjected to mandatory appointment of counsel retains the right to participate in the trial and is still allowed to speak and question witnesses. The German Code of Criminal Procedure provides for mandatory appointment of counsel for serious crimes and discretionary appointment in minor cases with difficult factual or legal problems. With the judge’s permission, the defendant may question witnesses and experts. Criminal procedure codes in countries of the former Yugoslavia have provisions substantially similar to the aforementioned ones, allowing the defendant a measure of involvement in and control of the case even after mandatory imposition of counsel.

In an appeal of the August 2006 Šešelj trial chamber decision, the appeals chamber confirmed the lower court’s finding that the accused’s conduct—which included abusive language, intimidation of the witnesses, and general obstructionist behavior—was a “substantial and persistent obstruction to the proper and expeditious conduct of the trial” warranting the suspension of Seselj’s right to represent himself. However, the appeals

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34 See id. ¶ 34.
35 Id. ¶ 33 (author’s translation).
36 Prosecutor v. Šešelj, Case No. IT-03-67-PT, Decision on Assignment of Counsel, ¶ 21 (Trial Chamber I, Aug. 21, 2006).
37 Id.
38 Id.
39 Id.
40 Id. at 8, n.50
41 Prosecutor v. Šešelj, Case No. IT-03-67-AR73.3, Decision on Appeal Against the Trial Chamber’s Decision on Assignment of Counsel (Appeals Chamber, Oct. 20, 2006).
court ultimately reversed the trial chamber’s decision to impose counsel on Seselj because the trial chamber failed to give Seselj the requisite formal warning that if he continued in his obstructionist conduct, counsel could be imposed on him. “[A] warning with regard to possible assignment of counsel needs to be explicit,” the court stated, “in the form of an oral or written statement to an accused explaining the disruptive behaviour and that, if it persists, the consequence will be restriction on the accused’s right to self-representation.”

On November 27, 2006, the trial chamber concluded that the accused’s self-representation during the previous month had “substantially obstructed the proper and expeditious conduct of the proceedings” and ruled that “permanent assignment of counsel to represent the accused [was] at this point justified.” The tribunal further ordered that Šešelj’s participation in the trial proceedings must be through assigned counsel, thus reinforcing the right of the tribunal to impose counsel.

In yet another qualification on the right to self-representation, the ICTY in Prosecutor v. Janković ruled that the right to self-representation can be exercised only by a defendant who truly understands the choice he is making. The tribunal ruled that “the election of such a right must be made by an accused who is literate and competent.” This right must be exercised “voluntarily, unequivocally and intelligently.”

Similar to the Saddam case, the ICTY in Janković found that the defendant obstructed the trial’s proceedings with abusive and disruptive conduct. For this reason, the tribunal held that it was not in the interest of justice to permit the accused to represent himself; thus, assistance of counsel should be imposed on the defendant.

The International Criminal Tribunal for Rwanda (ICTR) has also ruled on the issue of self-representation in several cases relevant to the Iraqi Tribunal. As with the ICTY, the ICTR’s Statute guarantees the right to self-representation. Article 20(4)(d) entitles the accused

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42 Id. ¶ 26.
44 Id.
46 Id.
47 Id.
48 Id. ¶¶ 22–25.
[t]o be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require [sic], and without payment by him or her in any such case if he or she does not have sufficient means to pay for it.\textsuperscript{50}

Similar to the ICTY, the ICTR has also restricted this right. In the case of \textit{Prosecutor v. Barayagwiza},\textsuperscript{51} the ICTR was the first international war crimes tribunal to squarely confront a defendant’s right to self-representation.\textsuperscript{52} The defendant in the case filed a request for his counsel to be withdrawn:

If this Chamber rules that my counsels are required to continue to be present at trial contrary to my instructions, I no longer wish to be represented by them. I would regret it if I am forced to make this decision because my counsel have properly represented me from the beginning. However, \textit{under no circumstances are they authorized to represent me in any respect whatsoever in this trial}. It is for this reason that I am forced to put an end to the mandate I entrusted given them... My Counsels are instructed not to represent me in that trial. Thus, their forced presence in the trial is the continuation of violation of my rights by a Tribunal incapable of respecting fundamental human rights, contrary to the UN Charter.\textsuperscript{53}

