



CASE WESTERN RESERVE
UNIVERSITY
SCHOOL OF LAW

INTRODUCTION TO INTERNATIONAL CRIMINAL LAW

**MOOC taught by Professor
Michael P. Scharf**

Module #8:

Maintaining Control of the Courtroom

**International Criminal Law
Module #8
Maintaining Control over a War Crime Trial**

On-Line Simulation:

Read the article below, “Chaos in the Courtroom: Controlling Disruptive Defendants and Contumacious Counsel in War Crimes Trials,” 39 Case Western Reserve journal of International Law 155-170 (2007).

For purposes of the simulation, assume you are a judge presiding over an international war crimes tribunal. You are invited to post an on-line submission indicating how you would handle one or more of the following twelve scenarios:

1. While in pre-trial confinement at the Tribunal, the Defendant writes and has published slanderous biographical accounts about the Prosecutor and Chief Judge. Using made up facts, the book about the Prosecutor asserts that he is an alcoholic and closet homosexual, and the book about the Judge asserts that she has taken bribes from various governments to rule against the Defendant.
2. The Defendant refuses to rise when the Judge enters the room or to address the Judge respectfully as “Your Honor.” And he sits with his back to the judges.
3. The Defendant refuses to dress appropriately, coming into the Courtroom in his pajamas.
4. The Defendant loudly hums his country’s national anthem in order to create a distraction during the testimony of a particularly compelling witness.
5. The Defendant insists on taking a prayer break at the holy hour in the middle of witness testimony.
6. A self-represented Defendant files pleadings and briefs which employ frequent curse words and insults aimed at the Court.
7. A self-represented Defendant insists on making political speeches instead of asking questions during cross examination, and yells at the Prosecution witnesses, attempting to intimidate them.

8. While on the witness stand testifying on his own behalf, the Defendant looks into the camera and exhorts his followers to attack members and supporters of the new government.
9. The Defendant instructs his lawyer that he wants to boycott the proceedings to protest a particular ruling by the Court. Thereafter, the lawyer and Defendant refuse to show up in court.
10. A Defendant goes on a hunger strike, and becomes so weakened that his life is in imminent danger.
11. A Defense Lawyer gives interviews to the media in which he accuses the Court of bias and incompetence.
12. A Defense Lawyer gives interviews to the media in which he discloses the identities of “confidential witnesses.”

In order to complete the optional on-line simulations for this course, students must go to the Navigation Bar on the left panel. Under the Exercises section, you will find a button for “on-line simulations.” The simulations for each session are available under this button. Written work can be submitted directly or through file upload. Students who post five or more on-line submissions of over 200 words in length during the course (simulations and discussions) will be awarded a Statement of Accomplishment with Distinction for the course.

**ORDER IN THE COURTROOM:
THE UNIQUE CHALLENGE OF MAINTAINING CONTROL
OF A WAR CRIMES TRIAL**

By Michael P Scharf

39 Case Western Reserve journal of International Law 155-170 (2007) (footnotes omitted).

I INTRODUCTION

International war crimes trials are inherently messy, especially when former leaders invoke the right of self-representation in order to advance a political agenda that goes beyond defending themselves on the charges against them. In the past decade, we have seen Slobodan Milošević, Vojislav Šešelj, and Radovan Karadžić at the International

Criminal Tribunal for the former Yugoslavia (ICTY), Charles Taylor at the Special Court for Sierra Leone ('SCSL'), and Saddam Hussein at the Iraqi High Tribunal ('IHT') use self-representation in various ways to disrupt and delay the proceedings.

Of all the modern war crimes trials, Saddam Hussein's behaviour was perhaps the most creatively disruptive. A month after the conclusion of the *Saddam Hussein* trial, in September 2006, I was invited by Luis Moreno-Ocampo, the Prosecutor of the International Criminal Court, to speak to his staff in The Hague about the lessons from the *Saddam Hussein* trial concerning maintaining order in the courtroom during a war crimes trial. Subsequently, the United Nations Office of Legal Affairs asked me to present a video lecture on this topic for inclusion in the UN Audio Visual Library of International Law. Drawn from my ICC and UN lectures, this chapter examines some of history's previous messy trials and the strategies judges have employed with varying degrees of success to respond to disruptive conduct by trial participants. It then describes the various tactics employed by the judges in the *Saddam Hussein* trial and analyzes why they were not more successful. The chapter concludes with a detailed prescription for maintaining order in future war crimes trials.



