2007

Debate: Did Saddam Get a Fair Trial?

A Debate
SYMPOSIUM: “LESSONS FROM THE SADDAM TRIAL”

DEBATE: DID SADDAM GET A FAIR TRIAL?

On October 6, 2006, the Frederick K. Cox International Law Center sponsored a public symposium reflecting on the proceedings of the Iraqi High Tribunal. The following transcript is excerpted from the day-long event. The speakers’ remarks have been edited for length.

MODERATOR:

Gary Simson, Dean, Joseph C. Hostetler-Baker & Hostetler Professor, Case Western Reserve University School of Law

ARGUING NO:

Kevin Jon Heller, Faculty of Law, University of Auckland, New Zealand
Kenneth Roth, Executive Director, Human Rights Watch

ARGUING YES:

Michael P. Scharf, Professor of Law and Director of the Frederick K. Cox International Law Center, Case Western Reserve University School of Law
Michael A. Newton, Acting Associate Clinical Professor of Law, Vanderbilt University Law School

DEAN SIMSON: I thank all of you in the audience for coming and those of you who will be hearing the debate or are hearing it right now as it is broadcast.

This conference comes almost a year since Saddam Hussein and seven of his cohorts went on trial before the Iraqi High Tribunal. They were charged with destroying an Iraqi town and torturing and murdering its Shiite inhabitants. The proceedings, which were televised around the world, were anything but orderly, including events such as assassinations of defense counsel and resignation of judges. The tribunal will reconvene on October 16[, 2006] for a judge’s review of the process, and at that point, prior to verdict, it is quite possible some witnesses may be recalled.

The debate that follows will look at the fairness of the trial. Did it comport with international standards of due process? Two of

* This transcript represents a portion of the from a debate ponsored by the Frederick K. Cox International Law Center, co-sponsored by the Institute for Global Security Law and Policy and the Law-Medicine Center.

† A webcast of the symposium, in its entirety, may be viewed online at http://law.case.edu/centers/cox/content.asp?content_id=90.
the people seated here will argue that it was unfair. Professor Kevin Jon Heller, a member of the law faculty of the University of Auckland in New Zealand, will be up first. His life, as well as his teaching and writing, are profoundly international. He has a J.D. from Stanford, several years of criminal defense practice in Los Angeles, and then headed off to New Zealand.

Kenneth Roth will speak next. He is the executive director since 1993 of Human Rights Watch, which, as you know, performs extraordinarily important functions as far as investigating, reporting on, and attempting to reduce human rights violations around the world. He is a graduate of Yale Law School, and Human Rights Watch has grown enormously in stature and scope under his leadership.

Among the two who will argue that the trial was fair is Professor Michael Scharf, of this law school, who was a member of the team of experts who trained the judges of the tribunal that tried Saddam Hussein. With Gregory McNeal, he co-authored the first book that has appeared on the trial. He is a Duke Law graduate, and he has been an invaluable member of this faculty since coming here in 2002.

Michael Newton of the Vanderbilt Law faculty will also speak. He is a graduate of the University of Virginia Law School. He practiced law in the military for some time. He served as senior advisor to the United States Ambassador at Large for War Crimes Issues.

The debate will go as follows: First, Professor Heller and Mr. Roth will each get twelve minutes to argue why the trial was not fair. And then, Professors Scharf and Newton will get twelve minutes to argue why it was fair. In the same sequence then, each participant will get two minutes to respond to arguments from the other side. So let me begin with the first speaker, Professor Heller.

PROF. HELLER: First, thank you to Michael [Scharf] and everyone else for having me here.

I want to begin my presentation by offering three basic assumptions that frame my approach to this issue. First, there is no question in my mind that Saddam Hussein is guilty of most, if not all, of the charges against him. I also believe, however, that Saddam would have been found guilty after a perfectly fair trial . . . that you did not need to cut corners in order to convict him. And third—and probably most important—the fact that Saddam is guilty of most, if not all, of the charges against him in no way justifies depriving him of the [ICC Statute's] legal guarantees required by international law.
Now, I want to focus on five critical flaws with the IHT’s procedures, flaws that I believe undermine the fairness of the Dujail trial and perhaps, given the nature of this get-together, will continue to undermine the fairness of any trial that is held. So I want to focus really on the statutory law as opposed to simply the conduct of the trial itself. And my point is hopefully constructive and not simply critical. Just as I feel about international criminal law generally, if there were not so much promise, if there were not so much strength, there really would not be much point in offering criticisms.

So that said, the first flaw I want to focus on is the burden of proof. I believe [the IHT] used an inadequate burden of proof. According to the code of criminal procedure, the tribunal could convict, “based on the extent to which it is satisfied by the evidence presented during any stage of the inquiry or the hearing.” Now, there are always difficult translation issues. It has been suggested that instead of “satisfied,” the translation should be “conviction.” But as I will try to explain, even if that is the case, it is still—at least under international standards—an inadequate burden of proof.

Every tribunal since the NMT, since the Control Council trials, has used “proof beyond a reasonable doubt.” The Human Rights Committee has continually emphasized proof beyond a reasonable doubt is necessary to give effect to the presumption of innocence. And I think it is important—despite the attention the issue has gotten from Amnesty International, Human Rights Watch, etc.—to focus on the burden of proof here, because Professor Scharf has claimed on a number of occasions that, in fact, the standard that the IHT uses is not inadequate. And I am going to quote him . . . he says, “The traditional standard with civil law judicial systems like France and Holland employ a phrase that is functionally equivalent to the American ‘beyond a reasonable doubt’ standard.” With all due respect to Professor Scharf, I do not believe that is correct. The only civil law system that uses even a remotely similar standard is, in fact, the Netherlands, which uses a “gain the conviction” standard. That standard is arguably more stringent than a “satisfied” standard, if that is the correct interpretation or translation. But even that standard has been criticized within the civil law community as not being stringent enough.