The ICTR, however, found that the defendant was simply trying to boycott the trial and ruled that his defense lawyers were required to continue to represent the defendant in court.\textsuperscript{54} In a concurring opinion, Judge Gunawardana explained:

In the instant case, the interests of justice would \textit{not} be best served by allowing the accused, who does not wish to attend his trial, to remain without representation. As stated by Justice Blackmun, “the right to Counsel has been based on the premise that representation by Counsel is essential to insure a fair trial.” Therefore, in my view, the Chamber is bound to ensure that Mr. Barayagwiza is represented at the trial. In that context, in my view, it will be useful to consider the established procedure adopted in the United States of appointing standby counsel, by the Court. The Supreme

\textsuperscript{50} \textit{Id.}

\textsuperscript{51} \textit{Prosecutor v. Barayagwiza}, Case No. ICTR 97-19-T, Decision on Defence Counsel Motion to Withdraw (Trial Chamber I, Nov. 2, 2000). For a good discussion on this case, see Scharf, \textit{supra} note 6, at 41.

\textsuperscript{52} See Scharf, \textit{supra} note 6, at 41.


\textsuperscript{54} See \textit{id.} ¶ 24 (referencing \textit{Faretta v. California}, 422 U.S. 806 (1975)).
Court approved the appointment of standby counsel and discussed the role of such a Counsel, in its Decision in *McKaskle v. Wiggins*, 465 US 168 (1984) where, in a robbery trial, the accused was permitted to proceed pro se, but the trial court appointed a standby counsel to assist him. The Supreme Court held,

"Accordingly, we make explicit today what is already explicit in *Feretta* [sic]."⁵⁵ A defendant's Sixth Amendment rights [to self representation] are not violated when a trial judge appoints standby counsel—even over the defendant's objection—to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals. Participation by counsel to steer a defendant through the basic procedures of trial is permissible even in the unlikely event that it somewhat undermines the pro se defendant's appearance of control over his own defence."

This solution has been tried and tested in the United States, and has been proved to be an effective and appropriate procedure to assist the proper administration of justice. In my view, the appointment of a standby counsel is the proper solution to the problem presented in the instant case.⁵⁶

Dealing with a factual situation very similar to that of the Saddam trial, the Court in *Faretta* ruled that a trial judge may "terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct."⁵⁷ Again, mirroring the Saddam trial, the *Faretta* court concluded that "a State may . . . appoint a 'standby counsel' . . . to be available to represent the accused in the event that termination of the defendant's self-representation is necessary."⁵⁸

In *Barayagwiza*, the ICTR further stated that counsel could only be withdrawn if incompetent:

As the Chamber observed in its decision of 25 October 2000, Mr Barayagwiza does not lack confidence in his two lawyers. Neither does he argue that they are incompetent. The core of his argument is that he will not be given a fair trial. He argues that the International Criminal Tribunal for Rwanda is not an independent and impartial Tribunal, but dependent on the Kigali regime.

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⁵⁵ *McKaskle v. Wiggins* actually states "[a]ccordingly, we make explicit today what is already implicit in *Feretta* . . ." Judge Gunawardana misquotes the case, though the substance remains unchanged.

⁵⁶ *Barayagwiza*, Case No. ICTR 97-19-T (Gunawardana, J., concurring) (citing *Faretta*, 422 U.S. 806 (1975)).


