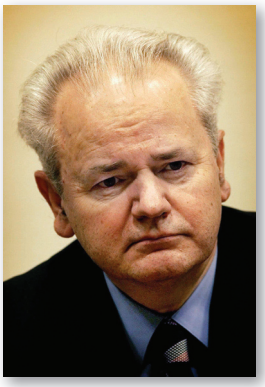
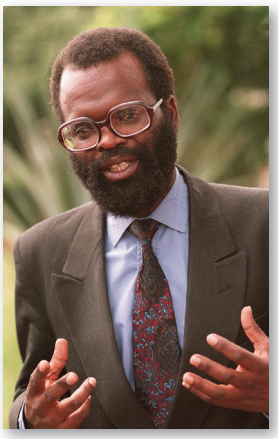
TYRANTS ON TRIAL

KEEPING ORDER IN THE COURTROOM

Patricia M. Wald



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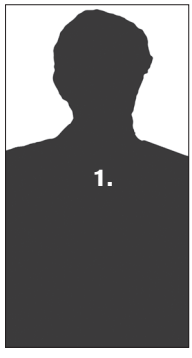

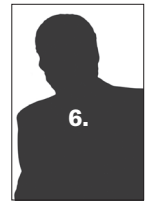

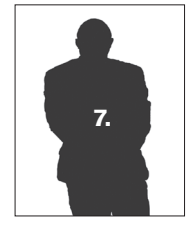

1.
Radovan Karadzic, former Bosnian Serb leader, indicted for war crimes, trial scheduled for September 2009

2.
Slobodan Milosevic, president of Serbia and the Federal Republic of Yugoslavia, 1989–2000, indicted for crimes against humanity and genocide, died during trial, March 11, 2006

5.
Duch, or **Kaing Guek Eav**, former Khmer Rouge leader in Cambodia, charged with crimes against humanity, on trial, July 2009

3.
Charles Taylor, former Liberian president, indicted for war crimes, on trial, July 2009

6.
Jean Kambanda, former prime minister of Rwanda, guilty of genocide, sentenced to life imprisonment, September 4, 1998

4.
Saddam Hussein, president of Iraq, 1979–2003, convicted of crimes against humanity and executed, December 30, 2006

7.
Theoneste Bagosora, former Rwandan colonel, guilty of genocide, sentenced to life imprisonment, December 18, 2008

Tyrants on Trial
Keeping Order in the Courtroom

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4. Hussein: AP Photo | Iraqi Special Tribunal
5. Duch: AP Photo | Mak Remissa
6. Kambanda: Alexander Joe | AFP | Getty Images
7. Bagosora: Reuters | George Mulala

Contents

Foreword

A significant development of our era is that an increasing number of heads of state and government, and others who have exercised substantial power, are being held accountable in judicial proceedings for gross abuses of human rights committed while they held power. Since 1993, several international criminal tribunals have been established for that purpose, including the permanent International Criminal Court. In addition, former leaders have also been tried for such crimes in a number of national courts, starting with the trials of the Greek colonels in the late 1970s and of the Argentine generals in the mid-1980s, up through the trials of Saddam Hussein in Iraq and Alberto Fujimori in Peru in this decade.

Inevitably, some of the former leaders put on trial have attempted to use their right to defend themselves to disrupt and discredit the proceedings in which they are judged. This poses a major challenge to the courts where they are being tried. It is a challenge that is especially great in the case of the international criminal tribunals because of their newness and because questions about their legitimacy may resonate with the nationalist sympathizers of defendants who appear before them. In meeting that challenge, it is essential that trials should be conducted in a manner that fully protects the rights of defendants. A major purpose of bringing such matters before a court is to demonstrate that justice can be done through fair proceedings even when they involve countries that have been devastated by the arbitrary exercise of power. At the same time, it is crucial that judges should maintain firm control of what happens in court so as to maintain the dignity of the proceedings and to ensure that witnesses are not deterred from testifying.

Judges cannot allow obstreperous defendants to degrade the judicial process for their own political purposes. Striking the right balance is no easy task.

The Open Society Justice Initiative is pleased to publish *Tyrants on Trial: Keeping Order in the Courtroom*, by Judge Patricia Wald, a member of the Justice Initiative's Board of Directors. This report reflects Judge Wald's long experience as a litigator in leading cases involving civil rights in the United States; as first a judge and then chief judge for the U.S. Court of Appeals for the District of Columbia Circuit; and as a judge of the International Criminal Tribunal for the former Yugoslavia. Our hope is that her report will assist judges who preside over the trials of former leaders, particularly in international criminal tribunals but also in national criminal courts, to strike the right balance and, thereby, to help ensure that the global movement for accountability serves its purposes.

Aryeh Neier
President
Open Society Institute

I. Introduction

In the past decade, we have seen several heads of state as well as military and civilian leaders criminally tried under international law for actions taken in their leadership capacities. They include Slobodan Milosevic, former president of the Federal Republic of Yugoslavia; Charles Taylor, former president of Liberia; Saddam Hussein, former president of Iraq; Jean Kambanda, former prime minister of Rwanda; Theoneste Bagosora, former Rwandan colonel; and Radovan Karadzic, former Bosnian Serb leader. A joint leadership trial for Khieu Samphan, former head of state in Cambodia, and three other Khmer Rouge leaders is expected to start next year at the Extraordinary Chambers in the Courts of Cambodia, where another Khmer Rouge leader, Kaing Guek Eav (known as Duch), is currently being tried. An arrest warrant has recently been issued by the International Criminal Court for President Omar al-Bashir of Sudan for crimes committed in Darfur.

These senior leader trials take place in war crimes courts set up under total or partial international auspices since 1993: the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the permanent International Criminal Court (ICC).[1] The Iraqi High Tribunal, while not an international court, was established to try crimes of genocide, war crimes, and crimes against humanity under international law norms.[2] Prior to the 1990s, only a handful of leaders (such as Adolph Eichmann and Klaus Barbie) had been tried in national courts for the kinds of crimes recognized in the post–World War II Nuremberg and Tokyo trials. In the past 20 years, domestic, regional, and inter-

national courts have charged 67 heads of state or government with committing serious crimes while in office, with fully half of these involving leaders charged with serious human rights violations.[3]

This report looks at some leading examples of trials in international—and, in the case of Iraq, domestic—courtrooms involving leaders, many of whom defend themselves before the court. The initial sections focus on structural elements in the trial, e.g., scope of indictment and joinder of parties, which commentators such as Gideon Boas believe contribute to "unmanageable" trials but about which prosecutors are skeptical. There is evidence on both sides, to be sure. There appears to be greater consensus about the role of the judge and even the substantive law, such as the right to self-representation, as critical elements in achieving a fair and expeditious trial not only for the defendant but for all participants in the trial.

Leader trials frequently revolve around bigger than life personalities who see themselves as historic figures defending nationalistic causes; they are less interested in evading conviction than in challenging the legitimacy of those international entities that assert jurisdiction to judge them, and in pleading their justifications for what they did to homeland audiences. Such trials have "political" overtones in the sense that the accused leaders invariably impugn the motives of those trying them as political and defend their own actions as done in the best interests of their countries. Both stances are fundamentally at odds with the basic notion of the court as an impartial, independent adjudicator of individual guilt under accepted rules of international law. These trials not surprisingly are often "unruly" and "messy," since the accused, and sometimes their advocates as well, see little advantage in following the rules, obeying court procedures, and displaying the respect for judges or the process that national and international courts generally command. Experience with these leader trials has given rise to searching questions as to whether traditional notions of how to run a criminal trial that meets international standards of fairness can accommodate their aberrational behavior. Disruptions in the courtroom are inevitably more complex and likely when the leader on trial chooses to, and is allowed to, represent himself. This is particularly true for wartime political leaders who have never or rarely set foot in a courtroom, much less in an international court with its unique rules and complicated procedures. And since many wartime military leaders are far more skilled with the sword than the tongue, threats, bullying, and attack mode will often be their first line of defense.

Are there lessons to be learned from the last decade's experiences on how to manage a leader trial, especially but not exclusively when the defendant self-represents? One international judge who has presided over such cases worries that the full panoply of rules and procedures usually associated with fair trials cannot be followed religiously without "adjustments" in cases of the magnitude associated with leader trials,[4] particularly when the leaders insist on representing themselves. How do judicial procedures

formulated in the main to resolve disputes involving single or at least far more limited or less extensive episodes of wrongdoing deal with the alleged criminality of plans for targeting military or civilian objectives in aerial warfare, acts of aggression toward neighboring nations, expulsion and maltreatment of millions of persons, and plans designed to be executed by hundreds and thousands of subordinates in the ranks of large-scale military and civilian organizations?

International cases, moreover, must be decided within the boundaries of an embryonic jurisprudence with sparse precedent compared with the centuries of law and practice available to judges and lawyers in the domestic criminal arena. Yet despite the emergence during the same time period that saw the creation of international courts, of truth and reconciliation commissions based on principles of confessions by perpetrators of wartime atrocities in exchange for communal forgiveness and retributive penalties, there is still a strong sentiment in international law communities that the most serious wrongdoers deserve criminal punishment. That was the theme of Nuremberg, the prototype of these leader trials held in the aftermath of World War II, and it continues to this day as exemplified by the several international and hybrid criminal courts created in the past two decades, most prominently the ICC.

Many supporters of international criminal trials for malevolent leaders who have committed massive atrocities seek to accomplish several goals—to record for history and victims the full scope of the tyrannical leaders' misdeeds, to provide basically fair and expeditious trials for the individuals accused, to maintain the image of international courts as orderly and effective vehicles for dispensing justice to officials whose predecessors enjoyed impunity from criminal accountability for decades, and, when feasible, to provide a measure of justice for the victims.[5] These goals are not always compatible: a good deal of balancing, prioritizing, and adjusting regular procedures is often necessary to bring these trials off.[6] What seems to bother critics of these courts most is the disorder and sense of continuous anarchy associated with the most notorious leader trials.[7] Just as troubling to legal insiders, however, is the difficulty of assuring fairness to all participants: the accused, the witnesses, the victims, and the court itself.

An orderly but unfair trial is the signature of an arbitrary and autocratic regime, as displayed in the sham show trials of Soviet Russia, Mao's China, and Nazi Germany. However, in their 1970s book *Disorder in the Court*, Norman Dorsen and Leon Friedman point out that, even in democratic nations that value impartial justice and fair trials, "recurrent patterns of disorderly conduct" occur when "courts are used to enforce or implant an unpopular policy" against dissident members of society, or when court procedures or rules are themselves perceived as "unjust, discriminatory or improperly invoked."[8] For example, Gandhi used his trial on civil disobedience as a platform to proclaim his opposition to British rule; Walter Raleigh had protested against the same sovereign centuries before in his 1603 treason trial. William Penn decried loudly the

denial of his right to confront and cross-examine witnesses as well as his right to a copy of the indictment before trial when he was tried in 1670 for unlawful assembly. Susan B. Anthony behaved decidedly unladylike in her trial for protesting the denial of her right to vote; she, like many of the defendants in later leader trials, asserted a right to self-representation and repeatedly refused to sit down when the judge told her to. World War II had its own disorderly trial episodes in the post–World War II sedition trials of U.S. Communist Party officials and, in the late 1960s, the Chicago 7 trial of anti–Vietnam War protestors accused of inciting riots against Chicago police. After examining these and other trials, **Dorsen and Friedman conclude: "Courts are seldom isolated from the turmoil of the political sphere in any nation."**[9] **Why then should we expect a different result in the vastly wider stage of international war settings?**

It is noteworthy that virtually all of the disruptive techniques used currently by heads of state were previewed in earlier trials: defense lawyers repeating each other's objections, accused interrupting the judge and witness examinations, attorneys and accused absenting themselves from the trial in boycotts, hunger strikes by defendants in detention, refusals to accord judges or prosecutors any respect in manner of address, repeated insults and name-calling of the judges, attempts to introduce repetitious and irrelevant evidence, intimidation of witnesses, complaints about abusive treatment of the accused in detention, refusal to obey court orders or comply with court rules, accused deliberately turning their backs to the judge, lawyers throwing robes on the floor, and very occasionally fistfights. The arsenal is apparently finite but transcends national and international boundaries.[10]

The dilemma for judges presiding over these trials (and for the prosecutors as well) is how to respond to, or better still, anticipate this pattern of aberrant behavior in a way that preserves the fundamental fairness and expedition of the trial for all participants while also maintaining the court's integrity and public respect. **In many cases, the accused do not deny the acts they have ordered which are the basis of the charges; they argue that they did it with beneficent and patriotic motives, such as self-defense or military necessity, and that they must be allowed to make those motives clear to the public to show the hypocrisy and perfidy of their accusers.** While such defenses have rarely been successful in justifying violations of humanitarian law,[11] they are often politically attractive at least to the audiences the accused cares about. Thus, the court cannot ignore the damage to its own image if it appears to act arbitrarily to silence an unruly defendant from having his day in court regardless of the merits of his argument. In one court participant's words, "The modern international criminal process" is not "designed to deal with intelligent and manipulative accused who do not accept the legitimacy of the judicial process" and who "have a political agenda to pursue."[12] But as of now, this process is all we have, and a survey of its intelligent use and avoidable abuse may be helpful until we evolve a better one.

II. The Scope of Charges and Number of Codefendants

One of the earliest points at which the conflicting goals of a leader trial may come into focus is the statement of charges or indictment on which the accused will be tried. This is initially the prosecution's call but that decision will likely determine the scope of the trial and, most importantly, its manageability. **International prosecutors at the ICTY, where some of the most troublesome trials have taken place, have understandably wanted the indictments to expose to the world the shocking extent of the criminal conduct of the "most notorious criminals known to history"; they say that is what the victims and their survivors—as well as history—demand.**[13] But they also argue that, especially in the early cases, they were unsure of what the court would require by way of proof that the leaders' conduct was part of a "widespread" or "systematic" campaign, and so they were driven in some cases to overkill. Others point out a natural inclination after a five- or six-year investigation to use the multitude of evidence that has been amassed. But critics of those long and tumultuous trials say experience has proven that "gargantuan indictments are unmanageable and unnecessary."[14] In the *Milosevic* case, it took three years to put on the prosecution case, though, as one prosecutor is quick to point out, not all that time can be attributed to the prosecutor's capaciousness: subtract the recesses and adjournments required by the accused's outbursts, health crises, and other diversions, and the real time consumed by the prosecutor's submissions would be reduced to less than three months—90 "ICTY court days."[15] Nonetheless, the indictment contained 66 different counts, broken down into 7,000 separate allegations of

crime spread over eight years and three conflict zones; 1.2 million pages of prosecutorial evidence had to be disclosed pretrial to Milosevic along with 930 exhibits and 117 videos. The prosecution first said it planned to call 1,000 witnesses, later reduced to 231 witnesses for the Kosovo charges and 600 for the Bosnian and Croatian charges (half in person, the rest by way of written statements). Eventually, it put on 133 live witnesses on the Kosovo portion, and 195 for the other portion. The transcript consumed 47,000 pages and written filings another 64,000.[16]

Excessively long trials that follow in the wake of unnecessarily broad indictments not only tend to invite outbursts, but they also carry significant risks of unfairness to the accused and damage to the image of the court. It is almost unfathomable for any human being, even with legal assistance, to digest the amount of information involved in the *Milosevic* prosecution and respond efficiently to it, especially if he is in detention. From personal experience I can assure you that even the judges who sit steadily on a trial for over a year and are assisted by computers and legal aides have to stretch their memories and powers of concentration to keep track of how the testimony of Witness A in May accords or does not accord with what Witness B said in the previous December and what Witness C said in the following March. As time passes it is much more likely that details—even important ones—may fall between the cracks. Long trials also increase the irritability of the accused, the lawyers, and even the judges, eventually giving way to public expressions of their frustrations and emotional distress; the number of lengthy, politically tinged trials in which either the defendant or a judge eventually claims his physical health has been impaired by the proceedings is significant.[17] In Milosevic's case, tragically, both the accused and the original presiding judge died before the four-year trial ended. Psychologically, the drain on all participants of months and months of courtroom bickering cannot help but lower their tolerance points and make more likely ugly exchanges, name-calling, and dramatic gestures, all of course reported in the news and on television for shock value and head shaking.