By contrast, France uses an “inner-most conviction” or an “intimate conviction” standard that the European Court of Human Rights says is, in fact, equivalent to “beyond a reasonable doubt”. Italy uses a “definitive conviction” standard. Germany uses a “leaves-no-reasonable-doubt” standard. Spain uses a “reasonable doubt” standard. Russia uses a “reasonable doubt” standard. Greece uses a “reasonable doubt” standard. Venezuela uses a “reasonable
doubt” standard. So really, by any civil law standard, the IHT’s “satisfaction” standard or “convinced” standard is inadequate, and I think that is a very important point. Professor Scharf continually dismisses the IHT’s flaws by analogizing to the harmless error doctrine that we all know is such an integral part of American criminal law. If we extend that analogy further, in the U.S. an inadequate burden of proof is never harmless error. It is, per se, a structural error, requiring reversal of the defendant’s conviction, even if the defendant never objects. So this is an extremely critical structural flaw regarding the burden of proof that the IHT uses.

The second flaw—and we have heard a lot about it so far—is the IHT’s lack of independence from the Iraqi government. I will not bore you with the same details that we have heard earlier, but I just want to root the problem in the text of the statute.

Article 4 of the IHT Statute gives the Iraq Government complete and unreviewable discretion to decide which judges remain and which do not remain on the Tribunal. It says the Presidency Council, in accordance with a proposal from the Council of Ministers shall have the right to transfer judges and public prosecutors from the court to the higher judicial council for any reason. And we have seen—as was discussed earlier—the consequences of that: two judges removed at the Dujail trial, most recently through a specific invocation of Article 4 to remove the Anfal judge.

Now, nobody wants a biased tribunal, whether that tribunal is for or against Saddam. But what is critically important to note is that there are already provisions in the IHT Statute for removing a biased judge. Rule 8 of the Rules of Procedure enacted by the IHT allows for either party to make a motion to remove a biased judge and requires the decision to be made on that motion within three days.

What is the difference between Article 4 and Rule 8? Well, Rule 8 is an internal process. It is the judiciary itself deciding whether a judge is biased—whereas Article 4 is the Iraqi government—the executive—determining for the judiciary who will be on the tribunal and who will not. And that is where the fundamental—and so necessary—independence of the IHT breaks down.

Third—and this one I think can not be emphasized enough—the tribunal does not confirm an indictment until the middle of a trial, after the close of the prosecution’s case in chief. One of the provisions of the Iraqi Code of Criminal Procedure describes the initial phase of the trial as hearing the testimony of the complaining witness and the prosecution’s evidence. And then you have paragraph 181, which provides, “If it appears to the court after the aforementioned steps have been taken that the evidence indicates
that the defendant has committed the offense being considered, then he is charged as appropriate.” The charge is read to him and clarified, and he is asked to enter a plea.

There are three really critical problems with this procedure, and it is worth noting that the procedure deviates substantially from all of the other international tribunals. First, it means that the investigative judge’s decision to indict a defendant is never reviewed by an independent judicial body prior to trial, significantly increasing the likelihood of an innocent defendant being convicted. The Dujail trial is a perfect case in point. Prof. Scharf has noted that the prosecution asked the tribunal not to convict one of the defendants in his closing argument. We can certainly hope the tribunal heeds the prosecution. There is certainly no guarantee that it will, but even if it does not, how fair is it to subject an innocent defendant to a nine-month ordeal before ultimately proclaiming his innocence, largely because there is no procedure in the IHT Statute for pretrial confirmation of the indictment, as is standard at the international tribunals?

Second, mid-trial confirmation is fundamentally inconsistent with the defendant’s right to be informed “promptly of the charges against him.” Now, there is a provision in the Statute that requires the tribunal to read the indictment to the defendant prior to trial, but, of course that indictment is not the final indictment. The final indictment will be issued mid-trial. The tribunal remains free to add or change charges against the defendant over the course of the trial, and the tribunal is under no obligation to inform the defendant that it is going to add charges to the indictment. And, in fact, that is exactly what happened at the Dujail trial.

The “clarified” May 2006 indictment added new charges against seven defendants, including compulsory concealment of people, kidnapping, and the wonderful catchall “other similar actions against humanity.” And this leads, of course, to the final problem with mid-trial confirmation, which is that it blatantly violates the defendant’s right to have adequate time and facilities to prepare a defense. You cannot defend yourself against charges that will change mid-trial—after your appointed counsel or hired counsel has cross-examined the prosecution’s witnesses. That is the third flaw.

The fourth concerns the IHT’s provisions for the disclosure of exculpatory information to the defense. This right is obviously fundamental to a fair trial. The right of the defendant to receive exculpatory information is the critical mechanism that prevents the conviction of innocent defendants, and it is particularly important in a non-adversarial system like Iraq’s, where so much of the investigation is conducted by the judge and not by a defense attorney. Rule
42 of the IHT Statute itself confirms the right of the defendant to receive exculpatory information. There is, however, a very critical exception to Rule 42 contained in Rule 43, and the exception really does swallow the rule whole, to invoke the old expression.

Rule 43 specifically exempts from disclosure all information that is provided confidentially to the tribunal, even if it is exculpatory. Here is the rule: "If the tribunal is in possession of information, which was provided to it on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin, notwithstanding Rule 42"—and that is the exculpatory evidence provision—"shall not be disclosed by the tribunal without the consent of the person or entity providing the initial information." Rule 43, in other words, specifically provides that the tribunal's obligation to protect confidential information trumps the defendant's right to obtain exculpatory information. That is a very, very critical limitation and a potentially vast one, because it clearly embraces—at a minimum—all three of the categories of information that Rule 40 allows the tribunal to keep confidential: information relative to an ongoing investigation, national security information, and the most broad—information whose disclosure would be "otherwise inimical to the public interest."