⁵⁸ *Id.* (citing United States v. Dougherty, 473 F.2d 1113, 1124–26 (D.C. Cir. 1972)).
This allegation is without foundation.\textsuperscript{59}

In the case of \textit{Prosecutor v. Nyiramasuhuko \& Ntahobali}, the ICTR again had to decide whether to impose counsel on an uncooperative defendant.\textsuperscript{60} Here, the tribunal granted the defendant’s request for withdrawal of counsel, but determined that, in the interest of justice, new defense counsel should be imposed on the defendant to assist in the case.\textsuperscript{61}

Other international war crimes tribunals have upheld the right to self-representation. The Special Court for Sierra Leone (SCSL) guarantees a defendant’s right to self-representation.\textsuperscript{62} Article 17(4)(d) of the SCSL’s Statute guarantees the right of the accused

\begin{quote}
[t]o be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it.\textsuperscript{63}
\end{quote}

However, in decisions similar to those of the ICTY and ICTR, the SCSL has also ruled that the right to self-representation is a limited right. In the case of \textit{Prosecutor v. Samuel Hinga Norman}, the defendant notified the court that he wanted to represent himself.\textsuperscript{64} The SCSL ruled that the right to self-representation is not absolute.\textsuperscript{65} A defendant has the right to self-representation, but “such a right, being qualified and not absolute, could in the light of certain circumstances, be derogated should the interest of justice so dictate.”\textsuperscript{66}

The SCSL relied on the concept of the interests of justice, a “multi faceted legal concept which is all encompassing and a vital component . . . of the Rule of law.”\textsuperscript{67} It denied the defendant’s request for self-representation, reasoning that exercising that right could jeopardize the

\begin{footnotes}
\item[59] \textit{Barayagwiza}, Case No. ICTR 97-19-T, ¶¶ 14–15.
\item[60] \textit{Prosecutor v. Nyiramasuhuko \& Ntahobali}, Case No. ICTR-97-21-T, Decision on Ntahobali’s Motion for Withdrawal of Counsel (Trial Chamber II, June 22, 2001).
\item[61] \textit{Id.} ¶ 20.
\item[62] Statute of the Special Court for Sierra Leone, art. 17(4)(d), http://www.sc-sl.org/scsl-statute.html.
\item[63] \textit{Id.}
\item[64] \textit{Prosecutor v. Hinga Norman}, Case No. SCSL-04-14-T, Decision on the Application of Samuel Hinga Norman for Self Representation under Article 17(4)(d) of the Statute of the Special Court, ¶¶ 4–5 (Trial Chamber, June 8, 2004).
\item[65] \textit{Id.} ¶¶ 8–9.
\item[66] \textit{Id.} ¶ 30.
\item[67] \textit{Id.} ¶ 10.
\end{footnotes}
The SCSL ruled that the defendant needed some degree of assistance. The court set forth several conditions for determining when to impose counsel, including whether assigning counsel was an essential and necessary component of a fair trial, whether it would enable the judges to perform their role as neutral arbitrators of the law, whether the assigned counsel would assist in exceptionally complex cases, and whether there was an interest in a speedy trial. In essence, the court felt that it had a broad duty to guarantee the integrity of the trial proceedings, and assigning defense counsel under appropriate circumstances helped achieve this goal.

Another example is the International Criminal Court (ICC) which, following its predecessor international courts, guarantees the right of an accused to "conduct the defence in person or through legal assistance of the accused's choosing." More importantly, the ICC registry is responsible for providing assistance to an accused who has chosen to exercise the right to self-representation.

The newly created Cambodia War Crimes Tribunal guarantees individuals appearing before the tribunal the right to self-representation. Although the Cambodian Law on Criminal Procedure suggests that a defendant does not have a right to self-representation, it seems likely that the Statute controlling the tribunal, which permits self-representation, will prevail.

At the other end of the spectrum, the War Crimes Court of Bosnia and Herzegovina requires an accused to be assisted by counsel when he is charged with a crime for which a prison sentence of at least ten years may be imposed.

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68 Id. ¶¶ 14, 19–20.
69 Id. ¶ 32.
70 Id. ¶ 26.
71 See id. ¶ 28.
73 Id. art. 67(1)(d).
74 Regulation 119(2) reads: "The Registrar shall also provide appropriate assistance to a person who has chosen to represent himself or herself." Regulations of the Registry, ICC-BD/03-01-06 (Mar. 6, 2006).
76 Law on Court of Bosnia and Herzegovina art. 36(6) (Bosn. & Herz.).
Based on the experiences of past and current international, hybrid, and domestic tribunals, the Iraqi Tribunal’s decision to restrict or to outright prohibit a defendant from representing himself is, in my view, permissible.

