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Will Saddam Hussein Get a Fair Trial

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“WILL SADDAM HUSSEIN GET A FAIR TRIAL?”*

*Debate between Dr. Curtis F. J. Doebbler
and Professor Michael P. Scharf*

Moderator:

Hiram E. Chodosh, Associate Dean for Academic Affairs,
School of Law, Case Western Reserve University

Participants:

Professor Dr. Curtis F.J. Doebbler, international human rights lawyer, Professor of Law at An-Najah National University in Nablus, Palestine, and member of legal team representing Saddam Hussein, and

Professor Michael P. Scharf, Professor of Law and Director of the Frederick K. Cox International Law Center, Case School of Law

ASSOCIATE DEAN HIRAM CHODOSH:

I'm Hiram Chodosh, Associate Dean for Academic Affairs for the School of Law at Case Western Reserve University. On behalf of the Frederick K. Cox International Law Center and the War Crimes Research office, welcome.

The Cox Center is dedicated to advancing understanding and solutions to the most critical issues of global justice. The Center supports innovative, educational programs, including a concentration of thirty-five courses, experiential and service learning, and our clinics, labs, and externships and study-abroad programs, cutting-edge research through symposia on terrorism, the Middle East, intellectual property, nation-building, and many other issues, and service to the broader community.

Today's debate, "The Hussein Trial on Trial," kicks off the Cox Center's newest program, the International Debate Series, which will feature an annual debate between leading experts on an important and timely issue of international law.

* Sponsored by the Case Western Reserve University Frederick K. Cox International Law Center on Thursday, January 13, 2005. The debate was broadcast nationally on C-SPAN on January 29, 2005: <http://www.C-span store.org/shop/index.php?main_page=product_video_info&cPath=18_19&products_id+184702-1>.

Before we begin, a few points of background. As you know, on December 10, 2003, the Iraqi Governing Council approved a statute establishing the Iraqi Special Tribunal for crimes against humanity, and Paul Bremer, the head of the Coalition Provisional Authority, signed the statute into law.

The tribunal is charged with the responsibility to prosecute those accused of crimes of aggression, crimes against humanity, war crimes, and genocide in Iraq between July 17, 1968, when Iraqi President Saddam Hussein's Ba'ath Party seized power, and May 1st, 2003, when President Bush declared the conclusion of major combat operations in Iraq. U.S. forces captured Saddam Hussein only four days after the establishment of the tribunal on December 14th, 2003.

On July 1, 2004, Saddam Hussein was arraigned before an investigating judge and informed of the allegations, including: the systematic killing of religious figures in 1974; two, killing off the Kurdish Barzani clan in 1983; three, torturing and killing members of political parties over the last thirty years; four, using chemical weapons against the Kurds in Halabja in 1988; five, the Anfal ethnic cleansing campaign against Kurds between 1987 and 1988; six, the 1990 invasion of Kuwait; and seven, drying rivers, killing hundreds of thousands of Marsh Arabs in response to their 1991 uprising.

The U.S. involvement in the tribunal, the statute, and the selection of judges, the absence of international jurists, the fear of violence against inexperienced Iraqi judges and witnesses, the isolation of Hussein under heavily guarded detention, the availability of the death penalty, the emerging civil war, the collective conviction of the former Iraqi regime in the court of public opinion, all raise a central question: Can Saddam Hussein get a fair trial before the Iraqi Special Tribunal?

During the next hour, our own Professor Michael Scharf, Director of the Cox Center, founder of the War Crimes Research Office and Adviser to the Iraqi Special Tribunal; and Professor Curtis Doebbler, a leading human rights expert, one of two Americans, the other being former Attorney General Ramsey Clark, who are defending Saddam Hussein before the Iraqi Special Tribunal, will debate this issue. Doebbler will argue that Saddam Hussein cannot get a fair trial before the Tribunal. Scharf will refute this claim.

These two leading experts do not sit neatly in their respective adversarial positions. When he first learned of the Iraqi Special Tribunal, Scharf wrote that it will be viewed as a puppet of the occupying power, and Doebbler has spent most of his career representing the interests of people, including over two million people in the Sudan, subjected to human rights abuses. Both are committed human rights experts; both seek justice for the Iraqi people and the broader international community. Each is here to contribute, albeit through heated disagreement to our appreciation of these critical issues.

The debate format today is simple. Each side, beginning with Professor Doebbler, will have fifteen minutes to make his argument. Professor Doebbler will then have three minutes to rebut Professor Scharf's argument, and the remaining time we will take four questions from the audience, two directed at Scharf and two for Doebbler. Each will be allowed two minutes to answer the question and one minute to comment on the response to the other's answer. You have been provided forms to write your questions down during the debate. If you have a question, please raise your form in the air, and they will be collected by our student assistants and brought to me for selection. The same process applies to those of you who are viewing the debate upstairs from our overflow room. Please supply your name and write clearly. And now, Professor Doebbler, you have fifteen minutes.

PROFESSOR CURTIS DOEBBLER:

Thank you very much. I want to thank Case Western Reserve University for being willing to host such a debate like this. There have been many other places that have shied away from discussing this issue although I think it is a very vital issue for human rights and, as I will try to indicate, a very vital issue for the values that underlie our society here in the United States. So I want to thank them very much, and to thank particularly Professor Scharf for being willing to join me in this forum.