Now, did Rule 43 undermine the fundamental fairness of the Dujail trial? I have absolutely no idea, and that is really the problem with the rule. We have no idea what information was not disclosed to the defense. There is no procedure that allows the defense to challenge the nondisclosure of information that is protected under Rule 43.

I am running out of time. I was going to talk a little bit about appointed counsel, but since we have seen the skirmishing between the various parties, I will leave that to them.

I will simply say that if you look at the provision for appointed counsel, it simply says that the defense office must appoint, quote, "highly qualified" criminal defense attorneys. They could certainly appoint adequate ones under that standard, but it is worth noting that the standard contrasts unfavorably with the ICTY, which specifically requires experience in international criminal law, international humanitarian law, or international human rights law. I think a specific standard like that would lead to far more fundamental fairness for defendants, given that the IHT is applying international criminal law: the definition of crimes, the moods of participation, the defenses, sentencing considerations, etc. These refer to international criminal law. So to not specifically require defense
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Counsel to have demonstrated capacity in that body of law fundamentally undermines the defendant’s right to a fair trial.

And so, just to conclude, there is no doubt in my mind that Saddam is guilty. There is no doubt in my mind that he would have been found guilty after a fair trial. His guilt, however, cannot be used to justify ignoring the countless ways in which the IHT violated his right to a fair trial.

DEAN SIMSON: Thank you. Next is Mr. Roth.

MR. ROTH: Thank you. Good afternoon, everyone. Let me begin by expressing my gratitude to Michael Scharf and to Case [School of Law] for organizing this very important conference. I also want to say I am happy to be back here in Cleveland. There was once a time in my life when I spent three-quarters of my life here, and then when leaving at age four, it left me with very fond memories.

Since then, and particularly since I was at Human Rights Watch, I spent a huge amount of my time, probably more than anyone else, looking at the crimes of Saddam Hussein and trying to bring him to justice. Frankly, it saddens me that we are here having to talk about the fairness of the trial rather than focusing on his crimes. I understand the national preference to have national justice, if possible, but “if possible” is the key. And we should have recognized that in this situation it would not be possible without a much greater international dimension to the trial than has taken place, and what we saw instead was ideology over pragmatism, the hatred for international trials taking precedence over the practicalities needed to ensure a fair trial that might have let us focus on Saddam’s actual crimes. I say this based on Human Rights Watch’s extensive observations of the trial. We have seen roughly eighty percent of the trial days during the Dujail trial. We did not watch TV. We did not read about it in the press. We were there. Most of that time we had a native Arabic speaker observing, so there was no translation problem and, most important, we looked at the documents that were actually submitted, which are, in this case, critical. That observation has made clear to us serious procedural shortcomings in this trial. And serious shortcomings were not simply due to the disruption of the defense counsel, serious as it was. These were due to the way the trial was conducted.

Much of this frankly comes from the lack of understanding of what a fair trial is on the part of many of the participants in the Iraqi court. And that is not surprising given that we have still not have found a defense attorney or lawyer who remembered a trial that lasted more than a day-and-a-half before this trial started. In
fact, as my colleague had mentioned earlier today, the typical trial to this day lasts fifteen to thirty minutes, and that will often lead to a twenty or thirty-year imprisonment. So this is not a system with a well-developed sense of due process.

I want to highlight five serious procedural errors in the course of the trial. The first to which Kevin [Jon Heller] just referred has to do with the lack of notice because there was never a real indictment until well into the trial. The initial indictment basically said, "you are guilty of crimes against humanity because of people who were killed around Dujail" . . . [no mention of a] theory of liability. Was this command responsibility? Was it aiding and abetting? Were you a principal? No detail and basic element of due process so that you are given the facts so you can prepare your defense.

Half-way through the trial they spelled it out a bit, but that was after many witnesses had already testified, after the opportunity to cross-examine them on this theory of liability had been lost. That is not the kind of notice that is required in order to give people a fair, fighting chance to defend themselves.

Second, there was extremely late disclosure of much of the key documentary evidence. The court rules require notice within forty-five days. That is important so you can read the documents and figure out what is in them and their significance, so you can authenticate them and challenge them, if appropriate. That did not happen.

Forty documents were produced in the middle of the trial, documents that were not in the original dossier so the defense attorneys had no access to them before that. In addition, three critical audio recordings were disclosed—again, right in the middle of the trial. These were recordings purporting to record conversations between Saddam and some of his co-defendants about Dujail. The defense objected. The judge let them in nonetheless.

Third, anonymous witnesses. Twenty-six of the twenty-nine witnesses who testified live during the Dujail trial were what you might call "constructively anonymous." That is, their names were deleted from the dossier, so there was no notice of who was going to testify until they showed up in court, and basically, an hour beforehand the name would be disclosed to the defense. Even then, all but three of the defendants testified behind a screen, so neither the defendant nor the defense could see their demeanor and use that important piece of evidence to cross-examine them. This was, of course, a very severe restriction on their right to confront those testifying against them. Now, we all know there is a very clear security danger in Baghdad. Many people have been killed who have been as-
associated with this trial, but international practice is to assess that danger case by case, witness by witness.

That did not happen with the IHT, which instead let the witness do whatever he wanted or she wanted. If you wanted to be anonymous, you are anonymous, no measuring the need against the needs of the trial. And this was the case even with witnesses who were known. Someone like a former senior official who nonetheless was allowed to testify out of sight even though everybody knew who the guy was.

International courts have moved away from this kind of anonymous witnesses largely because they were burned. One anonymous witness turned out to be lying through his teeth. Instead, [international courts] tend to use a confidentiality procedure in which the defendant and the public may not be informed, but the defense attorney is. You could not do that here because you could not trust the defense attorneys because they were only Iraqi defense attorneys . . . one more indication of what goes wrong when you do not allow a certain internationalization.