Gideon Boas, a senior legal officer tasked with managing the *Milosevic* trial for chambers, suggests that the *Milosevic* indictment bears much of the responsibility for the long and arduous trial.[18] The original indictment pertained to the accused's activities in Kosovo alone. After he was apprehended, two additional indictments pertaining to his activities in Bosnia and Croatia were issued. The prosecution wanted the three indictments consolidated and tried together; the trial court resisted. The Kosovo portion of the case was well along in preparation and the trial was expected to be completed within a year. The prosecution argued that all charges in the several indictments were factually part of one criminal enterprise headed by Milosevic to create a "Greater Serbia" by expelling the Albanians from Kosovo and Bosnian Muslims and Croatians from the parts of those two countries where Serbs were predominant. Boas found this argument factually uncompelling. Milosevic was the president of Serbia, of which Kosovo was a province;

his alleged activities in relation to Serb-dominant parts of Bosnia and Croatia, both of which had declared independence from Yugoslavia, were of a different genre altogether and had no relation to the creation of a "Greater Serbia." Boas called the prosecution theory "incoherent" insofar as it pleaded all Milosevic's actions were part of the "same transaction." Ironically, the prosecution also claimed judicial economy as a reason to hold one big trial, i.e., witnesses with testimony relevant to all three indictments need make only one appearance. And it insisted that Milosevic's poor health, revealed early on, would not inhibit his active participation in a longer trial. At any rate, although "running a trial on any one of the Milosevic indictments would have tested the boundaries of management, the three indictments joined into one case was clearly not conducive to best practices in the conduct of complex international criminal trials."[19]

Boas's view of the prosecutor's responsibility for the length of the trial is not, of course, conceded by prosecutors, who point to expert historians who agreed with their concept of the single "criminal transaction" at issue. In any case, the prosecution successfully appealed the trial court's ruling that the Kosovo trial should be completed before beginning another one involving Bosnia and Croatia. In a decision condemned by Boas as "poorly reasoned,"[20] the ICTY's appellate chamber sided with the prosecution and ruled in favor of one trial though assuring the trial chamber it could renew its severance ruling later if the trial did in fact prove "unmanageable." The two new indictments added six Croatian regions and 47 Bosnian municipalities to the crime sites involved in the Kosovo trial, in all of which murders, exterminations, torture, cruel treatment, expulsion, and deportation were alleged. "This ruling," according to Boas, "stands as a warning to the overextension of same transaction theories and the underestimation of the importance of practical case management issues in the exercise of a court's discretion to join events of indictments into large complex cases."[21] Had the trial chamber prevailed in severance, Milosevic would almost surely have been convicted or acquitted before his death and the image of the court as a fair and effective adjudicator likely enhanced. As it was, the case labored on for four years. In the third and fourth years, the trial court again raised the issue of severance. At that point, the defense was 75 percent through its allotted time with an estimated 199 witnesses still to go; 80 percent of the time it had used had been spent on the Kosovo indictment. Following resistance by both the prosecution and defense, the trial court ultimately decided against severance.[22]

Of course, it is not just the scope of the indictment but the quantum of proof proffered that contributes to the length of the trial. The lengthiest trial before any of the contemporary tribunals was the *Bagosora* trial in the Rwanda tribunal—commonly known as the Military 1 trial—held against Colonel Bagosora, mastermind of the genocide in Rwanda, and three other top military officials. The trial for genocide, crimes against humanity, and war crimes lasted 409 trial days spread out over some six years, with the court hearing 242 witnesses and receiving over 35,000 pages of documents

from six prosecution and seven defense attorneys. The *Bagosora* indictment charged the colonel with 12 counts in 32 pages—not excessively lengthy given the magnitude of the crimes and the senior level of the defendant. The oral summary of the judgment, however, pointed out the following:

> The amount of evidence in this case is nearly eight times the size of an average single-accused case heard by the Tribunal. Innumerable pages of pleadings have resulted in about 300 written decisions. . . . Much of the material has been translated or interpreted into three languages. Investigations were conducted and many witnesses were brought from throughout the world. Each of us in this courtroom today—the bench, the parties, the registry, the court reporters, the language section, the witness protection section, and the security officers—have at times endured late nights, long weekends and personal or professional sacrifice.[23]

Despite experienced judges (including the president of the ICTR), prosecutors, and defense attorneys, and even though Bagosora did not represent himself, the trial limped along for six years; one of the coaccused, ultimately acquitted of all charges, spent over 11 years in the ICTR's detention unit.

Including too much historical material in the indictment about the background of the conflict not only lengthens the trial but may provoke prolonged and irate responses by nationalist leader defendants. For example, it has been suggested that the *Milosevic* prosecutors "fram[ed] their case in ways that opened the door to politicization."[24] Critics say the prosecution discussed Milosevic's ideology at length, and went into historical processes that provided "justification for Milosevic to have endless arguments often with the prosecutor losing the arguments,"[25] due to Milosevic's greater familiarity with Serbian culture and history. The trial as a result became a "showcase" for Milosevic's perspective on past and present events that had led him into the dock: "He was really good. Even people who hate him thought he was successful."[26] Vojislav Kostunica, the then president of Serbia, no friend of the Yugoslav tribunal, criticized the prosecutor's strategy as reflected in the indictment: "By referring to historical events in the early 20th century, she [the prosecutor] appeared to contradict her own statement that individuals and not the Serbian nation were on trial."[27]

The *Milosevic* indictment, like most other leader indictments, posited an attenuated theory of liability,[28] meaning that because highly placed officials seldom, if ever, commit war crimes personally, their guilt must be established by theories of command responsibility or a mode of liability, a cousin to conspiracy, labeled "joint criminal enterprise." Command responsibility requires a showing that the leader knew or should have known that his subordinates were committing war crimes and did nothing to prevent or punish them. The more complex criminal enterprise theory depends on proof that the leader joined with others in a common plan for an illegal end and knew or should have

foreseen that the others would commit war crimes in furtherance of the illegal plan. The difficulty in proving both theories of liability is that the further up the hierarchical ladder the leader is, the more complicated must be the evidence showing his influence or direction all the way down the line to the individuals who actually committed the crimes. In the *Milosevic* case, proof was necessary to show that Milosevic wielded power over decisions by the Serbia Supreme Defense Council, which was responsible for authorizing much of the military strategy involved in the indictment, strategy that was then executed by the Serbian army or other subordinate organs of the Council. It was inevitable that the trial would thus spawn repeated debates concerning how the chain of command operated to link Milosevic at the top with military and civilian actors who committed the atrocities on the ground. **Although attenuated theories of liability may be unavoidable in leader cases, as was almost certainly true in the *Milosevic* case (few leaders put their nefarious plans on paper anymore, as the Nazis did), to the extent that specific crimes can be linked to the leaders through as few layers of officialdom as possible, these crimes should be given priority in charging decisions.** Attenuated theories of liability for large numbers of crimes committed over extensive periods of time and in far-flung places make for long and complicated trials, which in turn produce much greater opportunities for speeches, interruptions, outbursts, and other attention-getting devices on the part of the accused.

Accordingly, Boas makes the case for "well pleaded indictments" that clearly set forth both the particular crimes for which the defendant is accused and the facts of those crimes. If the charges involve widespread acts and hundreds of victims, representative examples should be selected for which specific evidence will be submitted. The mode of liability and the factual basis for alleging that mode should also be set out precisely: How did the accused order, instigate, or aid and abet the crimes charged? What was the accused's intent and the facts supporting that intent? What was the relationship between the accused and the subordinates who physically committed the crimes? And, in the case of criminal enterprise, what was the plan to which the accused agreed and what were his contributions?

The Kosovo portion of the *Milosevic* indictment is alleged by Boas to have skipped several of these steps: no state of mind was alleged, subordinates were not named, the phrase "persons known and unknown" appeared frequently, and Milosevic's contribution to the joint criminal enterprise and his presumed knowledge of crimes committed by subordinates were not specified. Boas speculates that, had Milosevic or his lawyer, if he had had one at that stage, challenged the indictment for these kinds of technical deficiencies, many of the charges might have been dropped then and there and a more manageable trial reconfigured. Boas also suggests that in trials of *Milosevic*'s size and complexity there should be an adversarial hearing on the adequacy of the indictment to inform the accused of what he will be tried for and whether there is *prima facie*

proof to support the indictment. Even if the accused does not object, as Milosevic did not, to the absence of specifics in the indictment, the court, *sua sponte*, should address patent defects since charges that are unclear or for which no adequate proof exists will clog up the process and prolong the trial. In Milosevic's case, a motion for acquittal filed by court-appointed *amici* at the end of the prosecution's case three years into the trial resulted in the dropping of 1,000 of the original 7,000 incidents cited by the prosecution.

Boas finds the inquisitorial method of trial in civil law countries potentially superior in developing issues for trial; an investigating judge sifts through the evidence, interviews witnesses proffered by the prosecutor, directs his or her own inquiries, and prepares a dossier of findings on which the more adversarial trial is based. In short, the investigating judge does the sifting to get rid of improbable or vague charges—a task that judges confirming indictments at the ICTY on the basis of prosecutorial submissions alone have seemed reluctant to do methodically. The fact, however, is that many of the countries that have traditionally employed the inquisitorial system are now abandoning it, i.e., Germany, Italy, and the Scandinavian countries. And the use of the investigative judges in the Khmer Rouge trials in Cambodia thus far has not resulted in any discernable time savings.

In those cases that continue to be tried in a common law mode, emphasis on sharper focus in the indictment on what the prosecution needs to prove to obtain a conviction and what it can prove within a reasonable time frame is essential; single judges who currently confirm the indictments need also to be more proactive in resisting overly expansive indictments. The evolution of practice in the Yugoslav tribunal's pretrial chambers has reportedly produced more focused charges and fewer witnesses than in the earlier trials, an encouraging sign. Boas's recommendations, however, obviously accept the premise that a shorter trial on a discrete number of episodes is both more likely to be orderly and more fair to the defendants than the larger, longer trial exposing a fuller range of the accused's malfeasance for the world to see. One of the *Milosevic* prosecutors has countered that assumption, writing that "what is required is a careful balancing of the rights of the accused with those of the international community as a whole, rather than a trial based on generalized conclusions about the size and scope of international indictments."[29]

There is also a strong argument made by prosecutors that it is less the length or scope of the indictment that makes for needlessly long trials than the management of time by the prosecutor, the defense, and the court. If the court sets reasonable time allotments and sticks to them, the trial will stay on a timely course.

Another risk factor cited by some for a disorderly trial is the number of defendants joined in the indictment. Multiple defendants—especially if they are all strong personalities—can make for rambunctious trials. Multiple defendants mean multiple counsel,

which in itself can produce a confusing and sometimes chaotic atmosphere; when one defendant misbehaves, the other defendants, and sometimes counsel as well, often tend to support and even replicate his antics. The trial of the Chicago 7 in the United States and of Saddam Hussein and his codefendants in Iraq support this thesis. At the end of the Chicago 7 trial, the judge issued 159 citations for contempt, 38 against the lawyers, 121 against the defendants other than Bobby Seale (the 8th defendant who was severed mid-trial)—many for purposeful signs of disrespect like refusing to rise for the judge or addressing him contemptuously or for making the same objection after the judge had already ruled on it. Forty-one of these, however, were for codefendants and their lawyers protesting the treatment of Bobby Seale. All of the contempt citations were eventually reversed on appeal because the judge waited too long until the trial was over before issuing the contempt citations. But the Chicago 7 trial did show that 10 counsel and 7 defendants inescapably make for a greater potential for disruption and defiance.[30]

In contrast, the post–World War II joint leadership trials held in Nuremberg and Tokyo against 22 and 28 defendants respectively were—with the possible exception of Hermann Goering—not particularly disruptive given the context and personalities involved. (One can only speculate whether had Adolf Hitler survived the war he would have been as submissive in the courtroom.) But there are differences between international trials then and now. Defendants did not have the full panoply of rights then that they are assured of now, with human rights activists ever watchful to ensure that these rights are not trampled upon. Moreover, the Nuremberg trials were in large part "paper trials," depending less on live witnesses than carloads of documents. That amount of direct linkage evidence is seldom available in contemporary trials. But even more important, advanced technology makes it far more attractive to current political and military leaders to seize the opportunity to broadcast their propaganda across the globe. I was in Cambodia during preparations for the Khmer Rouge trials and was able to watch proceedings of the *Saddam Hussein* trial held in Iraq on television in my hotel, a feat that could not have occurred during the Nuremberg trial.

Given all its other deficiencies which complicate any causal analysis, **the *Saddam Hussein* trial by a special Iraqi court applying international as well as national law must still be cited as a recent example of the danger of disorder engendered by joint defendants even under a narrow indictment**. The *Hussein* court, following Iraqi practice, held separate trials on separate incidents, rejecting the consolidated approach of the *Milosevic* prosecution. Thus, the trial in which Hussein and seven other high Iraqi officials were accused of ordering and executing retaliatory killings for alleged attempts on Hussein's life in 1982 began while pretrial work was still going on as to several other potential trials against some of the same accused based on separate incidents. The *Hussein* trial was aptly described as "one of the messier trials in legal history."[31] Saddam Hussein, the ousted president who had apparently followed Milosevic's trial performance

"obsessively" and used the same basic approach to his own, attacked the legitimacy of the court which had been specially established to hear his case (the judges were drawn solely from the regular Iraqi judiciary): Hussein defended his actions as immune from prosecution under the Iraqi Constitution; he demanded obeisance from participants (they should stand up when he came into the courtroom and refer to him as president); he consistently interrupted the judge and witnesses, boycotted the trial, went on hunger strikes, accused his captors of torture, shouted invectives at the judge, prosecutor, and witnesses, and even berated his codefendants for their in-court testimony. Several of his codefendants, particularly Saddam's half-brother, followed suit, and their retained counsel joined in the boycotts and outbursts. Retained counsel in the main made arguments as to the illegitimacy of the tribunal and objected to what they deemed procedural unfairness to their clients; standby counsel appointed by the court argued finer points of evidence and the merits of the case. Hussein basically confessed to the charges in his own in-court statement given late in the trial.[32] One of the negative lessons to be taken from the *Hussein* trial is that a determined accused can disrupt any trial, whatever its focus or scope, unless he is controlled by the judges, not an easy task but made harder in the case of supportive codefendants.

But it must be stressed, joint trials do not necessarily equate with long trials. Many ICTY trials with up to six or seven defendants have undoubtedly saved time from separate trials and have been completed in a reasonable time, under a year. The Omarska trial of five mid-level prison camp affiliates accused of atrocities committed on inmates, in which I participated, lasted 113 actual trial days (less than six months) conducted over nearly a year and a half in a courtroom shared on off days with another major trial. Preventing the 10 defense counsel from peppering witnesses with identical questions asked by other counsel and occasionally from making provocative comments about the witnesses was integral to balancing the rights of the accused with the rights of victims and moving the trial along. Even though we were not dealing with senior leaders who represented themselves, keeping disruptions at bay with so many accused, prosecutors, and defense counsel within the small courtroom required constant vigilance and rapid responses to avoid inherent conflict between the participants.