The first issue that has to be addressed is the fact that this whole situation, the trials, what is happening right now in Iraq, the military involvement, the soldiers that are being killed, the civilians that are being killed, the destruction of Fallujah, all this has taken place in violation of international law. I have been to more than sixty countries after the invasion of Iraq in March 2003, and I have not met one lawyer with whom I had to argue about the illegality of the invasion, except in the United States. In every other country I visited, and meeting with some of the heads of state of those countries and some of their most senior lawyers, they were unequivocally convinced that the United States' aggression against Iraq was a violation of international law, a violation of Article 2(4) of the Charter of the United Nations, which represents binding international law for the United States. So we have to look at it from that perspective.

In other words, think about it as if another country came to the United States, decided it didn't like President Bush and the Republicans in power because they thought that President Bush was a war criminal for having committed crimes of aggression against other countries, invaded the United States, and then put him on trial claiming that they would give him a fair trial. That is the situation right now that we face in Iraq. And I think it is important for us not to lose sight of that, the crucial starting point is the illegal use of force against the territorial integrity and political independence of another sovereign country in violation of international law.

Furthermore, even today, some would say that there is still an ongoing use of force against the people of Iraq and there is certainly an occupation of large parts of Iraq. This occupation is an illegal occupation, in part, because it was based on an illegal use of force, in part, because it is an occupation by a foreign power that has acted oppressively in the areas that it occupies.

So the second important aspect to understand is that Iraq, at least large parts of the country, are in a state of occupation. Legally, that means that there is law that applies to an occupier and how an occupier can treat the people of a country, how it can treat the institutions of a country, and in Iraq, the United States, I suggest, has not abided by this law.

In fact, part of that law, the Fourth Geneva Convention, states that an occupying power may not dissolve the judicial bodies of a country and institute its own judicial bodies. The United States has dissolved the judicial institutions of Iraq, and it has instated its own judges.

Yes, many of these judges were taken from among Iraqi judges, but only after Iraqi judges were politically vetted to decide which ones should stay. And they did not vet them for their legal competence; no, they vetted them in a process they called de-Ba'athification, a process to which every single one of the judges was subjected because every single judge in Iraq, with maybe an insignificant number of exceptions, were members of the Ba'ath Party.

In fact, the most senior judges in Iraq were senior members of the Ba'ath Party. These judges were excluded from the judiciary. It is not a huge number, 180 of maybe 900 judges, but they are the most senior judges. The judges that are left are some of the most junior judges. Some of them were not even judges before, and now they have been made, by essentially decree, judges. These are the individuals who will be part of the court.

Now, I'd like to go through each judge's background and say this is the judge who is going to be in the court, and these are his qualifications or lack of qualifications. But I cannot do that. I cannot do that because I don't know who the judges are of that court. I know one person who is an investigating judge only because a television tape of the initial appearance in July leaked out, but that should not have even been made public according to the American authorities, and that person is a very junior judge, not a very senior judge.

So we have a situation where the occupying power has created a tribunal of, in our opinion, less than competent judges that will be trying one of the most complex and possibly one of the most important cases in recent history. Certainly, I think that is inappropriate, but more importantly, I think that is a breach of international law guarantees of a fair, competent, independent, and impartial tribunal.

The court is not independent because it is created by an occupying power through a process by which the judges are chosen based not on their legal qualifications but on a political vetting. The court is not impartial *prima facie* in the words of the State Department, commenting on South

American countries, because faceless judges are prima facie, an illegitimate form of judiciary. And they violate the provisions of due process in a variety of ways.

If there is to be a court in Iraq that tries individuals for international crimes, such a court must have the authority to try every individual who has committed a crime against international law in Iraq. That includes crimes of aggression, which are not included in the statute right now, despite what you heard about some of the allegations -- and I will come to that in a second -- that includes being able to try the nationals of other countries that may have committed these crimes.

Probably not many of you are old enough to remember, but one of the greatest criticisms leveled at the Nuremberg and Tokyo processes after World War II by one of the judges who participated in that process, Judge Rollings, a Dutch judge of the Tokyo tribunal, was that that process was not legitimate because it was only "victor's justice" and in his words, that is, "not justice at all."

If we are going to have a system of the rule of law applied to Iraq if the occupying power and, hopefully, eventually, a sovereign Iraqi Government that represents the people of Iraq is going to deal with issues in their country that require a judiciary to deal with them, we need to have a fair judiciary established in that country. We do not have that right now.

I want to go through some of the due process rights that are being violated and that need to be respected in this instance. I mentioned some of them already, and because many of you are law students, I will point out, although not with the jurisprudence, we don't have time for that here, at least some of the provisions of international law, which are relevant.

For example, many of you know that Article 14 of the International Covenant of Civil and Political Rights provides for a competent, independent, and impartial tribunal. This right is also provided for in the American Declaration on the Rights and Duties of Man, which although not a binding treaty on the United States, has been accepted many times by the Inter-American Commission as reflecting customary international law that the United States must abide by, and those of you who studied constitutional law are certainly aware that the United States courts have said that customary international law is part of United States law.