Fourth, there was no right to confront the twenty-nine other witness statements that were introduced into the trial. That is, in addition to the twenty-nine live witnesses, there were twenty-nine pieces of paper that were read. . . . No notice was given to the defense as to why this happened. You can not cross-examine a written statement. When the defense challenged it or asked for the witnesses to be called, they were ignored. There was not even an explained ruling, just a “no”. In fact, as has been mentioned, that was common. Almost all of the interlocutory challenges, motions, etc. were simply ignored or denied summarily with no written record or reason provided to date.

Fifth, when it comes to the authentification of documents was built around documentary evidence, I know Prof. Scharf said there was broad authentification of the documents. I am sorry to say he is wrong here. If you look at what actually happened, only seven of the documents were authenticated through a Ministry of Interior handwriting witness. He was brought in and said, “Oh, yes. This is the signature. These are authentic.” It was his written report that was submitted saying that. He was never cross-examined. No defense handwriting witness was ever allowed. Indeed, the defense was never given access to the original documents to see whether it was worth challenging authentification or not, no explanation for why this extraordinary procedure was used. Those seven documents were the best cases, the fairest cases. The rest of them, one hundred or so documents came in with no authentification whatsoever. The prosecutor would not say where the documents came from. He
would not allow the defense to inspect the originals. There was no effort made to create a procedure in which authentification could be challenged or established. This is, of course, absolutely essential because who knows where these documents came from. Were they made up? We just do not know, and we are stuck with a sort of “trust me” defense.

Worse . . . if you can get worse . . . some of the documents were, shall we say, incomplete. Let me give you an example. There was a transcript, shall we say, or a file . . . of the revolutionary court proceedings. This, obviously, is critical because it was a revolutionary court that sentenced the 148 or so victims. Instead of introducing the whole proceedings, they introduced four out of 361 pages. The judge who presided over this and was one of the accused says what do you mean? There is exculpatory evidence in the rest of the file. In fact, that will show they had defense lawyers, a key part as to whether these were kangaroo trials or not. The rest of the file was never produced. Harmless error as Michael Scharf has suggested? Hardly. I mean, how can you call this harmless when the 357 pages of the 361-page document is never introduced, and the defendant claims that there is critical exculpatory evidence in there.

The bottom line on all of this: yes, we know Saddam committed terrible crimes. It is sad today that we are sitting here having to debate the fairness of the trial rather than focusing on the horrendous crimes that Saddam committed. And what makes this particularly sad is that this was avoidable. We could have avoided this by simply accepting the international expertise that is readily available, that has emerged out of Rwanda, Yugoslavia, and Sierra Leone. There are people out there who know how to do these trials well. They could have had a significant Iraqi component similarly to the Sierra Leone trial, but ideology prevailed. The Bush administration did not want to do anything that would legitimize the project of international justice because it hated the international criminal court, which, of course, could theoretically prosecute an American. And, therefore, it was not going to endorse any international tribunal that might indirectly lend credence to the ICC. It also wanted a court that it could largely control, that would not ask the difficult questions, [such as] what was the U.S. relationship with Saddam during Dujail? What was the U.S. relationship with Saddam during the Iran-Iraq War? What was the U.S. relationship with Saddam during Anfal and during its aftermath? Tough questions, and an independent court might well have allowed those questions to be answered. So ideology . . . prevailed, and what we have now is a seriously defective trial that is diverting us from the terrible atrocities that Saddam has committed.
Thank you.

DEAN SIMSON: Starting from the other side, Prof. Scharf.

PROF. SCHARF: Thank you, Dean Simson.

One of my professors in law school once told me that where one sits often colors where one stands. And in this debate, I think what you are going to find is that worldwide those who are against the Iraqi High Tribunal and believe that the trial of Saddam Hussein was a sham are the very same people who, at the very beginning, were against the Iraqi High Tribunal because it had the death penalty, because it was not an international criminal court, and because it came after the invasion of Iraq by the United States. I personally was one of those people when I began, but Michael Newton and I have had a chance to work with the Iraqi High Tribunal, and I suppose that has [led me] to see things a little bit more sympathetically, and perhaps the truth is somewhere in between. Let me make six points today in my twelve minutes.

The first point is that, on paper at least, the Iraqi High Tribunal meets all of the standards of due process required by international law. Its statutes and rules are modeled after the Yugoslavia tribunal, the Rwanda tribunal, and the permanent International Criminal Court. The protections of due process include: the presumption of innocence, the right to be informed of charges, the right to defense counsel, the right to be tried without undue delay, the right to be present during your trial, the right to examine and confront witnesses, the right against self-incrimination, the right not to have silence taken into account in determining guilt, the right to the disclosure of exculpatory evidence and witness statements, the exclusion of coerced evidence, and the right to appeal. Note also, Prof. Heller, Rule 43 . . . [uses exactly] the same language as the Yugoslavia and Rwanda tribunals' rules on the exclusion of confidential information that is not used at trial.

Now, my second point is one that will be a surprise to many of you. In some ways, the [IHT] is actually more fair than the United States' court system. First, all interrogations must be videotaped, so there is a videotaped record of whether there was coercion . . . something we don't have in the United States. Second, the proceedings are broadcast gavel-to-gavel, ensuring transparency. The reason we know about all of these errors and missteps is because we have gotten to see them on television. In United States federal criminal courts, there is no television coverage. And third, there is a written verdict—a detailed verdict that we will see at the end of the month—that will be three hundred or so pages long, enumerating all
of the very specific findings of fact and conclusions of law, something we do not have in the United States. We just have a jury, a black box that makes a decision.