III. Judicial Control of the Proceedings

A. Requirements for the Judge

The judge is the lynchpin in securing a fair and expeditious trial, a role doubly difficult in leadership cases. His or her principal job is guiding the other participants through the process so that the judge(s) (or in national trials, the jury) may arrive at a fair verdict in view of the evidence and the relevant law. That job is by no means confined to restraining unruly defendants or their counsel, but includes minimizing the justifiable complaints defendants may have about the fairness of the trial. In the 1970s, Dorsen and Friedman identified numerous instances in which the actions of the prosecutor or the judge significantly contributed to the disruptive behavior of high-profile defendants in the United States. Prosecutors in the Chicago 7 trial made provocative remarks in the courtroom about the defendants, calling them "liars and obscene haters," "evil men," and "violent anarchists."[33] Such remarks coming from a prosecutor, the authors pointed out, carry more weight than similar remarks from a defense attorney—especially in a jury trial—and they maintain prosecutors should be held to an even higher standard in their courtroom behavior than defense counsel. Outside the court, prosecutors have sometimes engaged in the problematic practice of discussing evidence with the press, another disfavored tactic guaranteed to raise defendants' and their counsels' ire. Prosecutors, however, have rarely been held in contempt of court in U.S. courts for disruptive or provocative behavior.[34] In the international leader trials, verbal attacks on the

prosecutor made by the defendants or their counsel have been standard fare. While the prosecutors may be sorely tried, ultimately they too must be held to a high standard of restraint in the quest for an orderly trial.

i. The Role of Experience and Personality

Ultimately, however, there is wide consensus that "the personality of the judge is the pivotal factor" in a fair and expeditious trial.[35] The need for experienced judges to be assigned to these cases is paramount, a view espoused by both prosecutors and defense counsel and echoed by at least one ICTY judge.[36] But the system by which ICTY judges are chosen puts no premium on their individual qualifications by way of practical experience in a courtroom setting. **One judge interviewed estimates only about half of the ICTY judges have the requisite kind of trial experience needed for the leader trials. No training in the kind of special courtroom management required in these trials is offered. In order to run an orderly trial of long and complex cases, judges need training in making allocations of time necessary for examinations in chief and on cross, reducing time spent on procedural motions, making overall time allocations for each party's case, using written testimony with and without opportunity for cross examination, computing the statistics on each party's use of allocated time, and employing numerous other trial management techniques.**[37] Others who have participated in these trials said it was vital for judges to feel "comfortable" in the courtroom and to exude confidence in their ability to walk the line between over-leniency and undue harshness, both of which promote acting up by defendants anxious to show the world that they, not the judges, control the scene.[38]

Surprisingly, the experience or inexperience of individual judges appears not to be an acknowledged factor in assigning cases to chambers in most international courts. Senior judges preside as a matter of course and cases are assigned to chambers without apparent regard to the experience of the judges therein. **Encouragingly, the Rome Statute establishing the International Criminal Court makes provision for a predominant number of judges with courtroom experience to be assigned to the pretrial and trial chambers.**[39] In the federal courts in the United States, judges are provided workshops in managing terrorist-related trials and a useful compilation of case studies is provided to them by the Federal Judicial Center.[40]

There is little question but that in protracted and chronically disrupted trials a personal antagonism may arise between the beleaguered judge and the disgruntled defendants or their counsel that can infect fatally the entire proceeding. The Chicago 7 trial, characterized by nine months of almost continual outbursts, arguments, and "theater" performances, such as draping a North Vietnamese flag over the counsel table, culminated in 159 contempt citations. The appellate courts reviewing the trial not only vacated the original contempt citations, but reversed the convictions citing, *inter alia*,

the "district court's deprecatory and often antagonistic attitude toward the defense in the evidence in the record from the beginning."[41] In particular, the trial judge, Julius Hoffman, had insisted on defendant Bobby Seale proceeding to trial with a substitute counsel when his own counsel had to have emergency surgery, a ruling which provoked uncontrolled protests from all the defendants and the refusal of the substituted counsel to obey the court's order to take over Seale's case. The appellate court said that the trial judge had not made a sufficient inquiry as to the causes of Seale's misconduct leading to the contempt citation or given him an opportunity to make his case for a delay until his counsel could return, or alternatively to represent himself. Seale was in fact bound and gagged in the courtroom for several days after his outburst, a response the substitute counsel assigned to represent him called "medieval torture" and one which caused the defendant to refer to the judge as a "fascist dog" and a "lowlife son of a bitch." Other uprisings in the trial occurred when the judge refused to let the defendants' expert witnesses, Ramsey Clark and Ralph Abernathy, testify about the original plans for the Chicago demonstrations. On remanding the contempt citations for new hearings, the appellate court stressed that as a basis for contempt misbehavior must rise to the level of intended obstruction of the trial, and that "mere disrespect or affront to the judge's sense of dignity will not sustain a citation for contempt."[42] Judge Harold Medina, who tried the American Communist Conspiracy case in a riotous 10-month trial in 1949, featuring rapid and frequent exchanges of insults and charges between the judge and the 11 defendants and their lawyers, was criticized by U.S. Supreme Court Justice Felix Frankfurter who dissented from an affirmance of the charges of convictions for contempt because of the judge's "comments [that] plainly reveal personal feeling against the [defendants'] lawyers however much the course of the trial may have justified such feeling."[43]

Clearly, it must be excruciating for judges to be subjected to continuous disobedience, lack of respect, provocative and insulting remarks, and delaying tactics day in, day out over months or even years. On a human level, their occasional expressions of frustration or disgust are understandable, yet nonetheless unacceptable insofar as a fair and orderly trial is concerned. The judges themselves risk undermining the integrity of the court and the process by reacting in kind to bad behavior by the defendants or their lawyers. They must be careful to assure that underlying justifications for the defendants' eruptions do not exist. While such causes do not excuse excessive behavior by the defendants, they can endanger the outcome of the trials on review in higher court and the overall perception of the fairness of the trials in the eyes of the public. Experienced judges generally have a greater capacity to absorb the antipathy of defendants and to steer a middle course in their response to unacceptable behavior.

An American judge who has run several taxing trials of potentially disruptive terrorist defendants emphasized that treating defendants with dignity is essential. They

want to use the trial as a vehicle to make a statement to the world about their cause and the judge can use this desire as leverage on their behavior. This judge promises them an opportunity at the end of the trial to make a full statement of their case and attitude toward the proceedings if they behave during it. This approach has apparently worked successfully in that judge's cases, though as discussed later negative control mechanisms are held as a backup. The judge explains to the defendant ahead of time both the positive and negative reinforcements in the judicial arsenal so he will be aware of what is involved when the judge warns him to calm down.[44]

ii. Appearance of Independence and Impartiality

The judge must appear to be fair and not personally antagonistic to the defendants even under pressure. But it is equally important that he appear independent and free from political influences. This is especially true in leader trials since the defendants invariably argue that the prosecutions are themselves politically motivated. Such a tension was clearly one of many trouble spots in the much-criticized trial of Saddam Hussein, who was tried in a specially established tribunal by regular members of the Iraqi judiciary. The proceedings were marred by the appearance (and probably the reality) of political interference, causing several judges to resign and to be replaced by the executive branch.[45] Only one of the five judges who sat on the original trial court stayed on to the end. Two defense lawyers were assassinated during the trial, and others claimed they were intimidated into refusing security housing within the Green Zone. The concern over whether judges were controlled by the executive served to exacerbate the reaction of the defendants and their counsel (including Ramsey Clark, a familiar figure in leader trials wherever held) not only to the switch in judges itself but also to other perceived unfairnesses, including a claimed refusal to disclose exculpatory material held by the prosecution and refusal of the court to let Clark orally argue about the legitimacy of the tribunal. Most frustratingly, against the advice of American advisers, the court did not rule on the several jurisdictional motions filed by the defense at the beginning of the trial which dealt not only with the legitimacy of the tribunal but also with the death penalty, accessibility of the defense to the dossier of the investigative judge, and the issue of the defendants' impunity from *ex post facto* legislation—all key legal issues going to the fundamental fairness of the trial. In the absence of such rulings, the defendants and their counsel returned again and again to raise these points by way of interruption and outbursts. Had the court issued its rulings on those issues in the beginning it would have been on much stronger ground to summarily deny later attempts to reargue them.[46] **A lesson here is that critical motions on jurisdiction, severance, and admissibility should be dealt with before trial begins to cut down on the number of contentious issues that defendants can plausibly carry on about during trial.** Fortunately, the ICTY rules provide for many such motions to be decided and appealed before trial.[47] As it was,

defense lawyers in the *Hussein* trial who thought the judges were controlled by political forces readily turned to boycotts in protest against the lack of opportunity to argue these points. Although the Iraqi judges received fairly intense training from American lawyers dispatched to Baghdad for that purpose, the training did not reportedly include how to respond to walkouts and boycotts.

The *Hussein* trial also presented further difficulties with regards to allegations of political bias. Because the Iraqi tribunal had been created specifically for these trials, its funding came through the political branches, not the regular judiciary budget. Additionally, some potential judges were disqualified because of Debaathification rules giving rise to a widespread notion that Ahmad Chalabi, who was in control of implementing the rules, was using his power to pick the judges. Court schedules and trial dates were announced through the prime minister's office because the court had no official spokesperson of its own.[48] The *Hussein* trial was beset by other crises and disputes too numerous to mention, but the perception that the judges were not acting independently was seen by many to be an important factor in spurring on the acknowledgedly outrageous behavior of the defendants and their counsel throughout the trial.

iii. Setting the Framework for an Orderly Trial

Dorsen and Friedman argue that "ultimately the problem of courtroom disorder is one which the trial judge must solve. He must anticipate potentially disruptive behavior and take steps to avoid it."[49] When, despite his best efforts, a trial judge is confronted with disruption, he must respond, but his first line of defense is to set the framework for a fair and efficient trial in which neither his affirmative actions nor his neglect is the cause giving rise to the disruption. Boas suggests the judge set the stage for an orderly trial in four ways: (1) a careful review of the indictment and active intervention if he feels the scope of the prosecutor's case will make for an unmanageable trial; if permitted, the judge should hold an adversarial hearing on the indictment in which defendants' challenges to the sufficiency of the supporting evidence will be heard and ruled upon; (2) pretrial submissions and meetings with the parties to ascertain agreement on facts, clarify ambiguous positions, and familiarize the parties and counsel with one another and the judge and, it is to be hoped, create some trust among them; (3) taking specific steps toward refining trial preparation, i.e., making final rulings on agreed facts, number of witnesses, possible deletion of parts of the indictment, challenges to evidence; and (4) holding a final pretrial conference to allocate overall time limits to both sides and limits on crimes and crime sites that will be offered in evidence. Courts, according to Boas, should be given authority to fine-tune prosecution and defense proffers in all these areas.[50] The current ICTY Rule 73bis(D)–(F) appears on its face to provide that authority, although there has been some tension between the prosecutor and the court as to how specifically the court can control what proof is offered or which charges

are made in the indictment.[51] In the ICC's first trial in the *Lubanga* case, judges have utilized the broad powers granted in article 64 of the ICC Statute to insure a fair and expeditious trial to proactively refine the issues and allocate the parties' time before the proceedings begin.[52]

Some ICTY judges who have presided over leader trials stress the absolute necessity of judicial authority to limit the number of witnesses (Milosevic sought initially to call 1,500) and crime sites. Similarly, they believe the judge should be able to insist that, after investigating the reliability of its source and content and the process by which it was compiled, a summary of evidence may be substituted for individual witness testimony when the summary evidence involves the commission of the crimes rather than the defendants' linkage to those crimes.[53] Major portions of trial time are currently spent on these crime base issues. One ICTY prosecutor would go further and have the facts or circumstances of the commission of the crimes adjudicated by truth commissions and their reports allowed in evidence, as was done in the Nuremberg trials.[54] Alternatively, as in the civil law system, an investigative judge might prepare a decision on the crime basis part of the case, subject to challenge in the trial itself.[55]

iv. Continuity of Judges and Establishing Ground Rules

The optimal situation in a leader case insofar as judicial control is concerned is thought by some to be continuity of judge or judges throughout the pretrial and into the trial process.[56] Otherwise, the trial judges late in the game may reject agreements already reached pretrial or place new restrictions on the number of witnesses or sites that the pretrial judge allowed. It is interesting that defendant outbursts often occur in these pretrial sessions as well as at trial when the accused perceives injustice or unfair treatment. **Disruptive pretrial behavior is surely a precursor to trial anarchy. Some of the ad hoc courts can and do provide continuity of judges in the pretrial and trial stages, but others, like the ICC, structure chambers so that judges are assigned to pretrial or trial chambers for discrete periods of time.** Dorsen and Friedman add that in cases of multiple defendants at the pretrial conference, the respective responsibilities of counsel and deadlines for submissions should be firmly settled.[57] Judges suggest that in cases where there is likelihood of disruptive behavior, the defendants and counsel should be told the ground rules of what the judge expects by way of tolerated behavior and what actions the court is likely to take if its rules are disobeyed.[58]

B. Rapid Responses: Too Harsh or Too Lenient?

It is of course expected that even with a focused indictment and careful judicial preparation for an orderly trial, persistent leaders intent on using the courtroom as a stage to play for history will engage in disruptive activities. How should the judges then react? Ignore the unruly defendants as long as possible and continue proceedings or rapidly respond with tough sanctions to show who's boss? Over the years judges in high-profile cases have been criticized as too reflexively harsh (Judge Medina in the Communist Conspiracy trial, Judge Hoffman in the Chicago 7 trial) or too lenient (the *Milosevic* trial judges, the first judge in the *Hussein* trial); a few seem to have found the right balance (Judge Leonie Brinkema in the 9/11 trial *United States v. Moussaoui*). There are a variety of sanctions judges can impose on recalcitrant defendants and their lawyers, but all of them have disadvantages as well as advantages and, when used too often, appear to lose their effectiveness. **Trials in absentia or permanent removal of the defendant from the courtroom would probably be the most effective sanction for consistently disruptive behavior, but no international judge has ventured to go so far, probably because of the recognition in most countries and in court statutes of a defendant's right to be tried in his presence in a public trial.**[59]

i. Removal of Defendants

The authority of a court to remove a defendant temporarily from the courtroom after warning and usually after lesser sanctions have proven unsuccessful has been repeatedly upheld by national and international courts (although with the reservation that arrangements be made for the accused to follow the trial and consult by audio with counsel representing him).[60] Judges have invariably let removed defendants back into the courtroom after brief periods of removal, on their promise to behave. In *Illinois v. Allen*, the first U.S. Supreme Court case allowing removal,[61] the defendant at trial had argued repeatedly with the judge over jury selection; told jurors there was "not going to be no trial. . . . I'm going to keep talking all through the trial," threatened the judge with "you're going to be the corpse here," and threw papers on the floor. The U.S. Supreme Court, in its 1970 opinion in the case, ruled that removal was not a violation of the defendant's Sixth Amendment right to confront the witness against him in a public trial because, after being warned that removal will follow a repetition of his disruptive conduct, he "insists on conducting himself in a manner so disorderly, disruptive and disrespectful of the court that his trial cannot be carried on with him in the courtroom."[62]

ii. Physical Sanctions

A federal appellate court in the Chicago 7 case had sanctioned binding and gagging the defendant to keep him quiet, but this tactic, though not declared constitutionally impermissible, was specifically criticized by the U.S. Supreme Court in the *Allen* case as an "affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold."[63] As best as I can learn, gagging has not been used since, although handcuffing to prevent physical violence or flight is still used in U.S. courts occasionally, and defendants are sometimes still shackled to the floor, although care is taken so the jury will not observe the restraints by seating him before the public or jurors are brought into the courtroom. The use of a "stun belt" or "stun bracelet" has also been reported in American courts. It would deliver a shock to the defendant—after a judicial warning—that could be strong enough to disrupt his bodily functions thereby producing a loss of the dignity he craves.[64] I am unaware of physical restraints being used in an international court.

iii. Contempt

The inherent power of courts to find defendants and their lawyers in contempt for unruly behavior is commonly employed, but for leaders facing possible life imprisonment or execution for their principal crimes and hell-bent on making their case to the world before they go, the additional sanction of some extra prison time is not likely to have a strong deterrent effect. In recent trials, cutting off the defendant's microphone or arranging for televised dissemination to be stopped or deferred is also used. If the defendant is representing himself (to be discussed at much greater length in the next section), counsel may be assigned to take over the case after other sanctions have proved ineffective. Recesses can be called so everyone has a chance to cool off. The court may move into closed session. No single response or set of responses has proven foolproof against a calculatedly disruptive defendant. The problem is always how to balance the defendant's right to a fundamentally fair trial with the interests of victims and the wider community in seeing that justice is done and is seen to be done.[65]

iv. Sanctioning Misbehavior of Counsel

Most disruptive behavior comes from the defendants and not their counsel, although in several leader trials the counsel have joined their clients or initiated unruly behavior on their own. There have also reportedly been instances in the Rwanda tribunal where prosecution and defense counsel have shouted loud and long at each other, with little or no intervention from judges, who appeared incapable of controlling the courtroom.[66] **When lawyers misbehave there are court rules as well as professional rules and disciplinary mechanisms, along with contempt, that can be imposed.**[67] International courts usually are required by statute to require lawyers appearing before them to comply

with the court's own Code of Professional Conduct.[68] Ultimately, the judge can have the lawyer removed from the case for misconduct and recommend he be eliminated from the roster of lawyers eligible to practice before the court.[69] Most defense lawyers have careers to pursue when the instant trial is over and are not so rooted as their clients in the outcome of any single trial. When lawyers misbehave it is more likely to involve refusal to heed judges' orders to either cease a particular argument or stop trying to introduce evidence already held to be inadmissible rather than misbehavior such as interrupting or insulting the judge or prosecutor.[70] The Chicago 7 and the *Hussein* trials are, however, exceptions, featuring brazen epithets hurled at the judges by counsel. The question has arisen whether lawyers have an obligation to dissuade their clients from misbehaving, and on this one the legal experts and even courts are split. They agree lawyers should privately counsel their clients to stay within the rules, but whether they have to publicly criticize their clients or remonstrate with them in the courtroom to stop disruptive behavior is more controversial. The lawyer does have a duty to tell the client in private about the consequences of his disruptive behavior, seek to dissuade him, and certainly not to encourage him.[71]

v. The Dorsen/Friedman Typology of Sanctioning Disruptions

Dorsen and Friedman, over 30 years ago, identified five types of disruption which they defined as "intentional conduct that interferes substantially with the dignity, order and decorum of the proceedings," and recommended different judicial responses to the five categories.[72] The first type is "passive disrespect," shown through such activities as refusing to stand when the judge enters or refusing to address him as "Your Honor" (Milosevic persisted in calling the judges "Mister," which the court ignored); the second type is "refusal to cooperate" with the rules of procedure, i.e., to submit required filings; the third is a "single obscenity or shout"; the fourth is repeated interruptions of the judge, prosecutor, or witnesses; and the fifth is physical violence. The authors advise largely ignoring the first (passive disrespect). As to the second, they recommend attempting to find the source of the defendant's failure to cooperate and reasoning with him, warning him of sanctions if he persists. For the third form of disruption—a single isolated shout or obscenity—they advise a warning not to repeat, but if the defendants continue with the fourth—frequent interruptions or outbursts—citation for contempt after a warning or even temporary removal is advised. If physical violence occurs, handcuffs, immediate contempt, and/or exclusion is called for. The authors stress none of these category-based responses should be automatic, however; the judge has to look at each case in its own context. Consideration should be given, for instance, to whether repeated interruptions occur close together as part of one episode or over an extended period of time; whether they occur at critical phases such as sentencing, or routinely during ordinary trial sequences; what the effect will be on other defendants;

and whether there were provocations for the misbehavior. Judicial responses should normally be escalated as bad behavior continues. Severance of the obstreperous defendant may be called for in a multiple defendant trial. Contempt should almost always precede removal, but there is "no talismanic formula for when contempt should be applied and when it is unnecessary."[73]