Also, the Geneva Conventions, Article 84, subparagraph 2 of the Third Geneva Convention specifically, contains the right to be judged by an independent and impartial tribunal.

One also has a right to be informed of the charges against him in a timely manner. That is in both the Third Geneva Convention, Article 104, and the International Covenant of Civil and Political Rights article 14, subparagraph 3(a). The right to be informed of charges against you is not the right to stand before somebody who points at you and says "We think you have done many bad things," or to even come before one who rails against you based on his perception of what might be public values.

It is the right to come before a court where you are presented with a prima facie case of facts against you and where you are able to reply to those facts, and most importantly, it is a chance to understand what provisions of law you have violated.

I don't know if any of you have seen -- I have watched it numerous times as you can imagine -- the process which took place apparently in Baghdad at the beginning of July 2004. Not one provision of law was mentioned in relation to any charges. In fact, at one point, the judge held up the law, and said that this is the basis of the establishment of the tribunal and the President replied that he was holding up the criminal law that was signed into law by the President.

The judge didn't even have the sense to open the book he was holding, and look at that criminal law and cite some of its provisions. That in my view -- and I think the view of any criminal lawyer -- is a travesty of justice. If you are brought before a criminal tribunal in this country, I hope that they will cite a provision of law that you have violated in any indictment or allegations against you.

I will not go through all of the due process rights. There are more than 20 rights that have been violated, but because of time, I just want to point out one or two important ones, particularly one that is important to myself as one of the counsel for the individual concerned, and that is the right to be able to have contact with a lawyer and not just any lawyer, not like in Guantanamo, where the state decides who your lawyers are.

I represent some individuals in Guantanamo Bay as well, and do you know what the Government told me? If I wanted to see those individuals, I have to sign an agreement stating that I would essentially tell the Government anything that was mentioned in my communications between them. That is an inappropriate manner for the government to respect somebody's right to legal counsel.

This right requires a defendant be able to consult with legal counsel of his own choosing and to be able to consult in confidence, and to be able to facilitate a defense.

Seeing that the time is running out, let me just end here because as you can see, it takes quite a long time just to get through the basic principles being violated in this case -- but let me just conclude by mentioning that it is not only Iraqis from whom we are setting a bad example by disrespecting or ignoring the rule of law, but it is important to all of you in this room, or at least those of you who are lawyers, because the law is based on respect for the law and respect for the rule of law for everybody equally. Thank you.

ASSOCIATE DEAN CHODOSH:

Thank you, Professor Doebbler.

PROFESSOR MICHAEL SCHARF:

Let me begin by thanking Mr. Curtis Doebbler for coming to Cleveland this morning, braving the winds of the Chicago Airport to make it here for this nationally televised debate. We actually met on line. After I had written a piece entitled "Can this Man Get a Fair Trial," which appeared in the Washington Post Outlook Section a few weeks ago, there was a Washington Post online discussion, in which Mr. Doebbler wrote, "Dear Michael: I have followed your online chat with interest, even encouraging some of my volunteers to participate. Rather than debate your many wrong or misleading statements on line, I would like to invite you to debate me in person. Maybe the Washing Post would sponsor such a debate or maybe even your law school. As you undoubtedly are aware, I am one of the lawyers for Mr. Saddam Hussein, and I am intimately familiar with the proceedings in the case. Best regards, Curtis Doebbler."

I wrote back "Dear Curtis: I would enjoy very much a public debate with you. Would you have any interest in coming to Case Western Reserve University for such an event?" And here we are now.

The other thing I want to do is provide a disclaimer. Although I was one of five experts from around the world selected by the Department of Justice Regime Crimes Liaison Office in Baghdad to help train the IST judges, I must stress I do not speak for the Iraqi Special Tribunal or the Department of Justice, and I have not received any financial compensation for my assistance. I am assisting the IST because I feel very strongly that this will be one of the most important trials of our lifetime, and I want to make sure that this trial complies fully with international human rights standards.

Now, let me begin by responding to Mr. Doebbler's attempt to link the issue of the validity of the invasion in 2003 with the question of the legitimacy of the Iraqi Special Tribunal process.

First of all, the Security Council of the United Nations, representing all the countries in the world, recognized in Resolution 1546 that the occupation ended and the Iraqi Interim Government was sovereign as of June 30, 2004. It has recognized the legitimacy of the Iraqi Interim Government, as well as the process for democratic elections to be held at the end of this month. Further, in calling for accountability for violations of international humanitarian law, the Security Council made a distinction between what many countries feel was an unauthorized invasion and the issue of what to do next.

Secondly, if the democratically elected Government of Iraq approves the statute and the judges of this tribunal, there would be no issue of a violation of the Geneva Conventions because that would severe any argument that this was a statute and a court that was set up solely by an occupying Government. The new Iraqi Government could do this indirectly by approving the funding for the IST and continuing its operations, including the construction of its facilities, the issuance of indictments, the conduct of investigations, and the commencement of trials.

And third, Mr. Doebbler's argument smacks of what is known in international law as the *tu quo que* defense. This is Latin for "you also." And it is a defense that the Nuremberg defendants raised sixty years ago; it is a defense Milosevic has raised at his trial before the Yugoslavia Tribunal in The Hague, and it is almost always raised by former leaders accused of war crimes. International courts have always dismissed this defense as invalid.