II THE NEED FOR ORDERLY JUSTICE IN WAR CRIMES TRIALS

Disruptive conduct may be defined as any intentional conduct by the defendant or defence counsel in the courtroom 'that substantially interferes with the dignity, order and decorum of judicial proceedings.' There are five main types of disorder: (1) passive disrespect, for example, the refusal to address the judge as "Your Honor," refusal to stand when the judge enters the courtroom; (2) refusal to cooperate with the essential ground rules of the judicial proceedings, for example, constantly insisting on making political speeches instead of asking questions during cross-examination; (3) repeated trial interruptions, ranging from insulting remarks to loud shouting or cursing; (4) in a televised trial, attempting to incite acts of mass violence; and (5) resorting to physical violence in the courtroom.

Former leaders and their counsel in war crimes trials are especially likely to engage in such forms of disruption. Because of the political context and widespread publicity, leaders on trial are more likely than ordinary defendants to have concluded that they do not

stand a chance of obtaining an acquittal by playing by the judicial rules. Instead, they seek to derail the proceedings, hoping for a negotiated solution (eg amnesty) outside the courtroom; to hijack the televised proceedings, hoping to transform themselves through political speeches into martyrs in the eyes of their followers; and to discredit the tribunal by provoking the judges into inappropriately harsh responses which will make the process appear unfair.

As Robert Jackson, the Chief Prosecutor at the Nuremberg trials, observed sixty years ago, war crimes trials, whether before international tribunals or domestic courts, seek to establish a credible historic record of abuses and elevate the rule of law over the force of might, thereby facilitating the restoration of peace and the transition to democracy. While tolerating dissent is a healthy manifestation of a democratic government, ‘a courtroom is not an arena in which dissension, particularly of a disruptive nature, may supplant, or even take precedence over, the task of administering justice.’ This is especially true in a war crimes trial.

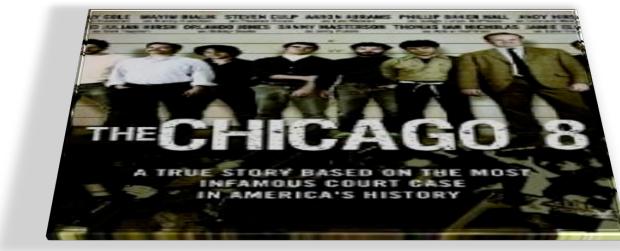
Unlike other forms of acceptable political expression, a disruptive defendant or defence lawyer who interferes with the ‘grandeur of court procedure’ (as Hannah Arendt once described the judicial process) threatens the proper administration of criminal justice in several fundamental ways. First, disruptive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

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

II HISTORY’S MOST TUMULTUOUS TRIALS

A FROM THE CHICAGO SEVEN TO ZACARIAS MOUSSAOUI

The administration of justice has always endured a degree of disorder and there have been many notable occasions when trial participants have been particularly unruly and disrespectful to judicial authority. A list of history’s most disruptive defendants would include Sir Walter Raleigh (tried in Britain for high treason in 1603), William Penn (tried in Britain for unlawful assembly in 1670), Auguste Vaillant (tried in France for blowing up the Chamber of Deputies in 1894), Michele Angiolillo (tried in Spain for assassinating the Spanish premier in 1897), and Gaetano Bresci (tried in Italy for killing Italian King Humbert in 1899). But by far the most notorious disorderly trial in the 20th century was the *Chicago Seven* (sometimes known as Chicago Eight) trial of 1969–1970.



The *Chicago Seven* trial is particularly relevant to the *Slobodan Milošević* and *Saddam Hussein* trials because former US Attorney General Ramsey Clark assisted the defence in all three trials. In the *Chicago Seven* case, the leaders of the anti-Vietnam war movement — Bobby Seale, David Dellinger, Abbie Hoffman, Jerry Rubin, Rennie Davis, Tom Hayden, Lee Weiner and John Froines — were charged with conspiring, organising, and inciting riots during the 1968 Democratic National Convention in Chicago. The trial drew considerable public notice because of the defendants' notoriety and their courtroom antics.