Other legal experts have argued that the Iraqi Tribunal’s position was too draconian and that it should have created a less restrictive approach, such as appointing *amici curiae*.\(^7\) The appointment of *amici curiae* would resolve what some have argued is an untenable situation—assigning counsel over the objection of the accused. A defense attorney cannot effectively advocate on behalf of someone who does not want assistance, creating an ethical dilemma for assigned counsel. By appointing *amici curiae*, the court maintains legitimacy without sacrificing the defendant’s right to self-representation.\(^7\)\(^8\) Even if the court removes the defendant because of egregious conduct, the *amici curiae* could still aid the judges as the case continues.\(^9\) The *amici curiae* could ensure that the interests of the accused are represented without resorting to the “legal fiction” of “imposed” defense counsel.\(^8\)\(^9\)

A second possibility would be to conduct a balancing test to determine a defendant’s right to self-representation.\(^8\)\(^1\) This approach has merit and is similar to the legal reasoning used by the ICTY and ICTR. A balancing test takes into account the rights of the accused and the court’s interest in conducting a fair trial.\(^8\)\(^2\) The approach is premised on the belief that the court has the discretion to impose counsel on an unwilling defendant, minding both the rights of the defendant and the need to proceed with the trial. Thus, a defendant’s abusive conduct (obstructing proceedings, boycotting the trial, etc.) would cause the balance to tip in favor of the interests of justice, and, consequently, the complete forfeiture of the right to self-representation.\(^8\)

The first case before the Iraqi Tribunal faced such a situation. In the Dujail trial and more recently in the Anfal trial, the defendants, including


\(^8\) Id. at 62–63.

\(^9\) Id. at 63.

\(8\) Id.


\(8\) Id. at 70.

\(8\) Interview with Sebastijan van de Vliet, Head of the Office of Legal Assistance and Detention, International Criminal Tribunal for the former Yugoslavia, in the Hague (July 11, 2006).
Saddam Hussein, were abusive and disruptive. Soon after a new chief judge was appointed to oversee the Dujail trial, Saddam Hussein and the three other lead defendants were removed from the courtroom and tried in absentia on January 24, 2006. One of the defendants, Barzan Ibrahim al-Tikriti, twice called the court "a daughter of adultery." When Saddam was removed, he yelled to the chief judge: "Don’t call yourself an Iraqi, I’ve led you for 35 years and now you say ‘remove him!’ Shame on you! Shame on you!" Barzan al-Tikriti was forcefully removed from the courtroom a second time on May 31, 2006, after continually referring to the chief judge as a Kurd. On June 12, 2006, he was again removed from the court by security guards after he accused the judge of being a "dictator.

A month into the Anfal trial, Saddam Hussein was expelled from court when he objected to the government’s removal of the first appointed chief judge. On September 25, 2006, after less than two hours back in court Saddam Hussein was ejected again, this time following an outburst when the court refused his request not to appear for the remainder of the trial. Saddam Hussein was ejected a third time in the Anfal trial when he defied instructions from the chief judge not to obstruct court proceedings. His co-defendants were also ejected after heated exchanges with the chief judge. On October 10, 2006, Saddam Hussein was again removed from court after shouting a verse from the Quran and yelling, "fight them and

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86 Id.
87 Id.
93 Id.
God will punish them." Another defendant, Hussain Rashid Muhammad, was also ejected after shouting insults to the prosecutors.

It was evident from these actions that the defendants were keen to use the trial proceedings as a platform to advance their own political agendas. If the court had allowed Saddam to defend himself, there is little doubt that the trial would have collapsed into complete chaos.

The experience of the Saddam trial suggests that it may be appropriate for any court trying international crimes to mandate that defendants be represented by counsel. This is consistent with the policy adopted by the court in Bosnia and Herzegovina. The right to self-representation should be narrowed and restricted by the interest of justice precisely because these types of cases are highly charged, highly political, and "reach the limits of human capacity."