In doing so, they say it is true that in wars and in foreign affairs many countries violate international law, but when a tribunal is set up to prosecute defendants, the only question is: were these defendants guilty of the crimes charged? And the fact that opposing leaders may have also violated international law or committed war crimes does not excuse the guilt of these defendants. Therefore, the *tu quo que* defense is not a valid defense. It may resonate as a television sound bite, but legally, it doesn't hold water.

Now, with respect to judging the legitimacy of the Iraqi Special Tribunal, there is international precedent that gives us a guide for making this determination and that comes out of the Yugoslavia Tribunal set up by the UN Security Council in 1993. In its first judgment, known as the Tadic case, the Tribunal ruled on whether it was validly established and what it means to be a legitimate tribunal. The Yugoslavia Tribunal focused on three criteria:

First of all, international law requires that a war crimes tribunal be established by a statute, not just executive fiat. There has to be some controlling document. Well, the Iraqi Special Tribunal does have a statute. It is interesting to most people who have read that statute that it looks an awful lot like the statute of the Yugoslavia Tribunal and the Rwanda Tribunal.

Secondly, the Yugoslavia Tribunal said that to be legitimate a war crimes tribunal has to be independent from the executive and legislative branches. Now, according to the Iraqi Special Tribunal, it is independent. The judges are specifically prohibited from taking direction from the Iraqi Government or US Government. The president and the legislature of Iraq cannot control the Iraqi Special Tribunal much like our legislature and president can't control our own courts.

For evidence that the IST is independent in fact as well as on paper, I point out that Provisional Prime Minister Ayad Allawi, who is running for election, has been saying on the campaign trail that the trial of Saddam Hussein and Chemical Ali must start imminently. And there is quite a bit of pressure from him and others who would like to see these trials commence as soon as possible. But the Iraqi Special Tribunal said "no, the trials cannot start because we do not yet have our rules of procedure; the defense counsel has not had time to prepare their case; and we will not and shall not be bullied by the executive branch because we are independent," proving, in fact, that the IST meets the second criterion.

And third, the Yugoslavia Tribunal said that war crimes tribunals have to comply with fundamental norms of due process, which are enumerated in the Covenant on Civil and Political Rights, as Mr. Doebbler mentioned.

Next, Mr. Doebbler attacked the fairness of the Iraqi Special Tribunal process, and I believe in assessing the fairness of any tribunal we have to ask three questions: First, are there fair procedures? Second, are there impartial judges? And third, is there equality of arms between the defense counsel and the prosecution?

With respect to the first of these factors, fair procedures, those are set out in Article 20 of the Iraqi Special Tribunal statute, which is modeled on the Yugoslavia Tribunal statute and the Rwanda Tribunal statute. The due process protections include the presumption of innocence; the right to be informed promptly and in detail of the charges and to have adequate time and facilities to prepare a defense and to communicate freely with counsel of choice; the right to be tried without undue delay; the right to be present during trial and to appointment of counsel; the right to have counsel present during questioning; the right to examine and confront witnesses; the right against self-incrimination and not to have silence taken into account in determining guilt; and the right to disclosure by the Prosecution of exculpatory evidence, and witness statements; and the right to appeal. These rights will be further elaborated upon in the rules of procedure of the Iraqi Special Tribunal, which should be coming out after the elections and very soon.

There has been a lot written in the press criticizing the Iraqi Special Tribunal, saying things like it will allow torture evidence to come in. In fact, that is the kind of thing that will be specifically addressed in the rules of procedure, and it is premature to try to allege that that such evidence will be allowed now when we have not yet seen the rules of procedure publicly. Those who have been working behind the scenes on the rules of procedure have suggested that they will be very similar to the rules of the Yugoslavia and Rwanda Tribunals and will be fully in compliance with Article 14 of the Covenant of Civil and Political Rights.¹

Next, with respect to impartial judges, Mr. Doebbler stressed that their identities have been kept secret. He mentioned that the only judge the world has seen is the one young judge, thirty-five year old Judge Ra'id, who presided over Saddam Hussein's televised hearing last July, and Mr. Doebbler alleged that Judge Ra'id's face was only shown because the footage leaked out.

Judge Ra'id is one of the judges I got to know best in London because he spoke fluent English. Judge Ra'id told me the story of how his image was released to the world during the July 1st hearing. He told me that he was given the option of having his face electronically blocked out and his voice distorted, but he and his colleagues were so committed to the perception of fairness, that they didn't want the IST to be seen as the kind of

¹ As this issue was going to press, the Rules of Procedure of the IST were issued. Rule 79 contains an exclusionary rule, requiring that the written judgments of the IST not refer to evidence deemed involuntary or obtained by means that cast substantial doubt on its reliability. See <http://law.cwru.edu/war-crimes-research-portal/instant_analysis.asp?id+15>.

hooded judges used in Chile and in Peru in the past that have been so criticized by human rights organizations.

So Judge Ra'id said he was willing to take the risk to his security to have his face shown to the world, and that the other judges throughout the trial will do the same, notwithstanding the fact that there are threats against them because they want to show the world how committed they are to fairness.

