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# Do Former Leaders Have an International Right to Self-Representation in War Crimes Trials?

MICHAEL P. SCHARF\* & CHRISTOPHER M. RASSI\*\*

## I. INTRODUCTION

Picture what would happen if former Iraqi dictator Saddam Hussein sought to represent himself at his war crimes trial before the Iraqi Special Tribunal. While doing so, assume that the judge presiding over his case decided to follow the precedent of the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) that tried the case of Slobodan Milošević, which held: “[U]nder customary international law, the defendant has a right to counsel, but he also has a right not to have counsel.”<sup>1</sup>

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<sup>1</sup> Prosecutor v. Milošević, Case No.: IT-99-37-PT, Transcript, Aug. 30, 2001, at 18 (“Status Conference”).

We have to act in accordance with the Statute and our Rules which, in any event, reflect the position under customary international law, which is that the [defendant] has a right to counsel, but he also has a right not to have counsel. He has a right to defend himself, and it is quite clear that he has chosen to defend himself. He has made that abundantly clear. The strategy that the Chamber has employed of appointing an amicus curiae will take care of the problems that you have outlined, but I stress that it would be wrong for the Chamber to impose counsel on the [defendant], because that would be in breach of the position under customary international law.

One does not need the imagination of a Jules Verne to be able to glimpse the perilous consequences. Indeed, the Milošević trial itself, now in its third year, provides a step-by-step blueprint for what would likely ensue.

As a result of the decision of the *Milošević* Trial Chamber to allow the defendant to act as his own attorney in the courtroom, the former Serb leader has been able to generate the illusion that he was a solitary individual pitted against an army of foreign lawyers and investigators. Day after day he sits alone in the courtroom behind a row of conspicuously empty desks that would ordinarily be occupied by the defense team. In reality, Milošević has had a squadron of legal counsel assisting him from behind the scenes, including some of the world's most distinguished trial attorneys. Under their direction, lawyers and supporters of Milošević dig up files and background on witnesses who are about to appear in court, enabling Milošević to become the Serb "Abe Lincoln."<sup>2</sup>

An even more significant ramification of the Trial Chamber's ruling is that it has given Milošević the chance to make unfettered speeches throughout the trial. In contrast, a defendant is ordinarily able to address the court only when he takes the stand to give testimony during the defense's case-in-chief, and in the usual case, the defendant is limited to giving evidence that is relevant to the charges, and he is subject to cross-examination by the prosecution. By acting as his own counsel, Milošević has been able to begin each stage of the trial with hours of opening arguments, which have included Hollywood-quality video and slide-show presentations showing the destruction wrought by the 1999 NATO bombing campaign.<sup>3</sup>

Bending over backward to maintain the appearance of fairness, the Trial Chamber has permitted Milošević to treat the witnesses, prosecutors, and themselves in a manner that would earn ordinary defense counsel expulsion

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*Id.*

As this article was in editing stages, the *Milošević* Trial Chamber reversed itself, ruling on September 2, 2004, that Milošević had to act through counsel for the remainder of the trial. Prosecutor v. Milošević, Case No.: IT-99-37-PT, Transcript, Sept. 2, 2004, at 32391. A written Order followed on September 3, 2004. Prosecutor v. Milošević, Case No.: IT-99-37-PT, Order on the Modalities to be Followed by Court Assigned Counsel, Sept. 3, 2004, at <http://www.un.org/icty/milosevic/trialc/order-e/040903.htm> (last visited Oct. 10, 2004). The Trial Chamber's decision was certified for interlocutory appeal on Sept. 10, 2004. Prosecutor v. Milošević, Case No.: IT-99-37-PT, Order on Request for Certification to Appeal the Decision on the Trial Chamber on Court Assigned Counsel, Sept. 10, 2004, at <http://www.un.org/icty/milosevic/trialc/order-e/040910.htm> (last visited Oct. 10, 2004).

<sup>2</sup> Michael P. Scharf, *The Legacy of the Milošević Trial*, 37 NEW ENG. L. REV. 915, 918 (2003).

<sup>3</sup> *Id.* at 918–19.

from the courtroom. In addition to regularly making disparaging remarks about the court and repeatedly browbeating witnesses, Milošević pontificates at length during cross-examination of every prosecution witness.<sup>4</sup> Summing up the impact of Milošević's trial performance, one former employee of the Tribunal stated: "You can't help falling under his spell. He's very sharp and he's funny. It's sick, I know, given what he's there for, but he's so cynical and quick that he's had the courtroom in fits of laughter at times."<sup>5</sup>

While Milošević's defense strategy is unlikely to win him an acquittal, it has been described by a Balkans expert as "brilliantly cunning, designed to play on Serbia's psychological vulnerabilities and continued Serb resentment of the 1999 NATO bombing."<sup>6</sup> To the extent that it is aimed not at the court of law, but the court of public opinion back home in Serbia, Milošević's strategy is unquestionably paying off. His approval rating in Serbia doubled

<sup>4</sup> *Id.* at 919.