Moreover, due to the nature of these trials, self-representation is likely to be unworkable. This is primarily because (1) the depth and range of legal knowledge required in international criminal cases far exceed that which is required in typical domestic criminal cases; (2) international courts rely on a combination of civil law and common law rules; (3) extensive work is required to adequately mount a defense in international criminal cases; and (4) access to evidence and witnesses is particularly complicated in international criminal cases, due to the nature of the crimes and typically the distant location of their occurrence.

In the Saddam trial, the court responded to the disruptive behavior of Saddam Hussein and his defense counsel by appointing standby counsel. Some have argued that imposing standby counsel weakens the fundamental

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95 Id.
96 See Scharf, supra note 6, at 33 ("The thought of the former Iraqi leader appearing on the nightly news throughout the Middle East, railing against the illegal invasion of Iraq, insisting that the Western countries were complicit in war crimes against Iran, and encouraging his followers to commit acts of violence against the newly elected Iraqi government, is indeed frightening, especially in light of the stakes involved.").
97 Interview with David Tolbert, Deputy Prosecutor, International Criminal Tribunal for the former Yugoslavia, in the Hague (July 11, 2006). Tolbert notes that Milosevic was allowed to put a great deal of irrelevant evidence forward in the course of conducting his own representation.
98 Scharf, supra note 6, at 39.
independence of counsel. They are alarmed by what they see as a practice of continually carving out exceptions to the right to self-representation.

However, the experience of the Saddam trial shows that the use of standby counsel was both appropriate and effective. In the Dujail case, standby counsel were allowed on several occasions when the defendants or their counsel were removed from court because of disruptive behavior.

On February 1, 2006, the four key defendants in the Dujail trial—Saddam Hussein, Barzan Ibrahim, Taha Yussin Ramadan, and Awad Haman Barder—did not appear in court; neither did their attorneys. The court appointed lawyers to represent those lesser known defendants who did appear for the proceedings—Ali Daeem Ali, Mohammed Azawi Ali, and Abdullah Kudhim Ruweid. When, on February 28, 2006, Saddam’s lead attorneys walked out of the courtroom, the judge replaced them with court-appointed lawyers.

At the start of the Anfal case, in protest of the government’s decision to remove the chief judge, defense counsel walked out of the proceedings. When it was clear that they would continue to boycott the trial, they were replaced by eight court-appointed lawyers so that the proceedings would continue. By October 9, 2006, the court-appointed lawyers were appearing daily as Saddam Hussein’s attorneys maintained their boycott.

On each occasion, the standby counsel did a superb job, particularly cross-examining witnesses and on closing arguments.

99 Interview with Melinda Taylor, Former Defence Attorney, International Criminal Tribunal for the former Yugoslavia, in the Hague (July 11, 2006).

100 Melinda Taylor calls this practice “disturbing.” She contends that creating exceptions due to the nature of the crimes or the nature of the accused is not an advisable practice. For instance, in the case of Milosevic, she evinces concern with the court’s reliance on health as a ground to restrict the right. Id. Joeri Maas agrees that the decision in Milosevic was problematic; if a defendant is not obstructive, Maas says he should be allowed to represent himself. Interview with Joeri Maas, Head of the Office of the Association of Defence Council, International Criminal Tribunal for the former Yugoslavia, in The Hague (July 10, 2006).


IV. WAS THE IRAQI TRIBUNAL CORRECT IN REMOVING DEFENSE COUNSEL?

The Iraqi Tribunal’s reliance on standby counsel raises questions about whether a defendant’s chosen counsel can properly be removed from court proceedings. In the Saddam trials, the defendants’ own counsel frequently walked out or were forcibly removed by the chief judge. On December 5, 2005, the attorneys left because the judge refused to allow former U.S. Attorney General Ramsey Clark, one of Saddam’s attorneys, to challenge the tribunal’s legitimacy in an address to the court.106 The entire defense team walked out and one lawyer was dragged out when a newly appointed chief judge ordered all four lead defendants out of the courtroom on January 29, 2006.107