Bench conferences should be frequent and warnings repeated, especially as to the imminence of contempt and removal. Disruptive activity often comes in the course of witness examinations and defendants can be barred from directly addressing the witnesses if they have counsel. Additionally, **in the case of a powerful and intimidating self-representing defendant like Slobodan Milosevic, the court might consider appointing an intermediary in conducting the cross-examination of victim-witnesses, so they are not revictimized on the stand by the very person they hold responsible for the devastation in their lives.** With, for example, Milosevic asking the question and an intermediary relaying the question to the victim-witness, one layer of protection is added to the victim without jeopardizing the right of the accused to confront his witness. This limits the ability of self-representing leaders to bully and intimidate survivors, or even underlings, in court. As Ellen Lutz and Caitlin Reiger point out in *Prosecuting Heads of State*:

> In cases of high-level commanders, establishing superior criminal responsibility requires proving an unbroken chain of command, and that usually involves the testimony of witnesses from inside the very command structure that the accused once controlled. Former leaders frequently continue to enjoy the support of segments of such national institutions as the armed forces. Hence, cross-examination of a former subordinate by his one-time commander can be not only intimidating but threatening and can lead to silence, perjury, or other ways of undermining evidence that the prosecution needs to prove its case.[74]

vi. Sanctions in Leader Trials

The international trials of leader defendants may call for a firmer hand than described in Dorsen and Friedman's typology. According to one ICTY judge, "these defendants may have power and money" and can indirectly pull levers through their connections outside the court that affect what goes on inside the court.[75] On the other hand, Judge Theodor Meron of the ICTY has said: "Any court dealing with atrocities has to pay particular respect to due process. There can be no cutting corners."[76] On a pragmatic basis, if it does cut any, a myriad of international NGOs will almost surely be at its heels. But there is always the question of what due process requires and at what point the competing interests of the victims and the integrity of the court come into the picture. There are those who believe that the international courts, like national judicial systems, are built upon the premise of law-abiding participants: professional lawyers, whose careers are bound up in making the process work smoothly, and defendants who in the final analysis realize their fate lies in the court's hands and do not want to antagonize

it unnecessarily. That kind of system, they say, simply is not able to deal with clever, unscrupulous deposed leaders who have no interest or reason to honor its procedures but rather seek to use it as a vehicle for their own political or historical enhancement. In the end, however, most participants I interviewed agree that smart and experienced judges can make the system work, but that such judges are not always put in control. Even when they are put in control, their hands have sometimes been tied by overly restrictive appellate rulings as to what they can do and when.

The *Milosevic* trial is again cited as an example. **Milosevic constantly interrupted counsel and witnesses; corrected interpreters; defied the authority of the tribunal or the judges; refused to comply with orders to disclose materials, file witness lists or produce experts; eschewed written submissions, insisting that only oral evidence was appropriate in a public trial; required for health reasons a minimal courtroom schedule (four hours a day, three days a week); ignored repeated admonitions by judges not to ask leading questions; sought to introduce irrelevant information into the record; and played blackmail with the court by getting defense witnesses to refuse to appear if he could not examine them himself.**[77] **One observer commented: "A curious feature of the *Milosevic* case is the extent to which orders of the trial court were not complied with."**[78] Early on it was clear Milosevic would conduct himself in an obstructionist manner even though prosecutors had originally expected him to be passive and had calculated the predicted length of the trial on that basis. Boas thinks the *Milosevic* judges should have been tougher and insisted more on compliance with their orders and rules, i.e., ICTY rules that allow the court not to hear a witness or admit evidence which has not been disclosed before trial.[79] Although allotted an overall time limit in which to present his defense, 80 percent of that time had been used up without any significant part of it responding to the prosecutor's Bosnia/Croatia case when he died. His late-in-the-day request for an additional 380 hours to cover those indictments was refused, although he was granted a substantial recess to continue preparation.[80]

The former Chief Prosecutor Carla Del Ponte recalls her frustration with the *Milosevic* trial and his self-representation:

> On August 31, 2004, Courtroom 1 sprang to life once again as Milosevic began presenting his defense case. True to form, he mounted no legal defense in the conventional sense. Rather, he chose to dabble in politics and to make speeches to his true believers in Serbia and elsewhere about his interpretation of Yugoslavia's break demise. . . . [A]s the months wore on, the judges found themselves facing a terrible quandary: the time allotted for the defense case was running out, and Milosevic was neglecting to present any discernible defense for the two components of the prosecution's case that were arguably its strongest: the indictments derived from crimes committed in Bosnia and Herzegovina and in Croatia. This incredible situation, I thought, would never have arisen if the Trial Chamber had forced Milosevic to accept appointed defense counsel from the beginning.[81]

In the court's defense, it tried for more dramatic solutions like severing the Kosovo indictment (twice) and later imposing counsel on Milosevic, but in both cases those efforts were thwarted by the appellate chamber. There is, currently, some question as to how much the more moderate micromanagement techniques discussed above would have worked after these big guns had been withdrawn. **As long as Milosevic remained at the helm in a seemingly endless trial conducted on a "banker's hours" schedule, the court projected a disheartening sense of powerlessness, a coup which doubled Milosevic's own popularity at home:** "The judicial proceedings at The Hague transformed Milosevic from a disgraced politician who had been ousted by a popular revolt into one of the most esteemed public figures in Serb history."[82]

The *Hussein* trial generated widespread reports focused on his misbehavior: "Mr. Hussein and his fellow defendants unleashing long diatribes against the court and the American role in Iraq"; "the former dictator's televised displays of defiance can only embolden his followers in the insurgency";[83] "he disobeys [the judge] with impunity"; "marchers said they are emboldened by his courtroom bravado";[84] "the trial has been too widely perceived within Iraq and abroad as a chaotic and politicized process with many serious flaws carried out by inexperienced judges."[85] Michael Scharf writes that the original judge was "pressured to resign as too weak to control the defendants; a second one engaged in angry shouting matches and frequent ejections from the courtroom," and seven codefendants and a dozen lawyers "regularly disparaged the judges, interrupted witness testimony with outbursts, turned examination into political diatribes and staged frequent walk-outs and boycotts."[86]

In truth, all available responses appear to have been tried by one or another of the Iraqi presiding judges. Defendants were removed from the courtroom several times for calling the judges "dictator," "daughter of adultery," engaging in loud praying, reading from the Koran, speaking out of turn. The judges also dismissed abusive private defense counsel and imposed assigned counsel against defendants' will. None of the standard responses appeared to work to produce a smooth trial.[87] Defendants and defense lawyers themselves boycotted parts of the trial. Two of the chroniclers of the trial wrote that Hussein in his first few minutes in court expected to be ruled guilty and executed promptly—when he found out that the trial would be run according to rules and procedures, he immediately became bolder and began answering the judge back.[88]

American advisers had counseled the *Hussein* judges that the defendants should not be allowed to speak except as witnesses in the trial since they had counsel, but the Iraqi judges disregarded this advice, preferring their own Iraqi practice which allowed the defendant with court permission to question witnesses. This was done in the apparent belief that unless the defendants could participate in their own defense and speak in open court, Hussein's trial, also known as the Dujail trial, would not be perceived by

the outside world as fair: "One of the ironies of the Dujail trial was that its very length and the often chaotic atmosphere that was caused by the effort to protect the due process rights of the defendants were primary reasons why ordinary Iraqis became increasingly skeptical and disillusioned" with the whole process.[89] The Iraqi and American authorities underestimated the power of Hussein's court persona, as well as the degree to which the Iraqi watchers of the first televised trial in the Middle East would not really understand how the process was supposed to work. No one ever explained to them adequately the legal principles involved in the trial. As in the Chicago 7 and *Milosevic* cases, the defense strategy was focused on showing the trial was really about bigger international geopolitical interests, not the events of the long-ago Dujail incident.

Saddam Hussein's trial lasted 37 court days stretched over a nine-month period. The second presiding judge in the *Hussein* trial took a different approach from the first: he did not ignore outbursts or display patience or tolerance, such as letting defendants wear Muslim headgear and ordering handcuffs removed. The second judge was quicker to engage in argumentative exchanges and levy sanctions such as removal. But the sheer force of Hussein's persona had been underestimated. Richard Holbrooke had predicted Hussein would appear "pathetic," but observers commented, "he was cunning, arrogant, forceful, at times petulant, but rarely pathetic, and never small."[90]

The defense was also upset because witnesses testified behind curtains and their identities were revealed to the defense team only on the morning of their testimony. And the judges did make one very critical strategic mistake by not permitting any oral argument on the issue of the tribunal's legitimacy until the third day of the trial and then delaying any decision until the end of the trial. Defense lawyers staged a walkout using the failure to allow successive argument or to decide this issue as their reason. Another important strategic error occurred when Hussein was allowed to question witnesses directly (after counsel). When the judges objected because Hussein would not limit his intervention to questions but wanted to make speeches, he threatened boycott: **"Perhaps more than any other decision, this [allowing Hussein to question witnesses] would lead to the chaos in the days to follow."**[91] Barzan Ibrahim Hasan al-Tikriti, Hussein's half brother and vocal codefendant, constantly interrupted witnesses' testimony as well, objecting to its "truth"; his questioning of witnesses was so abrasive that the judge finally required him to put all his questions through the judge (which is the usual civil law practice).

Hussein and codefendants also claimed they were tortured in detention.[92] The judge ordered an investigation into the allegation, but no report of the investigation was ever issued publicly and this fueled speculation as to the motives behind the trial. The first presiding judge was attacked in the press and behind the scenes in political quarters as too lenient, and he eventually responded to pressure to step down. It was thought he had not exuded enough confidence in his own ability to control the courtroom, had

not cut off the defendants' microphones quickly enough when they strayed. An abortive attempt was made at naming a successor, who was rejected for Baath Party membership, before a second judge took over and pursued a stricter regimen, i.e., removing Barzan Ibrahim for not sitting down when ordered to. This sanction, however, provoked shouts and curses from Hussein ("Down with America! Down with the traitor!") and threats from defendants and their lawyers to boycott the trial to which the new judge retorted, "If you leave you can't come back," announcing he would use "standby lawyers" to continue the case. The defendants rejected any contacts with the standby lawyers. Ultimately the retained lawyers for all eight defendants as well as the defendants themselves left the courtroom. The judge later ordered the defendants to come back, whereupon Barzan Ibrahim, Hussein's codefendant, appeared in his underwear and sat with his back to the judge. At other times, Hussein took prayer breaks in the middle of testimony; called the judge "son of a whore," a traitor, and a homosexual; announced a hunger strike which resulted in his being force-fed by IV; and his defense team asked for the dismissal of the judge and prosecutor, complaining to the U.N. Human Rights Commission in Geneva of human rights violations in the trial.

At the end of the prosecution's case, Hussein asked to address the court. According to Michael A. Newton and Michael P. Scharf, "[t]he next five minutes were the most important of the entire trial": Hussein admitted he had ordered the destruction of the orchards and homes and the arrest and execution of the townspeople in Dujail by saying, "I'm responsible." He argued later what he did was not unlike what the United States had done in bombing Iraq in 1993 after the plot to assassinate the first President Bush—"no investigation, no trial, no wait to clarify. . . ."[93] At other points, he accused the court of corruption and raised the specter of American abuses in Abu Ghraib. These issues were not on trial and the judge rightly cut off his microphone and ordered a closed session.

During the trial itself, the defense submitted successive different lists of witnesses to the judge's patent frustration—in the end 56 were allowed to testify. The prosecution had presented 28 witnesses.[94] Three witnesses for the defense claimed that the prosecutor had tried to bribe them to testify against Saddam. A video, however, was produced which showed a witness to have misidentified the prosecutor as the one offering bribes. After admitting the defense counsel had coached them and promised them rewards for so testifying, the witnesses were cited for perjury.[95]

The defense team announced they would boycott closing arguments, which were ultimately conducted by standby lawyers, even after Hussein threatened them, stating: "If you present the argument I will consider you my personal enemy and an enemy of the state." Hussein also engaged the judge in an amazing colloquy. Hussein: "You hear the sound of weapons . . . this is the sound of the people. Let us see how the Americans will face the people." Judge: "You are provoking the killing of people by car bombs. . . .

If you are urging to kill Americans, let your friends or the mujahideen attack the American camps and not blow themselves up in the streets and public places and cafes and markets. Let them blow up Americans."[96]

At the end, Hussein interrupted the judge's reading of the guilty verdict and had to have his microphone volume lowered.[97] No written opinion issued from the court until two weeks later (and then it was 300 pages).[98] Some critics like Human Rights Watch pronounced the trial "fundamentally unfair" primarily because the pretrial motions had not been resolved before trial, defense was presented with a 1,100-page file 45 days before the trial began, and only 20 trial days had been allotted to each side. The 17-page opinion of the appeals chamber issued a few weeks later and upholding the verdict was spurned by Human Rights Watch for the "cursory nature of the reasoning"; no international court cases were cited in it although the crimes the defendants were convicted of were based in international law and the tribunal's charter had instructed them to consult international court rulings. One of Hussein's counsel told reporters later that their defense strategy was to prolong the trial and inflame insurgency so that Hussein could bargain for freedom as a mediator bringing peace to warring factions.[99]

The *Hussein* trial demonstrates that even where the deposed leader is represented by his own counsel, strong confident actions by the judges are needed to keep control of the courtroom. Those actions must of course still allow the defendant and/or his counsel to present their witnesses and evidence in an orderly way and to refute the prosecution. My impression is that none of the "control" techniques used by the Iraqi judges, such as temporary removal from the courtroom or imposition of standby counsel, and certainly no similar techniques used in the *Milosovic* trial, impugned basic rights of the defendants to make their case. It seems, to the contrary, that the judges in these international trials have bent over backward to keep the defendants participating in the proceedings. But the judges have made strategic mistakes. In Hussein's case, "Perhaps the most important lesson in this regard is that allowing a former leader to act as counsel questioning witnesses and addressing the judge throughout the trial is a virtual license for abuse."[100] In the *Hussein* trial no clear ground rules were set for avoiding or punishing disruptive behavior; in later trials based on different episodes, pretrial sessions have been held to cover some of this ground and for whatever reasons—perhaps mainly because Hussein was no longer involved—those trials appear to have gone more smoothly.

More forgiving commentators on the *Hussein* trial, however, concluded war crimes trials are "inherently messy," even divisive rather than comforting to the war-scarred population involved in the short term: "To date, not one has been praised as a model of fairness, efficiency or decorum"; 75 percent of Serbs didn't think Milosevic got a fair trial; 80 percent of contemporary Germans thought Nuremberg was an act of retribution; it is fair to surmise the numbers in Iraq would not be different.[101] But it must be said that

the *Hussein* trial represented a "perfect storm," collecting in one proceeding virtually all the elements conducive to chaos: inadequately trained judges, political intervention, mid-trial replacement of the presiding judge, multiple defendants, unprofessional lawyers, nontransparent and delayed rulings on critical issues, and inconsistent responses to outrageous conduct by the defendants—a cornucopia of negative lessons.

In these leadership trials, judges have never imposed sanctions enforceable outside the courtroom to compel order inside the court. International trial defendants are allowed more privileges than in many national prisons due to UN humane treatment standards. In the Yugoslav tribunal, for instance, detainees in the court's Scheveningen detention facilities play volleyball, receive special meals or spices from their homeland, and are allowed conjugal visits and frequent phone calls. It might be worth experimenting with threatening to take away some of these privileges as a sanction for continued misbehavior in court.

Dorsen and Friedman also counsel occasional loosening of the rules to reward good behavior: In the prosecution of Angela Davis for murder and conspiracy arising out of a courthouse shooting, the defendant, who was represented by counsel, was allowed to cross-examine witnesses, argue as a cocounsel, and listen in on bench conferences. The defense was allowed to discuss background racial conflict issues in statements to the jury, though under a strict relevance standard that could have been refused.[102] Before such privileges are given, however, the judge needs to be sure that the defendant is acting in good faith and not simply exploiting the court's good will.