My third point is that we must assess the Iraqi High Tribunal with an understanding of Iraqi law and process. This is based on the international law principle known as the margin of appreciation. We can not look through American eyes in deciding the fairness of this process. Professor Heller talks about the standard of proof. He says it is not beyond a reasonable doubt, so the whole thing is a wreck. Of course, the proof standard is the same language basically of the Dutch. It is the “satisfied” of guilt. When we talked during the training sessions with the judges and explained what that means in practice, they used another phrase. They said, “We like to convict only when there is proof beyond a moral certainty.” This is actually a phrase that most of the civil law countries use. I talked to them more about what that phrase means, and I came away convinced that it is either the functional equivalent or even a tougher standard to meet than our “beyond a reasonable doubt” standard.

Also Professor Heller failed to tell you that our own Supreme Court has never defined what “beyond a reasonable doubt” means, leaving it for every jury to try to guess at this phrase, as if it in itself has some special quality. . . . [This is more than] what the Iraqi High Tribunal requires.

Professor Heller complained about the mid-trial confirmation of the indictment. Well, this is actually very similar to what the Yugoslavia and Rwanda tribunals do when half-way through the trial they entertain motions to dismiss, and literally, what the tribunal does at the beginning of the trial is decide whether there is enough evidence to begin. And after the prosecution’s case, then they decide whether there is enough evidence to continue. They do give the charges at the beginning of the trial. They give even more specific charges based on the evidence half-way through the trial. This is the way they do it in the Middle East. Are all the Middle Eastern countries flawed, simply by virtue of the fact that they are different?

Third . . . the role of the defendant. In Iraq law, the defendant gets to ask questions. It is very different than what we see in the United States, but it actually increases the level of fairness to allow Saddam to have this opportunity.

Fourth . . . pretrial motions. We heard Mark Ellis earlier today complain that the pretrial motions were not decided pretrial, and I wish they had been as well. That is the way they do it in the international tribunals. That is not the way they do it in some courts around the world. These pretrial motions will all be addressed in the
three hundred-page opinion, and that is, in fact, the way they did it at Nuremberg. That is, in fact, the way they do it in many countries. And there is nothing under international law that says that is, per se, a violation.

My fourth main issue is that there are unique challenges that the Iraqi High Tribunal faces. We have heard today about the antics of Saddam Hussein. Let me give you some specifics. Everyday Saddam goes into the courtroom with the goal of interrupting this trial by enticing and inducing the judge of yelling at him so the trial will look unfair. He has called the judge a homosexual, a traitor, a whoremonger. He has insulted his family. He has called him a dog—which in Iraq is the worst thing you can call somebody—and every once in a while, the judges have lost their temper. Now, in trials in the United States like the Zacharias Moussawi trial last summer, when the defendant did the same thing, Moussawi was thrown out of the courtroom by the U.S. federal judge four times in a single day. When that happens in the United States, the professors and the commentators say that was appropriate. Why should it not be appropriate when the same thing happens before the Iraqi High Tribunal?

We can even look back at the Bobby Seals incident during the Chicago Seven trial to see what happens when a defendant tries everything possible to disrupt a trial, and Bobby Seals, as we all know, ended up being gagged and bound. It was not a good moment for American jurisprudence, but sometimes American judges are struggling with the same kinds of problems, and there are not a lot of options.

My fifth point is about harmless error. We heard some preemptive discussion by both my colleagues about that. The documents in the trial—and there were seven that were authenticated—these seven are actually posted for you to read on our website [the Grotian Moment blog] so you can decide for yourself. They are in Arabic with English summaries. They actually prove all of the main elements of the crimes against Saddam Hussein. The surprise here was that this was like Nuremberg. Saddam, if he is convicted, will be convicted on the strength of his own documents. The documents show Saddam Hussein ordered the destruction of the town of Du-jail. He ordered the rounding up of the three hundred people. He ordered their interrogation. He gave medals of honor to the interrogators who ended up killing one-third of these people during interrogation. He ordered them then tried by the revolutionary court, and he signed their death certificates . . . all 148 people tried. That is the record. Those are documents.
You know what? Saddam Hussein admitted on March 1 that those documents were true. In his famous statement to which my colleague and co-author, Greg McNeal, refers as the Jack Nicholson moment from *A Few Good Men*, Saddam Hussein said, "Yes, I admit it. I gave those orders, but any president in my situation would have done the same thing."

And so this case is really a legal case. It is about one question of law. Is it appropriate for a leader to do what Saddam did? The facts are not in dispute. Ultimately, that question of law will be decided first by the trial court. And if that court is, for some reason, biased because of the yelling matches that have gone on, that same legal issue will be decided by the nine appeals judges who will not have been biased.

Also and finally, I want to point out that we have seen a lot of misleading press reports about this trial and I myself have fallen prey to this. Two weeks ago I got a call from both the *Washington Post* and the *Los Angeles Times*. They asked, "Did you hear what the President of Iraq just did?" I said, "No, tell me." They said, "The President just reached down and had the judge removed." Many of the [panelists] today have pointed that out as the biggest problem with this tribunal. And then what did I do? I shamelessly gave a quote. . . . The *Washington Post* [reported], "‘This raises alarm bells,’ said Michael Scharf at Case Western Reserve University School of Law, an advisor to the tribunal. . . . It looks like the government is trying to meddle with the tribunal. This will erode the tribunal’s independence and legitimacy further in the eyes of the international community and the Iraq people.” And [it was worse in] the *L.A. Times*, I suppose . . . it said, “Professor Michael Scharf, a law professor and war crimes tribunal expert at Case Western Reserve University in Cleveland said that Allawi’s dismissal could set a dangerous precedent for executive branch meddling in the judiciary.” Well it was not until the next day that I found out what happened, and this is often the case with the poor Iraqi High Tribunal and the misleading press reports. This is what happened: the prosecutor had requested the removal of the chief judge; the other judges got together and voted unanimously to have him removed; they then had the president of the tribunal make a request to the president of the Iraq government to have him removed . . . not because what the press reported. He said, “Saddam, you are no dictator” but, rather, because there was a record of one hundred or more things that were being mismanaged at the trial in the first three weeks, . . . they just felt that they needed better management. If I had known that was [what had really happened], I would not have said those things to the press. I would have said this is the way it should be working.
So let me conclude like this... the Iraqi High Tribunal must be fair, but we also must be fair in assessing it. The trial was a mess, that is for sure, but the errors and missteps did not create a miscarriage of justice.