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

Throughout the trial, the defendants refused to rise at the beginning or close of court sessions. On two occasions, defendants Abbie Hoffman and Jerry Rubin wore judicial robes in court onto which were pinned a Jewish yellow star, meant to imply that Judge Hoffman was running his courtroom like the courts of Nazi Germany. The defendants frequently called Judge Hoffman derogatory names, accused him of racism and prejudice, and made sarcastic comments to him, such as asking 'How is your war stock doing?' The most serious disorder occurred two weeks into the trial, when Judge Hoffman learned that a few minutes before the commencement of the court session, Bobby Seale had addressed the audience of his supporters in the courtroom, telling them that if he were attacked 'they know what to do.' Judge Hoffman responded by having Seale bound and gagged. Defense counsel William Kunstler then scolded the Court, saying 'This is no longer a court of order, your Honor; this is a medieval torture chamber. It is a disgrace.'



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

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

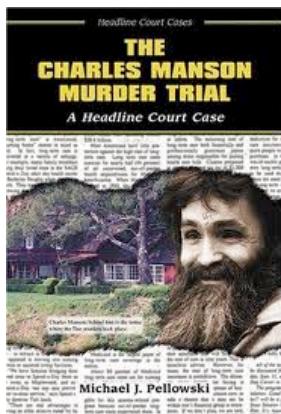
The Supreme Court affirmed Allen's conviction, ruling that removal after a warning was permissible and far less objectionable than use of restraints. In a passage that was obviously inspired by the publicity surrounding the *Chicago Seven* trial, the Supreme Court stated:

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

about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.

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

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



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



Moussaoui: The Final Verdict

B DISORDER IN THE HAGUE

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



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

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

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

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



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

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

The Appeals Chamber agreed that the Trial Chamber could revoke the right to self-representation where the Trial Chamber found ‘that appropriate circumstances, rising to the level of substantial and persistent obstruction to the proper and expeditious conduct of the trial exist.’ The Appeals Chamber, however, held that the Trial Chamber had to first give the defendant an explicit warning.

Šešelj’s obstructionist behaviour persisted at trial. He requested that judges remove their robes in his presence because the judges ‘reminded him of medieval inquisitors.’ He moved to have Judge Schomburg disqualified solely because he was from Germany, stating ‘the smell of crematoriums and gas chambers comes into The Hague courtroom with him.’

He publicly accused the judges and lawyers of bribing witnesses to testify against him. He intimidated witnesses on the stand and disclosed the name of confidential witnesses to an outsider so that the outsider could ‘disable’ them.

In the face of these continuing disruptions, the Trial Chamber issued repeated warnings, and then ruled that counsel could be rightly imposed on Šešelj. The Appeals Chamber disagreed, and reinstated Šešelj as primary counsel. The Trial Chamber later assigned standby counsel.

About this time, the trial of Bosnian Serb leader Radovan Karadžić commenced. On the eve of his trial in 2009, Karadžić, too, asserted his right to self-representation. Karadžić subsequently insisted on not recognising the authority of the Tribunal, he refused to abide by procedures, and he refused to attend trial sessions. After issuing repeated warnings, the Trial Chamber appointed stand by counsel to represent the interests of Karadžić if required. This time, the decision was upheld on appeal.



C DISARRAY IN THE DUJAIL TRIAL

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



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

Meanwhile, Hussein's co-defendant, Barzan al-Tikriti, who had served as head of the Internal Security Agency, competed with Hussein for the most offensive insults directed at the bench. On one occasion, he appeared in court wearing only his pajamas, and another time, he insisted on sitting on the courtroom floor with his back to the judge.



For their part, Saddam Hussein's retained lawyers, in particular Lebanese defence attorney Bushra al-Khalil and Jordanian lawyer Salah al-Armouti, frequently made outrageous political speeches and acted in outright contempt of the Iraqi High Tribunal. They engaged in tactics such as insulting Judge Ra'ouf, holding up photos of US prison

abuses at Abu Ghraib, and on one occasion pulling off their defence counsel robes and hurling them at the bench. Saddam Hussein's retained lawyers also staged a walk-out in the middle of a trial session and boycotted the majority of the trial sessions including the closing arguments. These acts violated Iraqi law and the Iraqi Code of Legal Professional Ethics, which provide that lawyers practicing in Iraqi courts must be respectful toward the court, must appear in court on the set dates, should not try to delay the resolution of a case, and must facilitate the task of the judge.