Now, let me say a few words about who the judges are and who they are not. One of the things the US public is not generally aware of is that Iraq was a very litigious society. There are actually 20,000 members of the Iraqi bar, 10,000 of which reside in Baghdad itself. Out of nine hundred available judges, about 150 were disqualified because they were active Ba'athists party members or associated with Saddam Hussein's corrupt national security courts. That left 750 judges with experience in non-political murder cases, assault cases, rape cases, and cases involving torts, and contracts, family law, and property matters.

The judges who were selected range in age from thirty-five for Judge Ra'id, who despite his youth is extremely competent; all the way up to the mid-sixties. And most have between fifteen and twenty years experience on the bench.

Now, in London, we spent a lot of time going over the specific crimes of genocide, crimes against humanity, war crimes, and the crime of aggression because these are crimes that no national judges have experience with. Even the distinguished jurists selected by the UN to serve on the Yugoslavia Tribunal and the Rwanda Tribunal needed to attend training sessions to learn this unique area of the law.

And I learned through these training sessions and simulations that the IST judges really grasped the nuances of this area of law. I also learned that they were very committed to the possibility of acquittal. They were very interested to learn that the Nuremberg Tribunal had acquitted three of the twenty-two major Nazi defendants tried after World War II, and several of the IST judges said "if the prosecution doesn't prove its case, we will acquit because we think that will prove to the world how fair this tribunal is."

There is actually an advantage to having Iraqi judges as opposed to international judges preside in this case. There is a myth of Nuremberg and the other international tribunals that the target population will think international judges are more fair and an international tribunal's judgment more credible. In fact, the U.S. Government conducted opinion polls in Germany after Nuremberg that showed that most of the German an people, 85 to 90 percent of them, thought that the Nuremberg trials were not legitimate, that the judges were not fair, and that the Nazi defendants, Goering et al., were not guilty.

One might be tempted to dismiss these numbers because Nuremberg represented a kind of victor's justice, since the judges were from the four allied nations: the U.S., the U.K., Russia, and France. What about the modern international war crimes tribunals? Well, the Yugoslavia Tribunal has

experienced the same thing. During the trial of Slobodan Milosevic, the Serb people have been polled, and they say overwhelmingly that Milosevic is not getting a fair trial, that these international judges are not fair, and they don't believe that Milosevic is guilty.

Now, if you ask the German people today if they believe in Nuremberg and the guilt of the Nazi leaders, they say, "yes," and there is some empirical data that suggests that these views changed in the 1960s at a point when the German people started having their own trials of the Nazis who had not been prosecuted at Nuremberg.

And this strongly suggests that Iraqi trials by Iraqi judges are most likely to convince the Iraqi people of the crimes of the Ba'athist regime -- provided they are proven by credible evidence in an open and fair trial.

Another advantage of domestic trials is that they enable defendants to effectively subpoena witnesses, whereas Milosevic has not been able to compel witnesses to testify at his trial since the international tribunal lacks any type of constabulary.

Finally, let me turn to the question of equality of arms. The fact that distinguished lawyers like Mr. Doebbler and Ramsey Clark are on the defense team suggests that Saddam Hussein, if anything, has the stronger side representing him against the Iraqi prosecutors. I have no doubt that every single procedural issue that possibly can be raised will be raised by this superb defense team which consists of over twenty of the world's most prominent criminal lawyers.

Defense counsel will raise these issues in front of the five trial judges. They will raise them again in front of the nine appeals chamber judges, and Saddam Hussein will get his fair day in court. At the end of the day, if there is a mountain of evidence proved against him and a record is created like the twenty-two volumes appended to the Nuremberg judgment, I think history will look back and say that Saddam Hussein was fairly tried, although it was a tough case to try. I mean, obviously, when you are dealing with an Adolf Hitler, a Slobodan Milosevic, or a Saddam Hussein, these are especially tough cases to try fairly in the face of world public opinion. But the IST, I believe, is capable of bending over backwards to maintain fairness, and the real challenge is going to be for it to convince the rest of the world that the trial of Saddam Hussein was fair. Thank you.

ASSOCIATE DEAN CHODOSH:

Professor Doebbler, you have three minutes to rebut.

PROFESSOR DOEBBLER:

Thank you very much. There are so many things to reply to I don't know where to start because I think Mike has a very different understanding of the facts.

But I must congratulate you because some of these judges I and my colleagues have known for decades, and we are not able to evaluate their competence. After one week, you are able to determine that they will provide a fair trial. So I congratulate you sincerely on that foresight and ability to look into their minds.

I must say, though, I would rather have my little sister representing me if she was able to have access to me, to talk with me, to bring me law books, to be able to facilitate some sort of defense, then even a lawyer as prestigious as yourself, if they tied you up and shipped you off to Siberia and didn't give you any contact to me but merely said you are my lawyer,...that doesn't help. It is not a matter of who represents the individual; it is a matter of being able to prepare a defense, and the first criteria for that is that you have access to the individual you represent.

And don't take my word for it that this is an unfair trial situation. Take the word of a High Commissioner for Human Rights of the United Nations, the word of the head of the tribunal right now, the chief prosecutor of the tribunal in The Hague, the word of Amnesty International, they have all said that.