Again on February 28, 2006, the defense attorneys stormed out of court. The attorneys demanded that the trial be postponed and that the judge and chief prosecutor be dismissed.108 On April 5, 2006, one of Saddam’s main defense attorneys, Bushra Khalil, was ejected from the court after attempting to display photos of Iraqis tortured in U.S. managed prisons.109 The judge permitted her to return six weeks later.110 However, on her first day back in court, the chief judge ordered guards to remove her from the court when she refused to wait her turn to speak.111 As she was forcibly removed, she threw her lawyer’s robe to the courtroom floor.112

During the second trial—the Anfal trial—Saddam Hussein’s Tunisian lawyer, Ahmed Saddiq, walked out when he was told that he must speak through Saddam’s lead attorney.113 On September 20, 2006, all of the defense lawyers left the courtroom in protest of the government’s decision to remove the chief judge.114


107 Worth, supra note 85.

108 Saouli, supra note 102.

109 Saddam Hussein Dismisses Evidence, BBC NEWS, http://news.bbc.co.uk/1/hi/world/middle_east/4878340.stm (last visited May 19, 2007) (explaining, in an article updated April 5, 2006, that “[a] defence lawyer was ejected from court after an altercation with the judge . . . when she tried to display photos of Iraqis tortured in US-run prisons).


111 See id.

112 See id.


114 Judge Orders Saddam Out of Court, supra note 90.
The Iraqi Tribunal’s Rules of Procedure and Evidence allow the trial chamber to remove defendants and their counsel under the following conditions:

Rule 52: Control of Proceedings
First: The Trial Chamber may exclude any person from the proceedings in order to protect the right of the accused to a fair and public trial, or to maintain the dignity and decorum of the proceedings.
Second: The Trial Chamber may not order an accused to be removed from the court during proceedings unless he acted disruptively. In the event of removal, the proceedings continue until he can be present and the court should make him aware of the proceedings he missed.

Rule 31: Misconduct of Counsel
First: A Judge or Trial Chamber may take legal action against a counsel, if, in its opinion, the Counsel’s conduct becomes offensive or abusive or de-means the dignity or decorum of the Special Tribunal or obstructs the proceedings.115

The Iraqi Criminal Code provides the same authority to all Iraqi courts. Paragraph 154 of the code provides that “[t]he court may prevent the parties and their representatives [from] speaking at undue length or speaking outside the subject of the case, reporting statements, violating guidelines or making accusations against another party or a person outside the case who is unable to put forward a defence.”116 Paragraph 158 of the Code further states that “[t]he defendant may not be removed from the Courtroom during consideration of the case unless he violates the rules of the court, in which case, procedures continue as if he were present. The court must keep him informed of the procedures which took place in his absence.”117

This inherent right of a court to control its own proceedings has also been recognized by international criminal tribunals. In Prosecutor v. Kovac, the ICTY suspended an attorney who was charged with contempt of court. The tribunal stated:

The Tribunal does, however, possess an inherent jurisdiction, deriving from its judicial function, to ensure that its exercise of the jurisdiction which is expressly given it by the Tribunal Statue is not frustrated and that its basic judicial functions are safeguarded. As an international criminal court, the Tribunal therefore possesses the inherent power to deal with

117 Id. ¶ 158.
conduct which interferes with its administration of justice. . . . such an inherent power includes the power to refuse audience to counsel. 118

V. WAS THE IRAQI TRIBUNAL CORRECT IN REMOVING THE DEFENDANTS FROM THE COURT?

The Iraqi Tribunal’s decision to remove the defendants from the courtroom also raises issues as to whether such an act violated the right of a defendant to be “tried in his presence.” Article 20(4)(d) of the Iraqi Tribunal Statute guarantees this right. 119 All international criminal tribunal statutes provide similar guarantees. 120 Article 14.3 of the International Covenant of Civil and Political Rights (ICCPR) establishes the fundamental basis for this guarantee, stating in part:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it. . . . 121

Iraq ratified the ICCPR in 1976. 122

The requirement that the accused be tried in his presence, as articulated in the ICCPR, is considered to be a prerequisite for a fair trial. However, this right is not absolute. As far back as 1983, the Human Rights Committee has stated that the ICCPR does not bar trials in absentia when, for instance, “the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his right to be present.” 123

In the landmark case of Barayagwiza, the ICTR tried and sentenced a defendant who, although aware of the proceedings against him, refused to...