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



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

III REMEDIES FOR DISRUPTION

A. LIMITING SELF-REPRESENTATION

Permitting a former leader to assert the right of self-representation in a war crimes trial is a virtual licence for abuse. While there is ongoing debate about whether there exists a customary international law right to self-representation, many countries of the world require that defendants be represented by counsel in all cases involving serious charges. The Iraqi National Assembly was prudent to require that defendants before the Iraqi High

Tribunal be represented by Iraqi lead counsel, who the Tribunal could control through various sanctions available under Iraqi law.

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

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

Even in a tribunal such as the ICTY, whose statute provides for the right of self-representation, the Appeals Chamber decision in the *Šešelj* case recognises that such a right is a qualified one. Abuse it and you lose it. Drawing from international tribunal precedent, defence counsel should be imposed on a defendant who seeks to represent himself where: (1) the defendant attempts to boycott his trial; (2) the defendant's self-representation would prejudice the fair trial rights of co-defendants; (3) the defendant is being persistently disruptive or obstructionist; or (4) self-representation would unreasonably prolong the trial.

Since most war crimes tribunal courtrooms are partitioned by sound-proof glass, a judge may effectively deal with minor disruptions by simply turning off the defendant's microphone. In the case of persistent disruptions, the judge must give a specific warning before revoking the right of self-representation. In addition, the defendant must be accorded at least a chance to reclaim the right if he manifests a willingness to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings. One commentator advocates a 'three strikes approach' after which the right would be permanently revoked, while others believe that the Court should have complete discretion to determine whether to provide the defendant yet another chance.

B STANDBY PUBLIC DEFENDERS

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

Just as a war crimes tribunal should appoint at least one alternate judge who observes the trial from its commencement in case one of the judges should need to be replaced for health or other reasons, so too should standby public defenders be present from the beginning of the trial. Such counsel should be highly qualified, receive the same international training as prosecutors and judges, and be assisted by international experts. The very presence of standby public defenders can have a deterrent effect on misconduct by a self-represented defendant or by retained defence counsel because they will recognise that their disruptive actions will not successfully derail the trial, which can proceed without pause with standby counsel.

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

C EXPULSION AND OTHER SANCTIONS

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

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

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

Third, a single obscenity or outburst should be met with a warning that continued disruptions of this kind will lead to sanctions, including expulsion from the courtroom. But repeated interruptions of a trial may be dealt with by expulsion after appropriate warnings have been given. Where the defendant is excluded from his trial the court should make reasonable efforts to enable him to keep apprised of the progress of the trial and to communicate with his attorney.

Fourth, since a televised trial gives the defendant the opportunity to communicate directly with the population at large, the judge must be particularly vigilant not to permit

the defendant to use the courtroom as a stage to incite mass violence. Usually, there is a twenty-minute delay in broadcasting to enable the Tribunal to bleep out references to confidential witnesses. While it may be appropriate to also excise defence outbursts that seek to incite violence, since such statements will likely be reported in the print media this approach is of limited efficacy.

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

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

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

D RESPONDING TO CONTUMACIOUS COUNSEL

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

Following the lead of the Special Court for Sierra Leone, all war crimes tribunals should adopt a Code of Professional Conduct, which spells out the rules of courtroom decorum applicable to both the prosecution and defence counsel. Consistent with such a

code, after an appropriate warning, persistent insults and disrespectful comments should be met with sanctions, including fines, jail time, suspension, and even disbarment. Because a judge has inherent power to remove a disruptive defendant from the courtroom, he also possesses the inherent power to deal with a disruptive lawyer in the same way and to temporarily or permanently replace him with standby counsel.

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

Moreover, the defence counsel should seek to dissuade his client from improper courtroom behaviour, including explaining to him the sanctions that may be imposed by the judge and the probable prejudice to his case if he disrupts the proceedings. A defence counsel who encourages courtroom misconduct may be punished under the rules that establish his own responsibility for maintaining courtroom decorum. If he advises a client to act disruptively (or suggests methods for doing so), the court has authority to discipline counsel.

IV CONCLUSION: FAIR TRIAL VERSUS INTEREST OF JUSTICE

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

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

Books by Michael Scharf