IV. The Right to Self-Representation

A. Why Do They Do It?

Senior national and paramilitary leaders have increasingly insisted on representing themselves in international court trials. One might ask, Why? These are long, complicated, legally sophisticated proceedings and none of the leaders have had past experience with courtroom proceedings. Obviously they do not seek the same goals from a trial as other litigants—a decision based on evidence and legal rules—but rather a platform on which to make their case to homeland audiences and to accuse their accusers of crass motives for holding the trials. Conceivably, some leaders might think they can do a better job at defending themselves than the lawyers provided whom they instinctively distrust and refuse to cooperate with. On a psychological level, these leaders have strong egos and are used to controlling those around them; they have confidence in their talents to continue that control even after arrest. The Nuremberg trial itself featured long diatribes by Hermann Goering and a refusal to answer questions "Yes" or "No." Though he engaged in no physical antics or boycotts other than "gesturing, mugging and muttering contempt on the proceedings," he did manage a tour de force performance during direct examination by Chief Prosecutor Robert Jackson, a dialogue which most commentators called in Goering's favor.[103]

In modern international trials, attempts to comply with demands for self-representation and to run a fair and efficient trial have collided drastically. Apart from their inevitable lack of familiarity with rules of evidence and procedure, self-represented defendants have complicated the trials by their emotional outbursts and muted the

court's responses because, not being lawyers, they are not subject to the same code of professional ethics as lawyers. This is unfortunate because "obstructionist behavior by a self-representing accused is no more tolerable than it is by an accused who is represented."

> The purposes that led to the establishment of international criminal tribunals must not be thwarted by self-representing accused acting with the approval and acquiescence of trial chambers, which may view the right of an accused to represent himself as so fundamental that it trumps the interests of the international community to a fair trial on the merits.[104]

The lengths to which the ICTY courts have felt they must go to insure the self-represented defendant gets a fair trial have made those trials extremely costly, time-consuming, and some would say legally convoluted. According to judges, prosecutors, and registry officials interviewed, the system—or shall I say the practice—as it now exists "doesn't work."[105] Most participants interviewed were unhappy with it, and it certainly provides no model for later courts to follow. A brief history of the ICTY experience is set out below to explain how the court reached its current dilemma.

B. The ICTY in Impasse

i. The Milosevic Story

Milosevic declared an intention to represent himself at his earlier pretrial appearances where he also displayed his proclivity to interrupt, preach, and run the show as much as the court would allow. Former Chief Prosecutor Carla Del Ponte describes in her memoir her views on Milosevic's self-representation:

> Milosevic announced that he would defend himself in court. The trial's presiding judge, Richard May, tried to convince Milosevic that the case would involve voluminous documentary evidence and testimony, making it impossible for him to mount an effective defense alone. Milosevic remained obdurate. The prosecution team filed a motion requesting the Trial Chamber to require that Milosevic retain defense counsel or to appoint counsel to defend him. The Trial Chamber decided instead to allow Milosevic to defend himself, and the prosecution team appealed, in vain. Milosevic clearly knew he could not defend himself successfully in a legal sense, because he did not bother to mount a legal defense. He chose instead to present a political defense, to speak through the window to his nationalist constituents in Serbia, to exploit each trial day as an opportunity for political diatribe. It did not have to be this way.[106]

During most of the next four years, his ill health required constant recesses; 66 trial days (the equivalent of six months trial time) had to be canceled for health reasons

and trial days were limited to three days a week, four hours a day. The trial court midway through the trial imposed counsel on Milosevic for health reasons. The appellate chamber, however, while upholding the imposition of counsel proceeded so to restrict what assigned counsel could do that in effect it undid its affirmance of the trial court's action. The trial court had told assigned counsel to prepare and examine witnesses, submit the facts and evidence it thought relevant and seek the orders it deemed necessary, discuss with the client the evidence and conduct of the trial and receive his instructions but retain the right to take a different course if counsel deemed it strategically practicable. The trial chamber also let Milosevic retain the right to examine witnesses himself after counsel had conducted direct examination and gave Milosevic the right to pick the assigned counsel from the registry's approved list. Milosevic appealed the trial court's ruling. In the interim, before the appeals chamber ruled, Milosevic took an even tougher tack with the court. Witnesses he had called for his defense refused to come if he was not allowed to examine them personally, and he himself boycotted the trial. These kinds of actions—some would call them "blackmail"—did not go unnoticed, and were later replicated by other defendants.

The appeals chamber ruled the trial court's restrictions on Milosevic's participation at the trial were disproportionate to the health-bound reasons given for imposing assigned counsel. Specifically, the appellate court said Milosevic himself must be allowed to select witnesses and question them when he was physically able, to argue motions himself, make closing arguments, and petition the court on all strategic decisions. In effect, Milosevic could continue to call the shots, and the role of assigned counsel was basically reduced to that of standby counsel. In reality, Milosevic refused to consult with his appointed counsel at all on selection of witnesses or defense strategy. The frustrated assigned counsel subsequently asked to be released but the court refused, and the trial continued its labored and uneasy pace under the appeals chamber's more permissive regime, though with a somewhat more pliant Milosevic in charge.[107] According to *New York Times* reporter Marlise Simons, "once given to bursting into tirades and dismissing his indictment as a fake and his trial as a farce, Mr. Milosevic . . . has now become steeped in the case's 200,000 pages. These days, he sits in the dock flanked by carts full of binders, which he frequently consults."[108] The former chief prosecutor's view is that the judges' failure to control the courtroom in the *Milosevic* case led to a predictable outcome:

> If, from the beginning, the judges had shown resolve in this regard and required defense counsel, Milosevic would have had to concede and surely would have resorted to some fallback strategy to politicize the trial. In my opinion, the Trial Chamber's judges exaggerated concerns over a fair trial and created a situation that was unfair to everyone, including Milosevic. The judges' lack of resolve was a weakness Milosevic exploited immediately. And once Milosevic had passed through this looking glass, other accused—notably Slobodan Praljak,

a Croat general facing charges linked with Tudjman's attempt to partition Bosnia and Herzegovina; Momcilo Krajisnik, who was appealing a twenty-seven-year sentence for persecution, extermination, murder, deportation and other charges; and Vojislav Seselj, a rabid Serb nationalist and ally of Milosevic who allegedly led a notorious paramilitary unit—would also exploit it.[109]

In real time, Milosevic had considerable legal assistance of his own choosing in representing himself both before and after counsel was assigned. He maintained a staff of informed "advisers," including internationally familiar names such as Ramsey Clark and John Livingston, with whom he was allowed to consult in his detention unit and who were accorded some of the same privileges as regular counsel; the court had also appointed *amicus curiae* to raise any issues independently before the court they deemed necessary for a fair trial.

ii. The Status of the Right to Self-Representation

A brief summary and evaluation of the appeals chamber's seminal ruling in the *Milosevic* case on the right of a defendant to represent himself is in order here. The appellate chamber's recognition of a defendant's right to self-represent as "fundamental" in the *Milosevic* case was based on its interpretation of article 21(4)(d) of the ICTY statute, which provides the defendant with a right "to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing." Drawing heavily on U.S. Supreme Court decisions which recognize the right to self-representation as rooted in English ancestral and early state practices and hence inferable as a fundamental right at the time the U.S. Constitution was adopted,[110] the chamber termed it a "cornerstone" right in international law as well. Although the right was revocable when it became irreconcilable with a fair trial according to the appeals chamber, it was nonetheless presumptively available to defendants and not easily to be refused or taken away regardless of impediments it posed to the defendant's own chances of success or to the optimal management of the trial: "[It] may never be in an individual's interest to represent himself . . . but he nonetheless has a 'cornerstone' right to make his own case to the Tribunal."[111] Though the right could be restricted "for substantially and persistently obstructing prudent and expeditious conduct of his trial," the restriction "must be limited to the minimum extent necessary to protect the Tribunal's interest in assuring a reasonably expeditious trial."[112]

This right to self-representation is by no means a universally accepted one nor is it part of customary international law. Many nations, including Bosnia, France, Italy, and Iraq, do not recognize it. The European Court of Human Rights has not declared it a "fundamental right." In the eyes of many international legal systems, it is the right to have counsel, not the right not to have counsel, which is the fundamental bedrock of a

fair trial. Even within the ICTY, judges disagree about the scope and priority that should be accorded to the right over other aspects of a fair trial. Judge Schomburg wrote a "Fundamentally Dissenting Opinion" on the existence of the right to self-representation in the *Krajisnik* case, opening with this salvo: "If I were tasked to show that international criminal jurisdiction cannot work I would draft the decision in the same way as was done by the majority of the Appeals Chamber."[113] In the *Krajisnik* case, a majority of the appellate chamber had again reaffirmed the right of a leader to represent himself, this time on appeal. **Schomburg went on to declare: "There is no fair procedure before international tribunals without public legal assistance."**[114] Labeling the "decision in this case" as a "glaring example in a long line of unfortunate decisions by the appellate chamber," Schomburg, though focusing on Krajisnik's right on appeal, made clear his opposition to its recognition in trial as well. His comparative study of the status of such a right around the world found that many countries did not recognize the right, and even those that did were generous in recognizing exceptions where its exercise interfered with a fair or expeditious trial.

Schomburg argued that even if the right to self-representation is generally recognized, it should be amenable to denial or revocation based on the nature of the proceedings as well as the health or behavior of the defendant. ICTY Rule 45 itself allows the court to assign counsel "in the interests of justice." In the *Krajisnik* appeal, the defendant faced a 27-year sentence and 27,000 pages of trial transcript, as well as "sophisticated case law" and complicated appellate procedures. The theory of the prosecution—joint criminal enterprise—was itself a complex and controversial doctrine, a "legal concept unknown in the defendant's home country." Substantial delays would be inevitable if he represented himself. The appellate chamber had ruled in *Krajisnik* that an *amicus curiae* would be appointed to basically keep an eye on the proceedings to insure all relevant arguments were raised on the defendant's part. Schomburg found the appointment of *amicus* as "de facto counsel" a distortion of the traditional function of that office, and the defendants' use of his own behind-the-scenes "undercover counsel" irreconcilable with the fundamental principle of a public trial.[115]

In the United States as well, there are judges who disagree with the U.S. Supreme Court's broad articulation of the right. As Judge Schomburg pointed out, Judge Reinhardt of the Ninth Circuit has written to that effect—and the U.S. Supreme Court has itself refused to broaden the constitutional right to an appeal setting as the ICTY has done.[116] Others interviewed, including ICTY judges, have difficulties understanding and embracing what they perceive of as an "absolutist" American perspective of the right to self-represent, which amounts in many instances to the "right to an unfair trial," and add that, even in the United States, judges would not apply the right to self-representation to situations where the ICTY appellate chambers has insisted on it.[117]

An American judge interviewed, who has presided over terrorist trials, is of the view that the *Faretta* decision by the U.S. Supreme Court on which the ICTY appellate court relied so heavily "went too far." This judge believes that letting a defendant, particularly one detained, represent himself in a complex trial with massive fact finding is "like shooting fish in a barrel." It is unfair both to the accused and to the rest of the trial participants and the public. Where a death penalty or even a long sentence is involved, and the facts are complex, the accused should not be allowed to represent himself.[118] Apart from his inability to integrate and collect evidence, such a defendant cannot usually have access to classified information, which in American terrorist trials makes up the lion's share of evidence. Indeed, in the *Moussaoui* case (the alleged 20th hijacker of 9/11), the defendant who did represent himself for part of the proceeding appealed on the ground that his denial of access to classified information during that period made it impossible for him to prepare an adequate case.[119]

This trial judge explains carefully to defendants who claim the right to represent themselves the disadvantages they face. The judge, as a matter of course, also appoints standby counsel who, if cleared, can access the classified information, and attempts to find standby counsel who speak the accused's language and to whom they can relate. The fact remains, however, that in the United States, as in international courts, the accused are likely to distrust counsel appointed by the court. In some instances cited by the American judge interviewed, this inherent distrust is exacerbated by the desire of the counsel to plead diminished responsibility, which cuts into the accused's sense of his own dignity. And in one notorious terrorist trial the judge said the prosecution and accused were more often aligned against the defense counsel than the defense counsel and the accused against the prosecution.

iii. Post-*Milosevic* Application of the Right to Self-Represent

After announcing the right to self-representation in *Milosevic* and expanding it in *Krajisnik*, the appeals chamber proceeded to apply it in ways that have added not only to the practical problems of running a leader trial but to some confusion about the doctrine itself. The *Seselj* case is particularly troubling in this regard. In October 2006, the appellate chamber reviewed a decision by the trial chamber assigning counsel to Seselj who was representing himself. Seselj had from the onset of his pretrial appearances, the trial chamber noted, "increasingly demonstrated a tendency to act in an obstructionist fashion while at the same time revealing a need for legal assistance." The trial chamber had previously appointed a standby counsel but now imposed an assigned counsel "effective immediately" on the basis that Seselj's intimidation of and slanderous comments about the witnesses, his "disruptive behavior and deliberate disrespect for the rules indicates that his self-representation may substantially and persistently obstruct the proper and expeditious conduct of a fair trial."[120] There was no doubt that his behavior up to the

time of the trial chamber's decision to impose counsel fell within the appeals chamber's formula for withdrawing the right to self-representation. It included repeated declarations in open court that he would "destroy the tribunal," as well as numerous prohibited statements to the press about the forthcoming elections in which the radical Serb party he still led was an active candidate. He had—even more crucially—revealed the name of a protected witness and disclosed confidential material to nonauthorized persons. The appeals chamber agreed that such conduct merited imposition of counsel even if not intentionally done to obstruct the trial, explaining the conduct need not be so extreme as to make continuation of the trial "impossible" before counsel can be imposed. The appellate division then, however, ruled that before counsel can be imposed the accused had to be given a specific warning that assigned counsel was under consideration and that warning had not been given here. (Seselj, though self-represented, had a standby counsel appointed and a backroom legal team of 28 members, and he had been warned repeatedly about the prospect of sanctions, though not in this instance specifically about imposition of counsel.) After the trial chamber imposed counsel, Seselj refused to communicate with assigned counsel or even appear in court. The appeals chamber remanded to the trial chamber with the instruction that a specific warning of imposition of counsel must be given on the basis of new obstructionist behavior before his right to self-represent could be taken away.[121]

On remand, the trial chamber returned Seselj's status to his prior one before assigned counsel, that is, self-representation but with the standby counsel appointed six months before. Seselj, on hearing of this ruling, refused to come to the courtroom and entered into a hunger strike. The standby counsel took over the pretrial proceedings, and Seselj was warned that if he persisted in his conduct, counsel would be imposed, which is what happened. On appeal of the second order imposing counsel, Seselj argued that the appeals chamber's original decision vacating the order of assigned counsel did not allow the trial court to revert to the prior standby counsel arrangement before any new disruptive behavior had occurred. To the disappointment of many, the appeals chamber did not back the trial chamber even against this record of continued obstructions and defiance of a specific warning that counsel would be imposed. The appeals chamber said its prior decision was not "clear" on the issue of standby counsel and the trial court had erred in interpreting it to allow reversion to the original regime before any new misconduct had occurred. The appeals chamber also noted that the standby counsel was the same person previously appointed as assigned counsel and a person Seselj would not acknowledge or work with in any capacity. It said Seselj could go back to representing himself until he misbehaved again, after being given a new specific warning and a hearing after the misbehavior. And if standby or any kind of counsel was subsequently appointed for cause, Seselj would be allowed to pick the one he wanted. In addition, the appeals chamber granted a recess of proceedings to allow Seselj to

recuperate fully from his hunger strike so he could adequately represent himself.[122] The decision was widely criticized, with many arguing that it "should not be seen as good appellate law."[123] The conditions of the standby counsel had actually been very conciliatory to Seselj: the counsel could only offer advice and suggestions to Seselj, address the court only on Seselj's or the court's request, be present in the courtroom, and examine witnesses only on request of court if the defendant was disruptive.

With a new judge in charge and representing himself fully, Seselj promptly moved to obtain payment for his self-selected legal advisory team. He would not, however, fulfill the requirements of the indigency assessment. Yet he demanded $6.3 million for past expenses of his legal advisors, arguing that his legal assistants should be paid as regularly assigned lead counsel. The registry objected, arguing that fees for experts or investigators to aid a self-represented defendant might be legitimate, but fees for handpicked legal assistants were not. The new pretrial judge sided with Seselj, writing an expansive opinion to the effect that the right to self-represent oneself cannot be controlled by financial restrictions; in detention the self-represented defendant needs legal assistance to search for witnesses and evidence. Although defendants should not normally be paid for drafting submissions (that is what self-representation is all about), the judge remarked that the latest submissions by Seselj were "more concise, better organized and reasoned" and showed the hand of legally trained assistants who could be paid for that work. Seselj was entitled to pay for "associates." To obtain funding for his defense, Seselj had to designate one or more associates who met the qualification requirements for counsel assigned by the registry. To date, Seselj has not complied to the registrar's satisfaction with the indigence assessment and the request for funding is before the court with Seselj threatening not to present a defense at all if he does not get his requested funding.[124]

In the meantime, the prosecutor filed a new motion to impose assigned counsel on Seselj as a result of new asserted breaches of confidentiality with reference to a protected witness and the use of his team members to intimidate and "harm" prospective prosecution witnesses. In a separate proceeding, Seselj was found in contempt of court for the earlier handling of confidential information. But the trial continued with Seselj representing himself while the motion to reimpose counsel was being decided.