118 Prosecutor v. Kovač, Case No. IT-96-23&23/1, Decision on the Request of the Accused Radomir Kovac to Allow Mr. M. Vujin to Appear as Co-Counsel Acting Pro Bono (Trial Chamber, Mar. 14, 2000). See also Prosecutor v. Kovač, Case No. IT-96-23&23/1, Separate Opinion of Judge Hunt (Trial Chamber, Mar. 24, 2000).

119 The Statute of the Iraqi Special Tribunal, art. 20(4)(d) guarantees the right of the accused “[t]o be tried in his presence.”

120 See, e.g. ICC Statute, supra note 72, art. 63; ICTY Statute, supra note 8, art. 21(4)(d).

121 ICCPR, supra note 6, art. 14(3) (emphasis added).


appear before the tribunal. The ICTR discussed the reasoning to move forward with the trial:

The trial in the so-called Media-cases started on 23 October 2000. One of the three accused, Mr. Barayagwiza, has chosen not to attend the proceedings. The reasons for his absence were advanced in his letter of 24 October 2000, where he stated:

"I would like to confirm to you the content of my statement of 23 October 2000, by which I informed you of my decision not to attend the so-called "Media Trial" in the Trial Chamber I to the International Tribunal for Rwanda (ICTR) for the reasons stated in that statement.

"I challenged the ability of the ICTR to render an independent and impartial justice due, notably, to the fact that it is so dependent on the dictatorial anti-Hutu regime of Kigali to which two of you paid recently a working visit aimed at strengthening relations to the detriment of my rights."

Thus, in the present case, Mr. Barayagwiza is fully aware of his trial, but has chosen not to be present, despite being informed by the Chamber that he may join the proceedings at any time. In such circumstances, where the accused has been duly informed of his ongoing trial, neither the Statute nor human rights law prevent the case against him from proceeding in his absence."\(^\text{124}\)

The court also noted several decisions by the ECHR and the Human Rights Committee supporting trials in absentia:

Article 20 of the Statute is modelled on Article 14(3)(d) of the International Covenant on Civil and Political Rights, which is equivalent to Article 6(3)(d) of the European Convention on Human Rights. Human rights case law does not prevent that a trial takes place in the absence of the accused provided that he has been duly notified of the proceedings. Reference is made to Maleki v. Italy, views of the Human Rights Committee, adopted on 27 July 1999 (Communication No 699/1996). Here, the Committee reiterated that a trial in absentia is compatible with Article 14, only when the accused is summoned in a timely manner and informed of the proceedings against him. In that case, the accused was convicted in absentia, duly represented by his court-appointed lawyer (paragraph 9.3). Similar principles are developed in Strasbourg case-law, see, for instance, the Court’s judgement of 28 August 1991 in F C B v Italy (Series A 208-B) with further references (paragraphs 29–36).\(^\text{125}\)

Iraq’s own Criminal Procedure Code provides for trials in absentia. Paragraph 135 of the code reads:

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\(^{124}\) Prosecutor v. Barayagwiza, Case No. ICTR 97-19-T, Decision on Defence Counsel Motion to Withdraw, ¶¶ 5–6 (Trial Chamber I, Nov. 2, 2000) (emphasis added).

\(^{125}\) Id. ¶ 7.
If the defendant does not appear before the examining magistrate or investigator, and is not arrested the use of methods of compulsion stipulated in this law, or if he escapes after arrest or detention, and if there is sufficient evidence for a transfer to court, the examining magistrate issues a decision of transfer to the court responsible in order for a trial to be conducted in his absence.\textsuperscript{126}

Paragraph 147(A) of the Code also states: “The trial will take place when the two parties attend. If the accused has absconded or is absent without legal excuse, despite his having been informed, a trial will take place in his absence.”\textsuperscript{127}