I find somewhat whimsical this restatement, which constantly resurfaces from journalists and others, of this *tu quo que* defense. It only seems to be the other side that mentions it. Perhaps you want to raise that defense for us, but it is not something right now that is even being considered by the defense except to listen to it from the other side.

You may well have access to the judges. You may know who the judges are, but the point of due process is that -- and the point of equality of arms, as you pointed out -- is that the defense team and the defendant know these people and have access to them and have access to the evidence.

It is very possible that there are, as the U.S. has claimed, 35,000 tons of evidence available. But we have not seen one ounce of that evidence, and I wish that one of you are sometimes put in a position -- or I should say -- I wish you never to be put in a position of having to defend an individual when you have no access to that individual and no access to any of the evidence that is being used to allegedly prosecute--or maybe in this case the better word is persecute--that individual.

And finally, Michael raises the issue of polls. You know, before the Iraqi war, a poll that was done I believe by CNN -- but you might correct me on that -- said that most people in the world in the United States and outside -- believed that American President George W. Bush was a greater threat to peace and security than Iraqi President Saddam Hussein. Maybe we have the wrong guy in the dock? Thank you.

PROFESSOR SCHARF:

Any questions?

ASSOCIATE DEAN CHODOSH:

The first question goes to Professor Scharf: You said that you had changed your opinion after your interactions with the Iraqi judges but before you viewed this as an illegitimate tribunal.

Not everyone has had the benefit of those interactions, and because perception is a key factor in determining the fairness of the tribunal, isn't it accurate to say that most people would view the trial as unfair, and by virtue of that perception, the tribunal is unfair?

PROFESSOR SCHARF:

I wrote a year ago in the *International Bar News*, a publication that went out to the 70,000 members of the International Bar Association, that because the United States had been involved in the drafting of the IST statute, because US officials were involved in selecting the IST judges, and because the Department of Justice would be involved in assisting the tribunal, it would probably appear that the IST was a puppet court, and I was worried about that. And I argued that there should be international judges added to the IST in order to help counter that kind of perception.

What changed my mind in London was that I found out a lot of things that haven't been publicly revealed about the IST, and I tried to share this information in my *Washington Post Outlook* piece a couple of weeks ago. The first on these was that the United States did not dictate the terms of the statute. In fact, the Iraqis themselves were equal players in the negotiations of the IST Statute, and there were certain provisions like the inclusion of the crime of aggression of which the United States was not in favor, that ended up in the statute because of the Iraqis' insistence.

Second, I found out that the United States did not dictate the inclusion of the death penalty. It turned out the U.S. negotiators actually warned the Iraqis that including the death penalty would make it harder for the IST to garner international support. But the Iraqis pointed out that Iraq has always had the death penalty, going back to the Code of Hammurabi, history's earliest comprehensive legal text. And citing the precedent of Napoleon, they were extremely concerned that without the death penalty convicted leaders may one day return to power, as Saddam Hussein himself had done after being released from prison in 1968.

Third, I found out that the Department of Justice Regime Crimes Liaison Office in Baghdad would be no puppet master. The office is made up of a half-dozen assistant U.S. attorneys from across the United States who volunteered for temporary assignment to Baghdad. The Director of the Office told me that he had been given an extraordinary amount of autonomy from Washington, which had decided to remain at arms length in order to counter the appearance of under influence over the IST. Moreover the Office had decided to partner with the internationally respected International Bar Association and other NGOs, which would take the lead in organizing

training sessions for the judges and prosecutors. And in contrast to what I initially understood, the DOJ staff will not themselves be filling the advisor slots identified in the IST Statute. Rather, those positions will go to independent experts from around the world selected with the help of the International Bar Association.

And finally, I've learned that the Iraqi Special Tribunal has held up to its independence against the prime minister's wishes that the trials proceed as fast as possible because the judges know that a rush to judgment would be a mistake. I think when the world-wide public learns of these developments, they will start to come around in their views about the IST. And there will be further positive developments, for example, when the rules of procedure are soon promulgated, and the world can see for itself that the IST has embraced the highest standards of due process.

ASSOCIATE DEAN CHODOSH:

Professor Doebbler, anything to respond?

PROFESSOR DOEBBLER:

Yes. I am glad that Michael has such insight into this. We have contacts with several thousands of people in Iraq, regular contacts with them, and we don't know many of these things. I have had the opportunity to meet the gentleman who claims that he drafted not only the Special Tribunal statute but also what is essentially the constitution of Iraq that went into force on the 8th of March, 2004. That gentleman is a Chicago lawyer. I have spent more time in Iraq in the last decade than he has.

But more importantly, I think the point that Michael is making is not that relevant here. It is not a matter of what he understands about the tribunal. Justice must not only be done; it must be seen to be done, and here it is seen to be undone.

ASSOCIATE DEAN CHODOSH:

Professor Doebbler, we have a question from the audience. You have emphasized that Saddam Hussein's individual rights have been repeatedly violated, particularly his rights to due process. However, can you suggest any other legitimate means in which Mr. Hussein could have been brought to stand trial for the crimes which he is accused of perpetuating? If Mr. Hussein's individual rights are somehow superior to the rights of the millions of people affected by his actions, how can the Iraqis truly obtain the justice they deserve?