Recently, however, the trial has been suspended because of the danger to the integrity of the proceeding due to threats to prosecution witnesses. Like Milosevic, Seselj had obtained a relaxed trial schedule of four hours a day, three days a week; it was calculated his defense will take more than a year with 50 percent of the time to be allotted to his own testimony. The *Seselj* appeals chamber rulings, according to one commentator, "call[] into question the very idea of international criminal justice as an orderly, rational, functional, legal system."[125] The ICTY rulings restoring his self-representation were "procedurally arbitrary, intellectually unconvincing, and vulnerable to improper political

considerations."[126] Tribunal officials predict future trial courts will likely think long and hard before imposing counsel against a defendant's will.[127]

The *Krajisnik* case supplies a third example of an appellate ruling that recognizes self-representation even beyond the boundaries of the national precedents the judges originally relied on to establish the right. The appeals chamber confirmed the registry's decision holding that an indigent accused who elects to represent himself is not entitled to have legal assistance paid for by the tribunal pursuant to Article 24(4)(d), which provides a right to have legal assistance assigned if the defendant cannot pay. The appeals chamber further confirmed that the term "facilities" in Article 21(4)(b) of the statute guaranteeing a defendant adequate time and facilities to mount his defense does not encompass legal assistance. The appeals chamber, however, accepted that limited funding has to be provided for legal associates outside the tribunal's legal aid scheme "to the extent that the registry requires or encourages indigent self-presenting accused to coordinate their defences through designated legal associates."[128]

Not unexpectedly, after being granted the right, Krajisnik then sought financing for his self-representation as well as a right to receive all filings in his own Balkan language, demands agreed to by the ICTY registry (translation of the judgment by the registry into Serbian alone took 10 months). He sought but was refused funding for legal assistance at the same rates as if he had assigned counsel. Krajisnik, however, does get funding for three advisers paid at a lower rate who also have privileged access to confidential material. Krajisnik has recently asked for and been granted the right to retain special counsel to argue specific issues on appeal. He subsequently retained private counsel at his own expense to argue a single issue—joint criminal enterprise—in the appeal.[129]

There can be little doubt that the appeals chamber decisions have encouraged self-representation by future senior military and civilian leaders on trial. The decisions have been perceived by many as giving way to defendants' "blackmail" consisting of threats of hunger strikes and boycotts, and in doing so diminishing respect for the trial courts, which the appellate chamber itself says deserve substantial deference in dealing with the day-to-day problems of these complex and lengthy trials and are in the best position to appraise **the defendants' motives and good faith as well as the effect of their disruption on the trial and witnesses. The appeal chamber has also been criticized in letting adherence to an extreme and absolutist interpretation of the right to self-representation not recognized in customary international law, trump the more holistic goal of fair and expeditious trials.**[130] No other tribunal, national or international, appears to have gone so far in upholding the right of self-representation under circumstances that make it a formidable obstacle to an orderly trial.[131] According to Boas, "a disturbing picture begins to emerge of an appellate jurisdiction overly zealous in its interference with the trial court's conduct of the proceedings, yet poorly equipped to do so."[132] There

is a wide consensus that the appeals chamber should only interfere with the trial court's decision about imposing counsel when there has been a clear error. Boas argues that poor appellate decisions like the current ones help to create a perception that there is no line between legal and political process. He proposed one appellate court panel for all international tribunals comprised of "high quality, independent" judges, but that is not likely to happen.[133]

Self-represented defendants, in the meantime, should be fastidiously warned of the specific consequences of disruptive behavior before and during the trial, but when those consequences ensue, the trial court should be afforded deference in imposing counsel unless it is clearly wrong. Standby counsel are automatically appointed in American terrorist trials featuring self-represented defendants. Indeed, the original conditions attached to the appointment of standby counsel in the *Seselj* case seem eminently reasonable. The enormous costs—time, personnel, money, prestige of the court—in permitting endless months of vituperative outbursts and even witness intimidation to go on before definitive action can be taken, militate toward a reconsideration of the ICTY's jurisprudence in this thematic area by future international courts.

V. Media Control

There is widespread agreement that the disruptive leader seeks above all exposure in the media for his courtroom performances. And thus far the media seem inclined to cooperate. The media's focus in these trials has been predominantly on the accused and his antics rather than on the evidence of his crimes or on victims' testimony. The televised transmittal of leadership trials has undoubtedly encouraged the defendants' performances; if the TV were shut down, almost certainly they would subside. Back in the time of the Chicago 7 trial, Dorsen and Friedman commented, "[o]ne intuitively suspects that if trials got no publicity, courtroom disruption would be engaged in only by the incompetent and the insane."[134]

Nobody suggests the press be barred from the trials, but many do suggest they could exercise some restraint. For instance, in 1944, the *Washington Post* stopped covering the Nazi Party trials during the vitriolic rants of some of the defendants, on the ground that the rants were not "newsworthy."[135] In contrast, during the *Hussein* trial, the 34 cameras in the courtroom focused almost exclusively on the defendants' "harangues and threats" rather than the judges' responses to them. Such news coverage can assuredly be misleading to the public. In the few instances where Saddam Hussein refused to obey the judges' admonitions to sit down, the cameras followed the ensuing arguments closely; they did not of course make note of the many more times when he obeyed the judge. When Hussein boycotted the trial, the press did not even cover the courtroom events that went on in his absence.[136] Charles Krauthammer wrote that, like Eichmann, Hussein should be kept in a glass box where his ranting could be shut off by the judges: "The lead story of every court session has been his demeanor, his defiance,

his imperiousness. . . . [T]he evidence brought against him by his hapless victims—testimony mangled in translation and electronic voice alteration—made the back pages at best."[137]

American advisers had strongly but unsuccessfully urged the Iraqi tribunal to appoint an official spokesperson for the court who could explain the meaning of trial events and rulings to the press, particularly the out-of-country press who would not understand the language in which the trial was being conducted. The court's response fell wide of the mark—they named one of the judges who obviously was impeded from going far outside the record. The court did finally set up a website, but it was too primitive and limited to official material to perform much of an educational function.[138] As a result, the press coverage tended to treat the trial like a "sports competition"[139]—who scored the points on whom that day—rather than the historic landmark it represented nationally and internationally for a national figure who had dominated the Middle Eastern political scene for decades and was now being tried for murdering thousands of his country's citizens. Milosevic similarly planned his own media strategy, releasing documents to the press from his detention unit and patently courting their attention in the courtroom. And the press seemed all too willing to play along.

These trials further demonstrate that an outreach strategy needs to be planned by the court with the press in mind before the trial begins. The court cannot count on the televised trial to make the national and international audience understand what is going on in year-long complex trials. Legal experts need to be conscripted to be available to the press to discuss the fine legal points and significance of testimony and of procedural rulings. (I remember from my own experience that when even a relatively short 100-page judgment was handed down, the reporters would run to NGO representatives in the courthouse asking, "What does this mean?" "Where does it say that . . . ?") For these trials, the court needs to have auxiliary help in insuring that the basic message in the trials gets through and that at least some thoughtful segment of the press will treat them as the historic events they are, not as "gotcha" games where antics, shouting, shocking displays, and animated animosity are the only stories worth covering. Such efforts, of course, must begin long before trial, certainly by the time the indictment or charges come down. Obviously, discretion is needed so as not to prejudice the defendant by talking about the actual evidence beforehand, but the theories of the defense and prosecution, summaries of witness testimony, even the significance of the court's interim rulings can be discussed. There ought to be someone or some place reporters can go to obtain answers to legitimate questions during the trial so that their stories will be accurate and focused on the important aspects of the trial. More balanced coverage could substantially affect the behavior of publicity-seeking defendants.

In the *Moussaoui* terrorist trial, the presiding judge together with the Administrative Office of the Courts set up an elaborate outreach program to inform press and

public about the ongoing trial.[140] It was decided that a nonjudicial press officer was essential and an experienced former editor of the American Bar Association's main publication was hired for that job to answer inquiries of the press. He also assisted the administrative office in the establishment in several locations across the United States of simulated courtrooms presided over by retired judicial officers or experienced courtroom participants to which victims' families and survivors of 9/11 could come, watch the trial, and ask questions. A special website was set up on which all the nonclassified pleadings and record material as well as updated information on the trial was posted.

VI. Systemic Problems in Self-Representation

The immense practical problems of running a trial with a self-represented defendant transcend how to deal with his misbehavior, and while they may not alone justify withholding the right, they deserve some consideration in weighing the balance between this one right of the defendant and the rights of the other trial participants to a fair and orderly trial. In counseled trials, defense counsel is generally the foreman of a team; he assures that proper papers are filed, deadlines and regulations met, negotiations at pretrial conferences conducted, evidence culled, investigators hired and supervised, and witnesses interviewed and prepared for trial. A defendant in detention is at a severe disadvantage in locating and interviewing witnesses and other evidence in the field and in collecting documents, answering prosecution and judicial inquiries, and conforming to disclosure rules; in reading and evaluating hundreds of thousands of pages of documents and transcripts, he can be easily overwhelmed. Del Ponte makes a strong case that leaders who are allowed to self-represent import huge time delays into the trial:

> Milosevic's 'defense' consumed inordinate amounts of courtroom time, not only because it enabled him to present a stream of irrelevant political and historical questions and arguments, but also because the prosecution found itself with no interlocutor, no objective counsel with whom to stipulate undisputed facts or sort out technical questions. This left it to the trial judges to handle mundane issues, including the minutiae of Milosevic's treatment in the detention unit, in open court rather than outside. The Trial Chamber's decision to appoint three 'friends of the court' or *amici curiae*, attorneys to provide a defense of sorts did not help matters. This was a bastardization of the customary practice that allows *amici curiae* to advise a court.[141]

Courts recognize the tension and have labored to render help and accommodations so that the basic right of a defendant to adequate time and facilities to prepare his defense is honored.

In Milosevic's case, the trial court made "extraordinary pretrial arrangements" by way of detailed instructions to the defendant on necessary filings and discovery disclosures.[142] The registry kept detailed time logs made available to the defendant so that he could keep track of his allotted trial time; the court itself engaged in frequent warnings that time was running out, pointing out when questions were irrelevant or cumulative, urging him to submit written instead of oral testimony. As aforementioned, *amici* were appointed to insure identification of all relevant issues should the defendant miss some; they were allowed to make submissions in pretrial motions, examine witnesses as appropriate, inform the court of any mitigating exculpatory evidence, and engage in any other activity deemed necessary for a fair trial. In fact, the *amici* did submit memoranda on the tricky issues of command responsibility under Article 7(1) of the ICTY Charter and on joint criminal enterprise. Additionally, Milosevic was allowed to have privileged communications with his self-appointed "legal associates"; in toto he had a legal team of 20 or more lawyers and investigators.[143]

Hans Holthius, the former ICTY registrar, in a recent speech, spoke of the problems of accommodating self-represented or *pro se* defendants—as of June 2009, two in pretrial, one in trial, and one on appeal. A recently established *pro se* office with coordinated services and resources provided to the *pro se* defendants will "streamline" and communicate requests submitted by the accused to the appropriate sections of the tribunal; provide guidance on procedural requirements for filing, limiting itself, however, to a "facilitating role, providing no legal or strategic advice to the accused"; and ensure that translation facilities are made available for the "key documents . . . necessary for the accused to understand the nature and cause of the charges against him."[144]

All of this, of course, puts a heavy burden on court resources and subtracts those resources from availability to other trials. Moreover, according to registry officials, translation requests peculiar to self-represented defendants are the most formidable for the court. Regular counsel are required to be facile in one of the two official languages of the court, English and French, in which all court documents are filed and judgments issued. Self-represented accused who are not themselves fluent in English or French, however, are entitled to receive those documents translated into their native language, usually one of several Balkan dialects, an effort requiring enormous expenditure of resources and time. It took 10 months to translate the trial court judgment in one case, and most self-representation cases engender significant translation delays in case-processing time. A welcome exception is the recent decision by the *Karadzic* trial chamber that the defendant understands English well enough not to require documents to which he is entitled under discovery Rule 66(A) to be translated into his native language.[145] Self-represented

accused who do not understand the official languages must also be assigned a language assistant to help translate other case materials. The accused are provided storage facilities and basic computer technology in detention to prepare their case. This has meant extra duties for security personnel in the detention unit as the accused receives frequent visits from his "team" and papers flowing in and out of the unit have to be monitored. Privileged visiting rooms, phones, faxes, and storage space must be provided and special hours of access thereto by his team have to be arranged.

One of the high-level officials at the registry describes self-representation as a "nightmare" for the system. He explains that when the "right" was recognized in the *Milosevic* and *Sesilj* cases, there was no reasonable fit between the special circumstances of self-representation and the way the various tribunal systems operate for counseled defendants. While a number of adjustments have since been made to some parts of the system to address the particular funding demands of *pro se* defendants and facilities made available to prepare and present their cases, the system is still deficient in many ways. The scope of the translation requirement is a case in point: Does the right to receive evidence in one's own tongue include transcripts from other trials (which were originally required to be only in English or French) when they are reintroduced into his trial? Or is an audio recording of the witness testimony together with a transcript in English or French sufficient to meet that requirement? The answer has varied from chamber to chamber. In too many cases, the delays engendered by momentous translation demands are still "enormous."[146]

Confidentiality breaches are another potentially higher risk in *pro se* trials. The defendant rather than his counsel is provided with the identity and statements of prosecution witnesses, often under protective conditions. But there have been significant leaks of confidential materials in the *pro se* cases; witnesses in other *pro se* trials have also shown reluctance to appear and be examined by the defendant, and, in international trials, there is no effective compulsory process to make them come. The registry requires "undertakings" from approved legal "associates" of a self-represented defendant to protect confidentiality but admits there is really no way to enforce them. In situations like the *Seselj* case, the accused may still be active politically in their regions, and the danger of their using protected evidence to further political aims is a real one.[147]

The tactics of these self-represented accused seems clear: to amass a legal backup team which will support their out-front efforts in the courtroom to the maximum degree possible. That team will be selected and controlled by the leader himself, not appointed by the court as an *amicus* or standby counsel might. The critical question then becomes—how much will the court pay to different members of his team?

The registry's formal remuneration scheme allows funding for some legal assistance but not under the normal Legal Aid Fund reserved for assigned counsel. Qualifications for funding the legal associates are similar to those for assistants to assigned

counsel. Up to four persons may normally be paid—a legal associate, a case manager, an investigator, and a language assistant. There must be a case manager among them to maintain a defense filing system, recording and classifying disclosure material, submitting documents for translation, scanning and uploading documents to the e-court system. The *pro se* accused may also receive payments for a defense expert(s) up to a maximum number of hours. To be paid, legal associates must meet certain professional requirements and not have been guilty of a criminal act, involved in a relevant disciplinary proceeding, have engaged in unethical conduct, or provided false or incomplete information to the registry. They must have written and oral proficiency in one of the two official languages of the court, and undertake to comply with the Code of Professional Conduct for counsel appearing before the tribunal. The registry will provide office space for the team, which is not allowed inside the courtroom except with court permission.[148]

In the end, however, even with the good faith attempts to provide aides and facilities to the self-represented defendant, there remains the question raised by ICTY and American judges: whether in monumentally big, long, and complex trials, there can even be a fair shake to either the defendant or the rest of the participants and the community at large when no trained counsel is representing the defendant in the courtroom. (Charles Taylor, the deposed Liberian president, on trial before the Special Court for Sierra Leone, boycotted his first scheduled appearance on the ground that the trial was a "charade" because of the purported sparse resources granted him in his self-representation.[149]) The defendant and the rest of the participants may well be pursuing different aims in the trial, but the raison d'être of a criminal trial, national or international, is to provide an orderly and rule-based forum in which evidence can be evaluated on the ultimate quest for justice. **There is reason to credit veteran judges' views that some cases, such as leader ones discussed here, are just too "big" to make the process credible if the defense spokesperson in the courtroom is not familiar with the rules, or able outside the courtroom to lead the investigation. The adjustments required on the rest of the system—massive translation capacity, expensive backroom legal assistants, hybrid devices like standby counsel, or assigned counsel confined to more restricted duties than his professional obligations dictate—result in delays and inefficiencies not just in routines and practices but in the overall goal of allowing the judges to make the best judgment on the best evidence available.** It may well be that a different, stricter approach is needed both as to when self-representation will be denied initially in the interests of a fair and efficient trial for everyone—witness, victim, defendant—and later on when the progress of the trial shows that either the defendant's own behavior or health or the sheer complexity of the trial itself make it unduly difficult to move the trial along in any orderly way.