Thank you.

DEAN SIMSON: And last is Professor Newton.

PROF. NEWTON: Thank you very much.

The intellectual caliber both of these debates and of this group has been impressive, and it is an honor to be here. The famous English poet Ian Hamilton once said that “On the day of battle, the truth lies naked on the battlefield. The next morning she has gotten up and put on her uniform.” And I think that is what is going on a lot. The defense strategy of disruption and distortion has really distracted from a timely focus on what is really going on in the courtroom, particularly in light of the Arabic nature of the proceedings. And I must say with great respect to both Human Rights Watch and some of the other trial observers, there is much more—and I know this firsthand—that goes on behind the scenes to ensure a fair trial and a fair process than what you ever actually see in the courtroom. And I think that is important because Article 20 of the Iraqi constitution says that the right of defense is sacred in all stages of investigation and trial in accordance with law. This lofty and quite correct sentiment has been reiterated from the bench on several occasions in response to misconduct by the defendants or their lawyers. That is what a fair trial is. It is a trial based on the evidence and based on counterargument, based on the law, and based on the presentation of evidence in the courtroom. And that is what you have seen in that courtroom in Iraq.

You have seen it in a way that—in fact, contrary to popular perception—has resisted political pressure. People all over Iraq for months have asked, “Why isn’t this trial done? Why isn’t it moving faster?” In fact, in early 2004 after an investigative judge had the first investigative hearing with Saddam, there was lots of political pressure. Iraqi leaders attempted to leverage the tribunal for their own gain by publicly promising that “the trials are going to begin in the fall.” They did not because the trial judges were not ready. The evidence was not ready. Commentators pressured the tribunal to act and in the winter of 2004, you heard that trials were beginning in the spring. The tribunal judges resisted political pressure at every step along the way, and, in fact, today there has been no demonstrated record of political pressure from outside the process actually affecting what happens in the courtroom. There has been enormous
conjecture and speculation about the effects of political pressure and posturing on the trial processes, but there is no record from within the courtroom to support such assertions.

I must point out just in passing that the effort to discredit the process is not a new standard. We have seen that for Milosevic called the International Criminal Tribunal for the former Yugoslavia a “lawless act of political expediency.” Let me give you a quote: “Here you have the U.S. pressing for a criminal tribunal against its enemies so, in effect, the statute authorizes this process, which is war by another means. You are attacking your enemies by first demolishing them, by telling the word that they are genocidal murderers.” I know that this sounds like a defense press conference in Amman during the Dujail. In fact, this is Ramsey Clark in the ICTR context. My point is that attempts to portray criminal prosecution as a biased and unfair process are not a new tactic. The Dujail trial has seen a deliberate defense campaign to try to discredit what has gone on in the courtroom simply by creating the illusion that it is merely an extension of politics. In fact, it has been the other way around. The judges have striven with great, great fortitude to try to keep the politics out of the courtroom over and over and over again. They have said, “This is not a political trial. . . . If you have an evidentiary point to make, please make it. . . . If you have a piece of exculpatory evidence that you want to be obtained, please request it. . . . Keep the politics out. . . . Let us stick to the facts. . . . Let us stick to the law.” And, in fact, most times when you see Saddam on CNN rampaging, they will cut it, and what they will not show is what comes next when the judge says, “I am the judge. You are the defendant. I am the judge applying Iraq law in accordance with the rules of procedure . . . if you have a substantive point to make, please make it.” That is what a fair trial is all about, folks. It is about evidence, and it is about law.

Now, we all know that, as was pointed out, one of the critical, fundamental, basic trial rights is the right to have adequate time and facilities for the preparation of the defense. That point has been made today repeatedly. It has been made by our opponents. Despite claims to the contrary, defense counsel have been able to see their clients every single time they request, sometimes not when they requested. There has been a delay because of transportation and security issues. Sometimes they have been transported in a way that they did not like, but they have been able to see their clients. They have also been able to exchange documents. During trial—I do not think this has ever been said publicly and it is true because I saw it—during trial, they have a secure video link where they can get on the phone and talk in a secure way with their clients. So there is plenty
of opportunity to both prepare and conduct a vigorous and affective defense based on reason.

The point was made about sixty-day processing. Yes, the Iraqi rules and the statute require forty-five days before trial . . . the referral packet. That was met. In this trial, the defense got the referral file sixty days before trial, thereby exceeding the required standard. The evidence that is discovered during trial is, of course, handed over promptly just like any other court in the world to include the ad hoc tribunals. One more point about the preparation of the defense. They came to court the first day on October 19. They told the judges, “We did not have adequate time to prepare,” despite the fact that they had more time than required by the statute. What did the judges do? The defense was awarded a thirty-day delay right off the bat. That happened on three subsequent occasions, so that today . . . out of a twelve-month trial, over three-and-a-half months are attributable to defense requests for more time for preparation. That is the hallmark of a fair trial, a bench that is bending over backwards to give the defense the adequate time and opportunity.

One more point about exculpatory evidence. . . . People [allege that] the entire Dujail file was not turned over. Remember that over 140 civilians were executed based on orders signed by Saddam Hussein supposedly implementing the trial sentences handed down by his co-defendant, Anad Bandar. Of those, the evidence is clear that many died during torture at the hands of Iraqi security forces under the control of another co-defendant, and a number were minors who could not have stood trial. The fact is that the very existence of a trial record for those victims is one of the critical questions of fact at trial. There is very powerful evidence that there was, in fact, no trial ever held. There is some small evidence on the other side that there was a trial. There was a request made by the defense for the records of trial that would prove it existed. Such records are not available, so, of course, they were not [submitted]. All of the documents related to the Dujail trials were handed over . . . the ones that were in the possession of the court.