PROFESSOR DOEBBLER:

I think it is a very good question about how we bring leaders to justice. Maybe the best way to answer that, particularly in my position representing somebody involved in such a matter, is by analogy. There is an individual that we all know who threatened the life not of just twenty-six million people in Iraq but of fifty-two million people, if you include Afghanistan as well, this person is the President of this country.

What he did, as I said, is almost unanimously understood to be a violation of international law. I think that individuals who carry out those sort of actions should be punished, but I think that if we are going to punish Bush for his crimes of aggression, for his crimes against humanity, for his war crimes, even arguably in the situation of Afghanistan with his statements about the Taliban saying first that it is a religious organization and that all its members should be killed, even for genocide perhaps, I think we should punish everybody who commits these crimes.

But if we are going to do it in a way that is better than the people who commit the crimes, we must do it with respect to the rule of law. We must do it with respect to due process. We must do it before a competent, independent, and impartial tribunal, not through some form of political vendetta, which is taking place right now in Iraq.

PROFESSOR SCHARF:

You know, for my part, I am very much a public advocate of international tribunals when they are appropriate, but even the Statute of the International Criminal Court suggests that such tribunals should be a method of last resort and that domestic prosecution has many advantages over international prosecution. It is better to assist a domestic system, where possible, to have a trial than to try to move it into the international plane. And this is not the first time we have seen trials like this being assisted by internationals.

After the fall of the Mengistu Regime in Ethiopia, foreign lawyer groups assisted with the domestic war crimes trials of the Ethiopian leaders. And international experts are currently playing an important role in the domestic war crimes trials under way in Rwanda and Bosnia -- serving as prosecutors, defense counsel, and even judges at the national level. But as Mr. Doebbler points out, it is critically important to ensure that such domestic trials fully comply with international human rights standards. I think the IST is doing that.

Let me just very quickly respond to the two things Mr. Doebbler said at the end of his rebuttal. First, with respect to access to Saddam Hussein, several of the defense counsel have complained publicly that they haven't had access to their client. Well, as of December, defense counsel got access. The defense counsel met with Saddam Hussein, and my understanding is that that access will resume as soon as the IST can ensure security.

Second, with respect to access to evidence, I have to ask you to be patient with these initial delays. The process envisioned will be the same as that employed in the Yugoslavia Tribunal, the Rwanda Tribunal, and the Sierra Leone Tribunal. However, until the process is ready to commence, which will happen shortly after the rules of procedure are issued, the next steps cannot be taken. The difference here is that defendants were in custody before the Tribunal was fully operational, but once the process is in place, the rules of procedure will give defense the right to the evidence. There will be a Brady-like rule, requiring the Prosecution to turn over exculpatory evidence, and the defense will have many months to prepare its case.

ASSOCIATE DEAN CHODOSH:

I wanted to exercise my power as moderator, and in order to be fair to Professor Doebbler, give him a minute to respond to that.

PROFESSOR DOEBBLER:

Thank you very much. Well, I hope we will get that opportunity. But again, Michael, I expect you tell me in the next sentence that you are visiting my client every day because you seem to know much more than I do about him.

We, as defense counsel, need that opportunity. The one opportunity that we had -- actually, we had been told several times we would have the opportunity to visit our client. We were even told by Craig Kehoe, who is the American there sort of supporting the prosecution, that the only reason we couldn't meet our client was because he didn't have an Iraqi lawyer. Five days before, I had received a letter from Pierre Prosper, the American Ambassador-at-Large for War Crimes, listing our client's Iraqi lawyers.

Something is wrong when they can't even get their own story straight. Consequently after a single meeting in the presence of armed guards who recorded everything we have not got another opportunity to meet our client. In fact, we have been denied that opportunity repeatedly, and we have been told that we will not get another opportunity to meet him. I think that is unfortunate. I think, in fact, that is a crime, a war crime because, as you know, to deny an individual a fair trial is a violation of the Geneva Conventions, a grave breach.

ASSOCIATE DEAN CHODOSH:

Thank you, Mr. Doebbler. Another question for Mr. Scharf from the audience: Isn't the exclusion of all Ba'athist judges analogous to having a U.S. election or a jury selection process, but let's say no Democrats able to vote or no Democrats able to serve on the jury?

PROFESSOR SCHARF:

Well, ultimately what they excluded were the high level Ba'athist judges and in particular those who had served in Saddam Hussein's security courts, which were very similar to Adolph Hitler's courts, which were the subject of the academy award winning movie "Judgment at Nuremberg," which most people have seen.

They did that because these judges were, in fact, tainted. They perverted justice and used the courts to commit crimes against humanity. Also excluded were jurists who had been in exile abroad. I was very happy to hear about that because I think those people had an axe to grind, and they would not be capable of fairly judging.

The judges who were included are not just low-level traffic judges, as the press has unfairly reported. These are judges that have many years of experience with very complicated cases -- not necessarily war crimes or genocide, but those cases are very rare, and no judges around the world have experience with those until they are assigned to war crimes tribunals. The IST judges are people that are neither too closely affiliated with Saddam Hussein nor too much opposed to him. They have been carefully vetted by the Iraq Bar Association, the Provisional Government, and the Department of Justice. From my time spent training and socializing with them in London, I can tell you that this is an incredibly bright, committed, and courageous group of jurists.