VII. Lessons for Upcoming Leader Trials

Radovan Karadzic, one of the top 3 among 161 indictees of the ICTY, a "principal suspect[] of the most serious crimes committed in the former Yugoslavia since 1991,"[150] was finally apprehended in 2008 after 13 years on the run and is scheduled to go to trial in 2009. ICTY supporters have every interest in conducting "a perfect trial" to offset the disappointing experience with the *Milosevic* trial. It is a propitious time to take stock of past mistakes and make plans to avoid them.

There are good signs and bad. For one thing, Karadzic's health is apparently good, so at least theoretically the trial can proceed without frequent adjournments for health crises and, it is hoped, on a full schedule rather than a few hours a few days a week. Thus the danger of a lengthy trial stretching into years may be avoided. On the other hand, lawyers who practice at the ICTY point out that the *Karadzic* trial, like the *Milosevic* trial, involves a combination of Srebrenica, Sarajevo, and dozens of municipalities and that the primary challenge for the prosecution will be how to get the size and the complexity of the evidence into the record in whatever time is allotted to them. In its exit strategy, the court is anticipated to be more parsimonious than in earlier trials.[151]

As of June 2009, it appears Karadzic will be tried alone without codefendants, although Radko Mladic, the chief of the Bosnian Serb Army and the most notorious indictee still at large, may be a codefendant if arrested prior to or early in the trial, since he is the alleged coperpetrator with Karadzic of the four criminal enterprises with which Karadzic is charged in his current indictment. A decade ago the two were indicted as

codefendants and Rule 61 hearings were held at the ICTY to publish all the prosecutor's evidence against them in order to obtain international arrest warrants. Mladic would naturally have to be caught in time, but if he were, there might be pressure for a joint trial given the exit phase that the ICTY is now on and in order to save resources through one trial instead of two. As we have seen, however, multiple defendants can heighten the risk of disorderly trials, and though Karadzic's temperament is only beginning to be revealed, plentiful evidence in prior ICTY proceedings suggests Mladic is an explosive character, given to tirades and outbursts.[152] (There are, however, rumors he currently suffers from disabling ailments.)

In his first appearances in court, Karadzic has attacked the tribunal as a "bastardized judicial system . . . created to blame the Serbs," before which he refused to plead.[153] He has also declared an intent to represent himself and has raised issues of alleged immunity from prosecution based on supposed agreements with Richard Holbrooke sanctioned by the UN Security Council that were his quid pro quo for agreeing to stay out of future Bosnian politics.[154] There are other signals of a potentially volatile and politicized trial. In a status conference, Karadzic said he will contest everything except "the weather" and refused to agree to stipulations of "uncontested facts." So far he has "unleashed an avalanche of nearly 100 pretrial motions and briefs," indicating that unlike Milosevic he intends to engage in the legal arguments intensively.[155] **With Karadzic announcing he will represent himself, the presiding pretrial judge has taken care to warn him of the problems with self-representation. But Karadzic has not been dissuaded.** Karadzic also requested expensive funding for his "defence team"; the registry allowed only the limited amount of funding for legal assistance and support staff in line with its remuneration scheme for self-represented defendants. Karadzic, however, complained the rates were too low for the "high level" legal assistance he requires; the trial court has refused to alter that decision. The appeals chamber cleared the air by emphatically agreeing with the trial court that where an accused lacks the requisite legal know-how to allow for a fair and expeditious trial, the solution is not to fund expensive assistants above their normal pay rate but rather to curtail the defendant's right to self-representation.[156]

There have already been changes made in the original pretrial roster of judges, including the withdrawal of one judge who had presided over a prior trial involving findings of fact implicating Karadzic in a criminal enterprise that overlapped with the current charges.[157] One note of encouragement is the recent third amended indictment, which streamlines and shortens it from earlier versions.[158] According to the prosecutors' explanation in their motion to amend, the proposed changes would add many more particularized facts to the allegations about the defendant's individual responsibility under the modes of liability, command responsibility, and criminal enterprise, give him more precise notice of the charges, and reduce the crime sites involving municipalities from

41 to 27. It would take account of developing jurisprudence at the ICTY as to the details which must be given about a defendant's alleged involvement in a criminal enterprise, and charges four separate criminal enterprises with different objectives rather than one overall enterprise (as in the *Milosevic* indictment), and with different coperpetrators (except for Mladic) and different "foreseeable consequences." More details are given as to the manner in which he is alleged to have exercised command responsibility and how he knew of subordinates' actions. Charges of grave breaches of the Geneva Conventions requiring as they do proof of the international complexion of the conflict have been dropped. An extensive addendum is attached identifying killings charged and their locations, as well as detention camps involved in incidents referred to.

It seems as though the *Karadzic* prosecutors have taken note of Boas's complaints about the *Milosevic* indictment. The revised version is considerably shorter and "more manageable" than its *Milosevic* predecessor.[159] On the other hand, it adds two new counts and new factual assertions under four others. The prosecutors plead, however, that in the case of 13 new killings alleged, all have been found to have occurred in prior judgments and so can be proved by adjudicated facts. A reading of the new indictment does support the prosecutors' claim that there are more facts and details given, but it also convinces that this will almost certainly be a "big" case involving as it does the genocide at Srebrenica, the siege of Sarajevo, the atrocities committed in taking over 21 municipalities, and the hostage-taking of UN military observers and peacekeepers.

There are some tough legal issues emanating from the indictment as well. The indictment charges, *inter alia*, genocide as a foreseeable consequence of a criminal enterprise despite that crime's definitional requirement of a specific intent to destroy, and apparently relies on the destruction of group leaders and "substantial numbers" of the group to show genocide in the case of the municipalities taken over by the Serbs, even though a similar theory did not succeed in the International Court of Justice case alleging genocide throughout the Bosnian region. Lawyers at the ICTY involved point out that as the number of these major leader trials grows, the defense counsel become more sophisticated in their pleadings and arguments, taking heed of the court's still developing jurisprudence. They learn from the mistakes of their predecessors.

And what one commentator calls the "dark cloud" of the "unworthy legal precedent"[160] of the *Seselj* case hangs over new self-representation cases. Though some hope that decisions in *Seselj* were an aberration attributable to the timing so soon after Milosevic's death in detention, questions remain: If the trial should break down, will the trial court feel free to impose counsel—even standby counsel—to assure it moves ahead? **Will there be boycotts and hunger strikes by the defendant to pressure restoration of the right, if the trial court does insist on proceeding with counsel? Will the *Karadzic* trial court, heeding the criticism that the *Milosevic* court was too lenient with the defendant's antics and not willing to enforce its rules and orders, take a firmer stand?** According to

one former ICTY prosecutor, "It comes down to the question of how to overturn the 8 December Decision [Seselj] and make it obsolete"; "The Karadzic case is an excellent opportunity for the Prosecutor to restore the reasonable interpretation to the right to self-representation and prevent serious abuse to the right."[161] **Not just this seminal case at the ICTY but the entire legacy of the court may be at stake.**

With regard to future leader trials in international courts, the underlying problem of inexperienced and unknowledgeable judges is repeatedly raised. How can a judge who has no background in the history of an international or an intranational conflict decide authoritatively whether something is relevant? The relative ignorance of judges from afar as to the centuries-old history of the particular conflict they are hearing about is apt to diminish their ability to rule confidently on the boundaries of what the leader wants to declaim about. It is like having foreign judges rule on American civil rights cases which involve U.S. racial policies going back to the Civil War. Much of the in-trial haggling, it is suggested, might be avoided if the judges are exposed before trial to the background and history of the conflict and the players (some read up on the history of the region on their own, but many do not). But this, of course, runs counter to the notion of the "impartial" judge who comes to the trial with an open and uninformed mind. When the ad hoc courts were established, the Anglo-Saxon adversarial mode of trial was virtually taken for granted but in this respect as in many others it may not be particularly suitable for massive trials of the sort discussed here. There should be new rules and perhaps even a new mode of proof that build on the experience of the past few decades both as to the orientation of judges to the historical background of these cases and as to the method of authenticating that background as well as crime sites. As it is, prosecutors say they do not know from case to case and from chamber to chamber whether they can count on adjudicated facts from prior cases to prove part of their current case.[162]

VIII. Conclusion and Recommendations for Future Trials

Experience so far has shown that trials involving leaders determined to make their case to a worldwide audience will inevitably be hard to control. The personality and experience of the judge in the final analysis may have more to do with producing a reasonably fair and efficient trial than any set of prescribed best practices. A cool but firm temperament that refuses to be riled by the antics of volatile defendants (or their counsel) is most likely to carry the day. These trials in the end often turn into a contest of wills between the judges and the defendant, and wily defendants used to political and even military conflicts can detect the scent of an uneasy judge, lacking in confidence in controlling the courtroom. Nonetheless, experience also provides a number of critical points in a prosecution and trial where outbursts may be anticipated or even provoked and which may be avoided or at least better controlled by planning ahead or by rapid and steady judicial responses. Leaders' increasing demands to represent themselves are a primary area of contention in this regard. There is as yet no guarantee that any or all of the control techniques designed will work in a particular trial, given the idiosyncrasies of these leaders and their abilities to adapt to changing challenges. These leader trials, however, are inevitably destined to be the crown jewels or the fatal flaws in the international criminal court system, and it is necessary to the intelligent evolution of that system that we glean from mistakes and successes of the past how to run them

better. This recount of past experiences and the following summary of recommendations emanating from that experience are attempts to begin that process.

The Scope of the Charges

- **Limiting Charges:** Prosecutors and judges should seriously consider whether, other things being equal, it is preferable to limit charges against high-profile defendants in complex cases to a reasonably small number that can be proven by direct evidence and that will not result in an excessively long trial or invite repeated debates over the relevance of evidence to those charges.

- **Framing Charges:** Indictments should use historical and ideological references with care and parsimony to avoid politicizing the trial and justifying defendants forays into history and national politics to make their case. Theories of command responsibility and criminal enterprise liability should attempt to focus on specific examples of crimes that can be linked to the leaders with as few intermediary layers of officialdom as possible. The indictments should be detailed as to the theory of liability and the facts of examples chosen.

- **Trial Judges:** Trial judges should be given deference when they decide that a trial is unmanageable because of the scope of the charges and that severance of some charges is necessary to complete it in a reasonable time.

- **Joinder of Defendants:** When other considerations do not outweigh, the number of defendants in a leader trial should be kept as low as possible to avoid higher risks of disorderly behavior stemming from defendants' and multiple counsels' support and encouragement of each other.

Judicial Control of the Proceedings

- **Judges' Conduct:** A judge's experience and personality are key to managing high-profile trials. Assignment to preside over leader cases should be based on experience and temperament; workshops on courtroom management, including managing self-represented defendants, should be available. Judges who have successfully conducted leader trials should make their expertise available to new judges appointed to these trials. Managing prosecutors and defense counsel will require fairness and a lack of antagonism; the appearance of independence and

freedom from political influences is paramount. Critical motions on jurisdiction, severance, and admissibility should be dealt with before trial to cut down on the number of contentious issues that defendants can plausibly raise during trial.

- **Setting a Framework:** Setting a framework for a fair and efficient trial is the first line of defense to avoid disruptive behavior. This includes refining trial preparation and setting clear guidelines for time limits for both sides as well as setting limits on crimes and crime sites that will be offered into evidence. This can be done without impeding prosecutorial discretion. For example, a judge might tell a prosecutor to reduce counts but should generally not specify which particular counts to be dropped. Crime base issues can often be dealt with through summaries of undisputed evidence, or a single judge may be designated to hear and prepare findings on this evidence, or a few representative examples involving a limited number of witnesses may be selected. Establishing a clear and consistent method for establishing and utilizing adjudicated facts can assist in the reduction of trial time.

- **Continuity and Ground Rules:** Where there is no statutory obstacle, continuity of judges throughout the pretrial and trial process is desirable for ensuring consistency in agreements reached between all parties as well as avoiding new restrictions and unclear expectations. Ground rules should be clear and include expectations of the responsibilities of counsel, submissions deadlines, and sanctions for violations.

- **Judicial Sanctions:** A series of options—temporary removal of defendants, contempt, reduced privileges, physical restraint as a last resort—can be imposed on recalcitrant defendants, but each has its own advantages and disadvantages, particularly when used often. Court and professional rules of conduct as well as disciplinary mechanisms and contempt should be used to sanction misbehavior of counsel, including removal from the list of approved counsel. Sanctions should be context-specific and not automatic; judicial responses should escalate if bad behavior continues.

Self-Representation

- **Warnings:** Defendants should be warned in advance, both before and during trial, of the specific consequences of disruptive behavior. The court should then follow through with imposing the warned-of sanction if disruption occurs. Appellate

chambers should give a high level of discretion to trial judges in their decisions on sanctions.

- **Microphone:** Judges should be able to cut off the microphone of defendants (or counsel) when necessary, particularly when a defendant strays outside the issues, bullies a witness, or violates a protection order.

- **Clarifying Standards for Imposition and Rescission of Self-Representation:** The standards for granting and denying self-representation should be reevaluated so as to reflect the creditable arguments that some cases are simply too complex and potentially too unmanageable to allow the defendant's choice to represent himself to be absolute. The interests of witnesses and of the court and the public in a fair and manageable trial are worthy of consideration. A trial court's decisions as to when the right should be denied deserve reasonable deference from the appellate court. Sufficient time and reasonable resources, including paid assistants, should be furnished a defendant who is granted the right, but he should not be awarded the same level of paid legal assistance as if he had regular assigned counsel. Trial judges should be accorded deference by appellate courts in deciding if standby counsel should be appointed to help the defendant on request or auxiliary counsel appointed to represent the interests of the court in obtaining a full view of the issues in the trial. When a defendant abuses the privilege by substantial and persistent misconduct or where it becomes evident he cannot represent himself adequately enough to ensure a fair trial, the trial court should impose counsel, and its decision should be accorded significant deference by the appellate chamber.

Media Control

- **Media:** The court should adopt in advance of trial a media strategy designed to acquaint the press with the critical issues of the trial and their legal significance. On a day-to-day basis there should be a court spokesperson to explain the import of the proceedings or particular testimony and to deflect media preoccupation with the antic behavior or outbursts of the defendant.

Notes

Patricia M. Wald was the chief judge for the U.S. Court of Appeals for the D.C. Circuit. She served as a judge on the International Criminal Tribunal for the former Yugoslavia (1999–2001).

The author wishes to acknowledge her substantial reliance on three books on this subject: Norman Dorsen and Leon Friedman, *Disorder in the Court* (Report of the Association of the Bar of the City of New York (1973)); Gideon Boas, *The Milosevic Trial: Lessons for the Conduct of Complex International Criminal Proceedings* (2007); and Michael A. Newton and Michael P. Scharf, *Enemy of the State: The Trial and Execution of Saddam Hussein* (2008). The author has endeavored to identify these sources as often as necessary to indicate that reliance without overburdening the manuscript with notes. Some interviewees have requested that their identities be withheld and are indicated by letter. The author also wishes to thank Hiba Hafiz for her assistance in collecting and checking materials and Kelly Askin and David Tolbert for helpful critiquing of drafts.

The status of case decisions are updated as of May 2009.

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1. Statute of the International Criminal Tribunal for the former Yugoslavia, May 25, 1993, 32 I.L.M. 1192 (1993); Statute of the International Criminal Tribunal for Rwanda, November 8, 1994, 33 I.L.M. 1602 (1994); Statute of the Special Court for Sierra Leone, annexed to the Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of August 14, 2000, 40 I.L.M. 247 (2001); Law on the Establishment of Extraordinary

Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, promulgated on August 10, 2001 (NS/RKM/0801/12) as amended October 27, 2004; Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999 (1998).

2. As discussed *infra*, the independence and conduct of the Iraqi tribunal in the *Hussein* trial has been widely criticized. It is included in this report because there may be relevant lessons to be learned from it.

3. Ellen Lutz and Caitlin Reiger (eds.), *Prosecuting Heads of State*, 12 (Cambridge University Press, 2009). Of the 67 defendants, half were charged with serious human rights crimes, the other half with corruption offenses. Of the 67 defendants, 32 were from Latin America, 16 from Africa, 10 from Europe, 7 from Asia, and 2 from the Middle East. Id.

4. Interview with Judge A.

5. Compare Gideon Boas, *The Milosevic Trial: Lessons for the Conduct of Complex International Criminal Proceedings*, 4 (Cambridge University Press, 2007), and Daryl A. Mundis, "The Milosevic Trial," 102 *American Journal of International Law* 691, 693 (2008) (reviewing Boas).

6. Boas, supra note 5, at 13.

7. See, e.g., Charles Krauthammer, "Editorial, Man for a Glass Booth," *Washington Post*, December 9, 2005, at A31; compare Norman Dorsen and Leon Friedman, *Disorder in the Court, Report of the Association of the Bar of the City of New York*, 1–5 (Pantheon Books, 1973).

8. The sources of the historical material in the following paragraphs are in Dorsen and Friedman, supra note 7, at 24–76.