I want to make one more point about the conduct of the defense because I think this is critical. The phrase “daughter of a whore” was referred to, among many insulting things that would have gotten people disbarred from any other court in the world. One day on July 29, Saddam stood up and said, “Down with America. Down with a traitor, long live Iraq.” Every single defense lawyer stood up and chanted with him. Now, as prosecutor, I would have been horrified, and any judge that I know would have been horrified and kicked him out of court and quite possibly sanctioned the attorneys for contempt of court. That did not happen in this trial.
The judges have bent over backwards to give the defense time, after time, after time to both prepare for trial and participate in a good faith manner, which, in fact, goes to the allegations of bias. In my mind, if there has been any bias here, it has been on the part of the judges biased toward a fair process, letting them get away with things they would never get away with in an ordinary civil court or any court in the world at a domestic level. In fact, the bench did have the power to hold them in contempt. The judges could have relied on the authority of a very pointed rule both from the substantive rules of procedure, but also from underlying Iraqi Criminal Code: "A judge or a criminal court may impose legal proceedings against counsel if in its opinion the counsel’s conduct becomes offensive or abusive or demeans the dignity and the decorum of the special tribunal or obstructs the proceedings." Rule of Procedure 31(First). See also Rule 52(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 or decorum of the proceedings."

I would submit to you that every single one of those prohibitions has happened on the part of the defense multiple times, and it has never been met with a sanction of contempt precisely because the judges are bending over backwards to let them present a fair trial, to let them engage on the evidence if they choose to do so. The fact that they have not chosen to do so is not an indictment of the tribunal; it is the indictment of the defense counsel.

Two points to end with . . . one, there has been a lot of talk about the security environment. There have been widespread claims that the security environment itself affected a fair trial. I would say to you, that is a question of fact for the tribunal. That is a question of legal argument to be made during closing arguments. If, in fact, there was a legitimate effect of the security environment on the conduct of the defense, that is precisely the kind of point you should document in a written brief . . . that you put into your closing argument. What did the defense do? They boycotted the closing argument. They said, "We are afraid to go to Baghdad." The truth is—and this is a matter of historical record—they were in Baghdad two times the same week to consult with their clients, but on the day appointed to go to court, make the closing arguments, document for the historical record the gaps in the defense, the way they think they have been mistreated, the legal effect on the case, which is a critical legal piece here, they refused to do it. And they have their own reasons for doing that. I am just saying the fact is that there has been no demonstrable effect of the security environment
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on the actual conduct of the case. Witnesses were procured. The evidence was procured.

With respect to the deaths of the defense counsel, that is entirely tragic. In my mind, those people died as heroes in defense of the rule of law. However, let me point out—and this is factually true—the first two deaths came the first day after the opening of trial. The court was already in a thirty-eight-day recess at defense request to prepare for time. Tragedy. But I would not say that having additional time after those deaths to prepare would critically undermine the rest of the trial. Yes, the [defense team may have suffered some consequences] . . . And the record demonstrates that when they asked for more time, the court granted them more time.

The same thing also happened with Khamis Ubaidi. The court was already in recess for an extended period of time when he was murdered, allowing defense to prepare its closing arguments. And, in fact, we know objectively that his death had no real effect on the presentation of the evidence because the defense also chose to boycott closing arguments. The fact is, in every single way possible, this court has provided secure transportation to the defense attorneys [in extraordinarily complicated circumstances]. They have bent over backwards to preserve the right to present evidence, to allow the defense to collect evidence, to gain them access to their clients when appropriate. They provided secure housing for the defense attorneys during the conduct of the trial days. They had done everything they could do despite the security environment to ensure that these trials go on, and at a fundamental level, the court, I believe, made a fundamental decision that said the point of this process is to demonstrate a fair trial, fair process in accordance with international standards. If we simply stop the trial because of the security environment, because of the threats, what we are essentially doing is rewarding those who are waging war against the rule of law. This court made a very courageous stand to uphold the rule of law, to try to conduct a fair trial in extraordinary circumstances.

I will end by quoting the appeals chamber of the International Criminal Tribunal for the former Yugoslavia. “It is in the interests of justice to include the interest of the international community in a fair and expeditious trial and the effective presentation of evidence.” And that is what you have seen in that courtroom. You have seen no procedural bars to that. You have seen no systematic bars to that. You have seen no political bars from that. As was said earlier, this was not a sham trial; this is a substantive trial. It is a trial based on evidence. It is a trial based on law. It is a trial based on fact and fundamental fairness, and that is the historical record for which I believe this trial should be remembered.
DEAN SIMSON: We are up now to the rebuttal . . . each will get two minutes to respond to arguments from the other side. We will start with Prof. Heller.

PROF. HELLER: Thank you. Two minutes is not enough to respond point by point, so I will just make a few general comments. First, I am certainly not against the IHT. I certainly do not believe that the trial was a sham. Quite the contrary. What I do believe in, however, is the importance of written law—as opposed to informal procedure. Fifty years from now . . . one hundred years from now, there will be no judges of the Iraqi High Tribunal to talk to. Even the youthful Michael Scharf will not be here to explain how the trial actually functioned. All you look back on after the passage of time is the written law. That is what governs this trial. That is what governs future trials. Maybe Article 4, which gives unreviewable discretion to the executive to remove a judge, was not used without the participation of the tribunal in this particular situation. I do not know. I can not comment on that. I do know, however, that the provision is there. It undermines the already existing provisions that allow the tribunal to police itself. One of the great things about Iraqi law is its commitment to strict legality. There is a provision in the constitution preventing the retroactive application of criminal legislation, and I think the more that we simply ignore that limitation, the weaker the court becomes.