ASSOCIATE DEAN CHODOSH:

Professor Doebbler?

PROFESSOR DOEBBLER:

Well, instead of looking at the reflection of an individual that is sitting across from me with a Martini and trying to decide whether or not that individual is an appropriate judge, I look at manifestations that are in the public domain, and we know that the individual they chose to head this tribunal initially was Salaam Chalabi, an individual who is on record saying that he wants to kill the individual that he is going to be trying. Would you feel that you are getting a fair trial if an individual who for a decade has been trying to kill you is the one trying you?

ASSOCIATE DEAN CHODOSH:

I have one more question for Professor Doebbler: It has to do with the question of the invasion of Iraq: You have argued that the underlying occupation, the invasion of Iraq and the subsequent occupation, were illegal, that that is a strong element in making the trial unfair. When is any invasion illegal if there is a dictator violating his own people?

PROFESSOR DOEBBLER:

I think an invasion is illegal when it is against a country's sovereignty, its territorial integrity and its political independence. Read Article 2, subparagraph 4 of the Charter of the United Nations, or if you want an interpretation of that, read the Nicaragua case from around 1986.

There are a lot of bad leaders in the world. If you are going to use this justification, that someone is a bad person so we need to invade their country, if we were to do that, even using that based on a consensus, in this instance as I have indicated the invasion would have been the other way around because as I said, before the invasion of Iraq, more people thought George Bush was a greater threat to international peace and security than they thought Saddam Hussein was, and we probably know that's true now that they found no weapons of mass destruction, nothing that they could say was a smoking gun in Iraq. We invaded a country because we didn't like them.

We better hope that for our foreseeable future no other country is in that same position and remembers our precedent and is able to invade us for that same reason. And unfortunately, because of the political consequence of what we did, there are a lot of countries that don't like us right now.

PROFESSOR SCHARF:

Let me just say that the difference between the 1999 NATO bombing campaign against Serbia to stop the genocide in Kosovo and the 2003 invasion of Iraq was that the emphasis in the latter case was on self-defense and weapons of mass destruction rather than humanitarian intervention. I would have been much more comfortable had the United States first pursued an international indictment of Saddam Hussein, and then obtained international approval for the invasion. I wrote as much in a Los Angeles Times Op Ed titled "Indict Him, Don't Just Fight Him." But this does not mean that Saddam Hussein should not now be brought to justice, that there should be impunity for the atrocities of his regime.

Let me take a moment to comment on the issue of Salaam Chalabi because I think Mr. Doebbler just kind of threw up a strawman. As most people know, Salaam Chalabi is no longer associated with the IST. Furthermore, he was never a judge or a prosecutor. He was just the administrator. His job was to do what a registrar does, and if a registrar says inflammatory things about the accused, I think they should be removed, but I don't think that shows us that this international Iraqi Special Tribunal process is somehow tainted. Thank you.

ASSOCIATE DEAN CHODOSH:

I am going to give Professor Doebbler one more minute to conclude, and I will allow Michael Scharf the last word since Professor Doebbler had the first.

PROFESSOR DOEBBLER:

I just want to stress again that this is not a situation only for the people of Iraq, although it is mainly for the people of Iraq. We killed thousands of people in Iraq by our invasion of that country, and according to very reliable estimates, hundreds of thousands of Iraqis -- these are conservative estimates -- are going to die in the next five years because of this invasion. That's more than died in that same period under Iraqi President Saddam Hussein, even under sanctions.

For an American audience, I also think that what we are doing is crucially important because we have contradicted our own basic values first by invading the country contrary to international law and perhaps, even more importantly, by now following that up with an unfair trial -- and I hope that we will correct that quickly. Thank you.

PROFESSOR SCHARF:

Let me conclude by saying that after Nuremberg, there was hope that "never again" would mean something, and it didn't. Unfortunately, during the Cold War, we lived in an age of impunity where a person stood a better chance of being tried and convicted for killing one person than for killing a hundred thousand or a million.

Now, luckily we now live in a new age, the dawn of accountability. We live in an age where there exist international tribunals and hybrid domestic/international tribunals, and now the world's first internationalized domestic tribunal, the IST, has been created.

And let me again stress that this internationalized tribunal is not just getting assistance from the United States. There are many respected, independent, non-governmental organizations around the world that are joining this process. And I think experts in this field have to ask themselves: Do they want to be like the UN Secretary General and stand on the side line and hurl criticisms, or do they want to get involved to try to help the tribunal be as fair as possible, so that in the words of Robert Jackson, the IST can "establish incredible events with credible evidence" and thereby facilitate reconciliation and the rule of law in Iraq.

Having distinguished defense counsel like Mr. Doebbler is a very important ingredient; and so is enlisting international experts to help train the IST judges. Having the Case Western Reserve University School of Law help the judges by providing research memoranda on very difficult legal questions will also be helpful. And despite the monumental challenges that

such a case presents, I'm convinced that at the end of the day Saddam Hussein will get his fair trial. Thank you.