9. Id. at 28.

10. Id. at 50 et seq.

11. See Gerhard Werle, Principles of International Criminal Law (2005) 138 et seq.

12. Boas, supra note 5, at 9–10.

13. Mundis, supra note 5, at 693.

14. Boas, supra note 5, at xiii.

15. Id. at 156. Mundis, supra note 5, at 692.

16. Boas, supra note 5, at xii; Mundis, supra note 5, at 692.

17. See, e.g., Dorsen and Friedman, supra note 7, at 48–49 (judge dies of heart attack mid-trial in Nazi sedition case; judge complains of impairment to health caused by defense in communist trial); see also Monica A. Miller et al., "How Emotion Affects the Trial Process," 92 *Judicature* 56, 63 (September–October 2008) ("stress resulting from exposure to emotions—arousing evidence also affects judges' . . . decision-making capabilities, with obvious implications for the fate of plaintiffs and defendants").

18. The main source for the following discussion of the *Milosevic* indictment is Boas, supra note 5, at 79–128.

19. Id. at 129.

20. Id. at 118.

21. Id. at 121.

22. Id. at 166–69.

23. *Prosecutor v. Bagosora*, ICTR-98-41-T, Oral Summary [of the Judgment], December 18, 2008, at 1.

24. Diane F. Orentlicher, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia*, 76 (Open Society Justice Initiative, 2008) (citing Serbian interlocutors).

25. Id. at 77.

26. Id. at 74 (quoting Srdjan Bogosavljevic).

27. Id. at 79.

28. The discussion on attenuated liability and other defects in the indictment in the following paragraphs is drawn from Boas, supra note 5, ch. 2.

29. Mundis, supra note 5, at 693.

30. Dorsen and Friedman, supra note 7, at 56–64.

31. Michael A. Newton and Michael P. Scharf, *Enemy of the State: The Trial and Execution of Saddam Hussein*, 106 (St. Martin's Press, 2008).

32. See Id., ch. 6.

33. Dorsen and Friedman, supra note 7, at 183.

34. Id. at 184–191.

35. Id. at 85.

36. Interview with Judge A.

37. Id.

38. Interviews with current and former ICTY personnel.

39. ICC Statute, supra note 1, art. 39.

40. Interview with Robert Timothy Reagan, Federal Judicial Center; Robert Timothy Reagan, "Terrorism-Related Cases: Special Case-Management Challenges, Case Studies," *Federal Judicial Center* (2008).

41. *United States v. Dellinger*, 472 F.2d 340, 386 (7th Cir. 1972).

42. *United States v. Bobby Seale*, 461 F.2d 345, 369 (7th Cir. 1972).

43. *Sacher v. United States*, 343 U.S. 1, 34 (1952).

44. Interview with Judge C.

45. The following accounts are taken from Newton and Scharf, supra note 31, at 103–05.

46. Newton and Scharf, supra note 30, at 116–19; John Gibeaut, "Behind the Scenes with the American Advisers to the Iraq v. Saddam Hussein Court: Rough Justice," 93 *American Bar Association Journal*. 34, 55 (May 2007). The degree to which the American advisers themselves were perceived as an obstacle to the independence of the Iraqi judges may also have been a factor in the perception of the court's independence.

47. ICTY, Rules of Procedure and Evidence, Rule 73 *bis* (2008).

48. Newton and Scharf, supra note 31, at 105.

49. Dorsen and Friedman, supra note 7, at 192.

50. Boas, supra note 5, at 281–83.

51. Compare Mundis, supra note 5, at 693 (accusing Boas of going "too far" in his proposal to allow judges to "sacrifice large parts of the prosecution case").

52. See, e.g., *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-102 of May 15, 2006 (Decision on the final system of disclosure and the establishment of a timetable); ICC-01/04-01/06-1141 of January 30, 2008 (Decision suspending deadline for final disclosure); ICC-01/04-01/06-1633 of January 20, 2009 (Decision on the "Prosecution's Submission pursuant to the Trial Chamber's 'Decision on prosecution's requests to add items to the evidence to be relied on at trial filed on April 21 and May 8, 2008'" and the Prosecution's related application for authorization to add one item to the evidence to be relied on at trial.)

53. Interview with Judge A.

54. Mundis, supra note 5, at 694–5.

55. Id. at 695.

56. Id. at 694.

57. Dorsen and Friedman, supra note 7, at 195.

58. Interview with Judge C.

59. Dorsen and Friedman, supra note 7, at 98–100. See also ICTY Statute, supra note 1, art. 21 and Rome Statute, supra note 1, art. 63.

60. Dorsen and Friedman, supra note 7, at 98–100.

61. Id.; *Illinois v. Allen*, 397 U.S. 337 (1970).

62. *Allen*, 397 U.S. at 343.

63. Id. at 344.

64. Interview with Judge C.

65. All of these techniques are discussed in Dorsen and Friedman, supra note 7, at 90-111.

66. Discussion with Kelly Askin, who observed such trials.

67. Dorsen and Friedman, supra note 7, at 157–65.

68. See, e.g., International Criminal Court, Rules of Procedure and Evidence, UN Doc. PCNICC/2000/1/Add.1, Rules 8 and 20(3) (2000), (Development of a Code of Professional Conduct).

69. Rome Statute, supra note 1, art. 71.

70. Dorsen and Friedman, supra note 7, at 132.

71. Id. at 142–49.

72. Id. at 91, 111–18.

73. Id. at 91 et seq.

74. Lutz and Reiger, supra note 3, at 283; see also Myrna S. Raeder, "Enhancing the Legal Profession's Response to Victims of Child Abuse," 24 *Criminal Justice* 12, 15 (Spring 2009) (*pro se* defendants not allowed to cross-examine child plaintiff); Federal Rules of Evidence, Rule 611.

75. Interview with Judge A.

76. Quoted in Molly Norris, "Trial of Milosevic Holds Lessons for Iraqi Prosecutors," *Washington Post*, October 18, 2005, at A19.

77. Boas, supra note 5, at 131, 199–200.

78. Id. at 144.

79. Id. at 145 ("[I]n areas of self-representation, manipulation of his health, non-compliance with procedural orders and court-room decorum, and in leading evidence of cross-examining on areas irrelevant to the forensic case, Milosevic was able to exploit the Tribunal's hesitation or failure to enforce its orders in such a way that compromised its authority and gave the perception that it was not in control of its own proceedings").

80. Id. at 154, 158–59.

81. Carla Del Ponte, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity*, in collaboration with Chuck Sudetic, 310-311 (Feltrinelli Editore 2008).

82. Newton and Scharf, supra note 31, at 160.

83. Robert F. Worth, "Fed Up, Judge in Hussein Trial Offers to Quit," *New York Times*, January 15, 2006, at 6.

84. Krauthammer, supra note 7, at A31.

85. Marlise Simons, "Hussein's Case Won't Bolster International Human Rights Law, Experts Fear," *New York Times*, December 31, 2006, at 11.

86. Michael Scharf, "Chaos in the Courtroom, Controlling Disruptive Defendants and Contumacious Counsel in War Crimes Trials," 39 *Case Western Reserve Journal of International Law* 155, 157 (2007).

87. Mark S. Ellis, "The Saddam Trial: Challenges to Meeting International Standards of Fairness with Regard to the Defense," 39 *Case Western Reserve Journal of International Law* 171, 184–86 (2006–07).

88. The following textual descriptions of what occurred at the *Hussein* trial are taken from Newton and Scharf, supra note 31, ch. 6.

89. Id. at 91.

90. Id. at 113–14.

91. Id. at 122.

92. Jonathan Finer, "Hussein Claims He Was Abused: Ex-Leader Says U.S. Captors Tortured Him," *Washington Post*, December 22, 2005, at A22; John F. Burns, "Hussein Accuses U.S. Guards of Torture," *New York Times International*, December 22, 2005, at A8.

93. Newton and Scharf, supra note 31, at 141–42, 149.

94. Id. at 152.

95. Id. at 158–59.

96. Id. at 167, 169.

97. Id. at 171.

98. Id. at 173.

99. Id. at 173–75, 192–94, 225.

100. Id. at 228.

101. Id. at 211.

102. Id. at 130, 196.

103. Id. at 212–13; Telford Taylor, *Anatomy of the Nuremberg Trials,* 166 (Little Brown 1993).

104. Mundis, supra note 5, at 694.

105. Interviews with current and former ICTY personnel.

106. Del Ponte, supra note 81, at 140–141.

107. The preceding account is based on Boas, supra note 5, at 205–217.

108. Marlise Simons, "Prison Changes Milosevic, but not His Version of Events," *New York Times,* June 24, 2005, at A3.

109. Del Ponte, supra note 81, at 141.

110. *Faretta v. California*, 422 U.S. 806 (1975).

111. *Prosecutor v. Krajisnik*, Case No. IT-00-39-A, para. 11, Decision on Momcilo Krajisnik's Request to Self-Represent, May 11, 2007.

112. *Prosecutor v. Milosevic*, Case No. IT-02-54-AR73.7, para. 17, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, November 1, 2004.

113. *Krajisnik*, supra note 111, para. 1 (Fundamental Dissenting Opinion of Judge Schomburg, attached to the Decision on Momcilo Krajisnik's Request to Self-Represent).

114. Id. at para. 2.

115. Id. at para. 78.

116. Id. at paras. 18–21.

117. Background interviews with current and former ICTY personnel.

118. Interview with Judge C.

119. Interview with Robert Timothy Reagan.

120. *Prosecutor v. Seselj*, Case No. IT-03-67-PT, paras. 79, 81, Decision on Assignment of Counsel, August 21, 2006.

121. Boas, supra note 5, at 228–36.

122. Id. See also Alexander Zahar, "Legal Aid, Self-Representation, and the Crisis at the Hague Tribunal," 19 *Criminal Law Forum* 241 (2008).

123. Boas, supra note 5, at 236.

124. *Prosecutor v. Seselj*, Case No. IT-03-67-PT, Decision on Financing the Defense of the Accused, July 30, 2007; Request for the Trial Chamber to Secure the Financing of Professor Vojislav Seselj's Defense, Case No. IT-03-67-T, January 15, 2009; Registry Third Submission Pursuant to Rule 33(B) Regarding the Financing of the Accused's Defense, March 16, 2009 (defendant in any case could not seek reimbursement for past expenses not authorized).

125. Zahar, supra note 122, at 261.

126. Id. at 241.

127. Communication with Martin Petrov, Office of the Registrar, ICTY. Krajisnik lost his appeal and received a 20-year prison sentence.

128. *Prosecutor v. Krajisnik*, Case No. IT-00-39-A, Decision on Krajisnik's Request and on Prosecutors' Motion, September 11, 2007, at 40, 42, 131.

129. Communication from Martin Petrov.

130. Boas, supra note 5, at 288–91; Interview with Judge A.

131. For a description of the less rigid manner in which international courts (ICTR and SCSL) have treated requests to self-represent, see Boas, supra note 5, at 266–67; Ellis, supra note 87, at 180–86 (*Iraqi* trial).

132. Boas, supra note 5, at 288.

133. Id. at 290–91.

134. Dorsen and Friedman, supra note 7, at 253 (quoting David L. Schapiro in a letter to Leon Friedman, January 11, 1971).

135. Id. at 254.

136. Newton and Scharf, supra note 31, at 122, 127, 213.

137. Krauthammer, supra note 7, at A31.

138. Newton and Scharf, supra note 31, at 97–98.

139. Orentlicher, supra note 24, at 119.

140. Interview with Judge Leonie Brinkema, U.S. District Court, E.D. Virginia.

141. Del Ponte, supra note 81, at 141–142.

142. Boas, supra note 5, at 155.

143. Id. at 153–63, 251–56, 258–65.

144. Hans Holthius, ICTY Registrar, ICTY Diplomatic Seminar Addressed to Den Haag Chamber of Commerce, December 2, 2008.

145. *Prosecutor v. Radovan Karadzic*, Case No. IT-95-5/18-PT, Decision on Prosecution Motion-Seeking Determination that the Accused Understands English for the Purposes of the Statute and the Rules of Procedure and Evidence, March 26, 2009 (on appeal). (Karadzic attended Columbia University and interacted with foreign politicians and diplomats in English, and gave media interviews in English.)

146. Communication with Martin Petrov. The *Karadzic* trial chamber ruled that in this case an advisor expert in the Serbian dialect and transcripts in English were sufficient.

147. Id.

148. A special Remuneration Scheme for Persons Assisting a Self-Represented Accused was established by the registry, which provides for the assignment and remuneration of support staff to self-represented accused (e.g., legal associate, investigator, case manager.) The registry has also designated an office space at the UN detention unit where self-represented accused have access to the standard office equipment, as well as the Electronic Disclosure Suite and the Tribunal's Judicial Database. Special visitation entitlements have been granted to self-represented accused too.

149. BBC News, "Ex-Liberia Leader Boycotts Trial," June 4, 2007, available at http://news.bbc.co.uk/2/hi/africa/6717485.stm (last visited May 13, 2009).

150. Göran Sluiter, "Karadzic on Trial: Two Procedural Problems," *The Hague-Justice Portal*, April 18, 2008, at 7.

151. Background interview with current and former ICTY personnel.

152. See, e.g., *Prosecutor v. Krstic*, Case No. IT-98-33-T, Transcript of Record, 10129–10131, June 29, 2001.

153. Update from International and Internationalized Courts and Tribunals, 16 No. 2 *Human Rights Brief* 44 (2008).

154. Susan Jennings, "Karadzic Determined to Represent Himself," *Institute for War and Peace Reporting*, September 19, 2008, available at www.iwpr.net/?p=tri&s=f&o=346780&apc_state=henh. The U.S. Department of State has issued a press release adamantly denying the existence of any such immunity agreement. U.S. Department of State Media Note, May 25, 2009.

155. Sense News Agency, "Karadzic will Contest Everything 'Except the Weather'," April 2, 2009. Karadzic has also complained about "unlawful" actions of the parties in searching the homes of his friends and relatives to "rob him of evidence" in his defense and to intimidate potential witnesses; Mike Corder, "Karadzic wages paperwork blitz in war crimes trial," Associated Press, May 15, 2009.

156. Jennings, supra note 154; *Prosecutor v. Karadzic*, Case No. IT-95-05/18-PT, see Motion to Adequate Facilities and Equality of Arms: Legal Associates, November 25, 2008 (defendant wants three legal assistants paid at same rate as assigned counsel (71 euros rather than 25 euros per hour paid for support staff), citing "1 million pages of disclosure" and need for "strong team to help me review the material, organize it, conduct investigation . . . and provide me with the tools to use the materials during the trial.") The Registry agreed to consider allowing him three more than the usual five assistants due to the scale and complexity of his case, but not the high pay rates. The trial court perceptively found "what the accused essentially seeks is all the assistants and public funding associated with full legal representation of counsel, while at the same time retaining his status as an unrepresented accused." "Should the Accused lack the ability to present his defence efficiently and effectively because of his lack of knowledge of law and legal procedures or because of the complexities of the case, the solution envisaged by the Appeals Chamber was not the provision of experienced, high-level professional assistants but 'restriction of his right to self-representation.'" *Prosecutor v. Karadzic*, Case No. IT-95-05/18-PT, para. 30, Decision on Accused Motion for Adequate Facilities and Equality of Arms: Legal Associates, January 28, 2009. In his appeal, Karadzic argues that by denying adequate reimbursement of his legal associates, the tribunal has impugned his right to a fair trial and that "a lack of knowledge of the law or legal procedure" does not warrant a restriction on his right to self-representation afforded by the Trial Chambers Decision on Adequate

Facilities, March 5, 2009. The appeals chamber in its decision of May 7, 2009 upheld the trial court in refusing to pay higher than normal rates for legal assistants because of the accused's deficiencies in legal knowledge, agreeing with it that the solution in that circumstance was restriction of the right to self-representation. It elaborated on the duties legal assistants could be expected to perform versus what a self-represented accused must do for himself.

157. Sluiter, supra note 150, at 5.

158. *Prosecutor v. Karadzic*, Case No. IT-95-5/18-PT, Third Amended Indictment, February 27, 2009.

159. Sluiter, supra note 150, at 1.

160. Id. at 3.

161. Id. at 4.

162. Background interviews with current and former ICTY personnel.

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INTERNATIONAL CRIMINAL COURTS, as well as national courts, are holding an increasing number of heads of state and other leaders accountable for gross abuses of human rights committed while they held power. Some of the former leaders put on trial have attempted to use their right to self-representation to disrupt and discredit the proceedings. In *Tyrants on Trial: Keeping Order in the Courtroom*, Patricia M. Wald, who served as a judge on the International Criminal Tribunal for the former Yugoslavia, writes about the difficulties of ensuring a fair trial when former leaders defend themselves by attacking the court. Drawing on her experiences, and the experiences of judges and participants in other celebrated proceedings, Wald provides insightful lessons learned and practical recommendations for upcoming leader trials. Her report is invaluable to everyone connected with the international courts—and anyone interested in the cause of international justice.

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