And the final point is—and Professor Bassiouni has talked about it before—that I am not an uncritical believer in internationalizing everything. I believe countries have the sovereign right to create their own legal systems. I would not have complained if, in fact, it had been a more Iraqi process. I still might disagree with certain points, but I have no problem with the general idea. But, what I do find problematic with the IHT is that it is somewhere in between. It wants to incorporate international criminal law in terms of new kinds of crimes, new kinds of liability, different kinds of sentencing considerations, but it does not want to incorporate international criminal law when it comes to the protection of the defendant [and] the procedural guarantees. And that kind of selective incorporation of international criminal law is what I find the most troublesome about the IHT.

DEAN SIMSON: Thank you. Next, Mr. Roth.

MR. ROTH: What is striking to me is how much the defenders of the tribunal ignore the reality of the trial. Nothing about the vague indictment
that gave no notice and opportunity to prepare, nothing about the unnecessary use of twenty-six anonymous witnesses who could not be effectively cross-examined, nothing about the twenty-nine witnesses who had a written statement turned in, which you could not possibly cross-examine. Instead we get a bunch of straw men. Milosevic discredited the [ICTY], so I guess I am like Milosevic? The Iraq war . . . people are against that. What does it have to do with anything here?

We want to follow the good rules of the court, but they were not followed. So let us look at it through Iraq’s eyes . . . the same eyes that have a fifteen-minute trial for a thirty-year sentence. I do not want to look at it through those eyes. I want a fair trial.

The disruptions of the defense attorneys were destructive, but none of the problems I outlined had anything to do with that disruption. They were all the way the judges chose to conduct the trial. Now, where did we try to meet on some of these facts? Michael [Scharf] says seven of the documents were authenticated. Look on his website. The reality there was a handwriting expert whose written statement was submitted. He could not be cross-examined. The defense was not allowed to submit its own handwriting expert to give a contrary point of view, and the defense was not allowed to even look at the original document. They could look at the website, but you cannot tell from a website whether something is authentic or not. That is not a fair way to proceed.

Another example, Michael Newton says . . . well, we don't even know if there was a trial in the revolutionary court, but we do know that there was a 361-page file, which was cherry-picked, so that the four bad pages were put in, but the 357 allegedly good pages were kept out. I used to be a federal prosecutor. If I did that, I would be disbarred, if not prosecuted. Here we are calling it harmless error.

This is not the trial we want. These were awful crimes. We should be focusing on the crimes, not on this parody of justice that took place, and we did not have to be here. Any objective assessment of this would have said we need a Sierra Leone-type situation where it is internationalized, as much national preservation as possible. Instead ideology prevailed, and we went with a national system that was not ready for it.

DEAN SIMSON: Thank you. Professor Scharf?

PROF. SCHARF: Thank you.

This week marks the sixtieth anniversary of the Nuremberg tribunal’s judgment and on the faculty of law at Case Western Re-
serve University, we have a former prosecutor from Nuremberg, eighty-seven year-old Henry King, who was twenty-five during the Nuremberg trial. Prof. King has told me repeatedly—and I have seen the documents myself—about how in the aftermath of Nuremberg the Supreme Court judges who were the colleagues of Chief Prosecutor Robert Jackson said things publicly, like “the Nuremberg trial was nothing but a high-grade lynching party”... “that the Nuremberg trial violated so many provisions of fair process that no fair trial in the world, no civilized system would accept its findings.” Well, now sixty years later, we celebrate Nuremberg, and I am going to make a prediction... I predict that sixty years from now—and maybe in only ten or twenty years—people will look back at the Iraqi High Tribunal and also its sister court, the Bosnia trial, which is very—they are domestic tribunals that have international elements. There are crimes; there are rules, and the advisors are international. If you look back at these tribunals with all of their flaws, as launching a new kind of criminal tribunal, that is an important supplement to the International Criminal Court and to domestic trials.

Thank you.

DEAN SIMSON: Thanks. And last, Professor Newton.

PROF. NEWTON: The legal phrase is an “equality of arms,” and by sheer happenstance, the trial days ended up split exactly down the middle for both the defense and prosecution in terms of witnesses. This is potentially important because it shows the latitude given to the defense to present their case and to present their exculpatory evidence. In all, there were twenty-two confirmation government and prosecution witnesses in contrast to sixty-two defense witnesses.

The numbers really don't matter. What matters is the fact that the defense had every chance in the world to present its case, even to the point—and I think this is critically important to remember—after it became obvious that the defendants themselves were going to take every opportunity to disrupt the proceedings, they were still allowed to present exculpatory evidence, to present their opinions, to cross-examine witnesses—a remarkable demonstration of good faith in an effort to present an open and fair trial.

I will tell you in closing one of the most inspiring things I have seen in my life as a lawyer was during the day that the appointed defense counsel came to deliver closing arguments. This was only necessary because the retained counsel boycotted their own closing arguments despite the clear warnings of the judges that the trial would not be held hostage. Saddam stood up, and he
wagged his finger, and he said, “If you speak, you are an enemy of the state.” And these arguments had, in fact, been prepared by the international advisor, which was pointed out, but then critically they were taken by the Iraqis and changed. They were Iraqi arguments by Iraqi lawyers. Saddam stood up, and he wagged his finger and he said, “if you speak, you are an enemy of the state” on live television. That lawyer stood up and spoke for four hours, and his arguments were very substantive, and very powerful. He spent time attacking the evidentiary basis, attacking the forms of participation, attacking all the substantive things that we teach in our law school courses. That is what a fair trial is all about. That is what you have seen in Baghdad, but not what has been portrayed through the media filter.