However, the case of Saddam Hussein and his co-defendants does not fall under any of the aforementioned categories of absconding beyond the tribunal’s jurisdiction. Saddam was present at his arraignment and appeared in court. The issue, of course, is that Saddam was removed from the court and the trial proceeded in his absence. As discussed earlier, the Iraqi Tribunal’s Rules of Procedure and Evidence allows the trial to proceed when the defendant is disruptive and is subsequently removed.\textsuperscript{128}

The Iraqi Tribunal’s Statute mirrors the statutes of other international criminal tribunals with regard to trials \textit{in absentia}. The ICTY’s Rules of Procedure and Evidence provides that a trial chamber may “order the removal of an accused from the courtroom and continue the proceedings in the absence of the accused if the accused has persisted in disruptive conduct following a warning that such conduct may warrant the removal of the accused from the courtroom.”\textsuperscript{129}

In the United States, the case of \textit{Illinois v. Allen}\textsuperscript{130} dealt with similar antics by a defendant. In its decision, the U.S. Supreme Court ruled that a defendant may lose his right to be present at a trial “if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insist on conducting himself in a manner to disor-

\begin{itemize}
\item \textsuperscript{127} Id. ¶ 147(A).
\item \textsuperscript{128} Al-Waqa’I Al-Iraqiya [The Official Gazette of the Republic of Iraq] R. P. & Evid. Iraqi Special Tribunal, Oct. 18, 2005, No. 4006, available at http://www.law.case.edu/saddamtrial/documents/IST_rules_procedure_evidence.pdf. Rule 52 states that “the Trial Chamber may exclude any person from the proceedings in order to protect the right of the accused to a fair and public trial, or to maintain the dignity and decorum of the proceedings.” Id. Furthermore, “the Trial Chamber may not order an accused to be removed from the court during proceedings unless he acted disruptively. In the event of removal, the proceedings continue until he can be present and the court should make him aware of the proceedings he missed.” Id.
\end{itemize}
derly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom."  

The ICC's Statute provides similar recourse for a disruptive defendant.

If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

The Rules of Procedure and Evidence of the Special Court of Sierra Leone addresses this same issue and provides the following guidance:

(A) An accused may not be tried in his absence, unless:
   (i) the accused has made his initial appearance, has been afforded the right to appear at his own trial, but refuses to so do; or
   (ii) the accused, having made his initial appearance is at large and refuses to appear in court.

(B) In either case the accused may be represented by counsel of his choice, or as directed by a Judge or Trial Chamber. The matter may be permitted to proceed if the Judge or Trial Chamber is satisfied that the accused has, expressly or impliedly, waived his right to be present.

Elaborating on these requirements, the court in Prosecutor v. Hinga Norman held that the defendant's boycott of the proceedings was an effort to obstruct justice and, thus, in the interest of justice the trial would continue in his absence. However, the court ensured that the accused would not lose the benefit of legal representation merely because of his absence at trial.

V. CONCLUSION

As presented in this article, both Iraqi and international law give the Iraqi Tribunal significant latitude in controlling the trial proceedings. This
includes the authority to remove defendants who are disruptive or whose behaviour undermines the integrity of the court. It also includes authority to dismiss defense attorneys who ignore judges’ instructions and to impose court-appointed attorneys on the defendants. Despite the disorder and, at times, flawed nature of the trial proceedings, the court, including its judges and prosecutors, performed admirably.

The failures of the Saddam trial actually had very little to do with what occurred inside the courtroom. The most fundamental component of a fair, independent, and impartial trial is the absence of government interference. Regrettably, the Iraqi government displayed a complete lack of adherence to this most basic principle.

Holding Saddam Hussein legally responsible for his actions was a test for Iraq. Many had pinned their hopes on the trial in part to bring closure to an era, but also to establish Iraq’s commitment to the rule of law. The trial was an opportunity to demonstrate that the Iraqi legal system is capable of conducting fair and impartial legal proceedings.

In the end, the Iraqi government’s blatant interference in the trial process thwarted these aspirations. The casualty was the court, whose legitimacy and prestige has been irrevocably weakened. Saddam was convicted, but rather than being remembered for unveiling truth and carrying out justice, the Iraqi Tribunal will be seen as yet another government tool. It did not have to be this way.