<sup>5</sup> *Id.* at 930 n.83 (citing Marc Champion, *Court of Opinion: With Hague Case, Defiant Milošević Wins at Home 'All Alone against the World'*, WALL ST. J., Jan. 10, 2003, at A-1). The decision to permit Milošević to serve as his own lawyer has also affected the pace and duration of the proceedings. Because of concerns about Milošević's high blood pressure and heart condition, the trial (now in its third year) only takes place three times a week as opposed to the standard five, and the amount of hours per day has been reduced from eight to four. Scharf, *supra* note 2, at 917. As a result, the trial has lasted much longer than originally envisioned, and the prosecution has been ordered to reduce the number of its witnesses in an effort to speed up the proceedings. At the end of the prosecution's case in chief, Milošević requested a continuance of over two years, blaming the fact that he is conducting his own defense, the complexity of the case, the large number of witnesses he anticipated to present, and the extensive material disclosed by the prosecution which he must examine. See *Prosecutor v. Milošević*, Case No.: IT-02-54-T, July 2, 2003 ("Scheduling Order for a Status Conference"); *Prosecutor v. Milošević*, Case No.: IT-02-54-T, Transcript, Sept. 2, 2003 ("Status Conference"). While not granting the full extent of his request, the Milošević Trial Chamber was quite lenient and granted him an adjournment of three months to prepare his defense. *Prosecutor v. Milošević*, Case No.: IT-02-54-T, Sept. 17, 2003 ("Order Concerning the Preparation and Presentation of the Defence Case"). During the adjournment, one of the three presiding judges, Sir Richard May of the United Kingdom, was forced to resign for health reasons, and Milošević has argued that the trial should begin anew because of the addition of a new judge. Judge May died July 1, 2004. See Marlise Simons, *Richard May, Milošević Judge, Dies at 65*, N.Y. TIMES, July 2, 2004, at A17.

<sup>6</sup> Scharf, *supra* note 2, at 930 n.84 (citing Dusko Doder, *Book Review of Slobodan Milošević and the Destruction of Yugoslavia by Louis Sell*, THE NATION, May 27, 2002, at 25).

during the first weeks of his trial.<sup>7</sup> A recent poll found that 39% of the Serb population rated Milošević's trial performance "superior," while less than 25% felt that he was getting a fair trial, and only 33% thought that he was actually responsible for war crimes.<sup>8</sup> Milošević has gone from the most reviled individual in Serbia to number four on the list of most admired Serbs, and in December 2003, Milošević easily won a seat in the Serb parliament in a nation-wide election.<sup>9</sup> "You really have two trials going on at the same time, one in the court and the other in the forum of public opinion," observes Judith Armatta, an American lawyer who monitors the trial for the coalition for International Justice, a non-profit organization that supports international efforts to bring war criminals to justice. "You may get two very different results."<sup>10</sup>

What if Saddam Hussein were permitted to do the same thing at his trial? The thought of Saddam Hussein appearing on the nightly news throughout the Middle East, riling against the illegal U.S. invasion of Iraq, insisting that the United States was complicit in Iraqi war crimes against Iran, and encouraging his followers to commit acts of violence against the United States, is indeed frightening, especially given the stakes involved.

As with trials of other former rogue leaders around the world, the trial of Saddam Hussein could potentially serve several important functions in the transition to democracy and the rule of law in Iraq.<sup>11</sup> First, by pinning prime responsibility on Saddam Hussein and other top Ba'ath figures, and disclosing the way the Iraqi armed forces and security services were compelled to commit war crimes, crimes against humanity, and crimes against foreign nationals and Iraqi citizens alike, the trial would facilitate national reconciliation. While this would not completely absolve the

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<sup>7</sup> *Id.* at 930 n.85 (citing Andre Purvis, *Star Power in Serbia; Slobodan Milošević's Performance at his War Crimes Trial has Won Him Increased Popularity at Home*, TIME (EUROPE), Sept. 30, 2002, at 46).

<sup>8</sup> *Id.* at 930 n.83 (citing Joseph Lelyveld, *The Defendant; Slobodan Milošević's Trial, and the Debate Surrounding International Courts*, THE NEW YORKER, May 27, 2002, at 82; CNN International: *Q&A with Zaine Verjee, Early Afternoon* (CNN broadcast transcript, Feb. 12, 2002)).

<sup>9</sup> Dosan Stojanovic, *Milošević Wins Serb Parliament Seat*, THE PLAIN DEALER (Cleveland), Dec. 30, 2003, at A9.

<sup>10</sup> Scharf, *supra* note 2, at 931 n.83 (citing Champion, *supra* note 5).

<sup>11</sup> For a detailed discussion of the roles of justice in the aftermath of conflict, see PAUL R. WILLIAMS & MICHAEL P. SCHARF, *PEACE WITH JUSTICE?* 11-22 (2002). In the context of rebuilding Iraq, see Michael P. Scharf, *Is It International Enough? A Critique of the Iraqi Special Tribunal in Light of the Goals of International Justice*, 2 J. OF INT'L. CRIM. JUST. 330, 331 (2004).

thousands of underlings for their acts,<sup>12</sup> it would make it easier for the northern Kurds and southern Marsh Arabs (Shi'ites) to agree to remain in a unified Iraq and participate in a national government made up of Kurds, Shi'ites, and Sunnis. This would also promote a political catharsis in Iraq, enabling the newly elected leaders to distance themselves from the discredited repressive and bellicose policies of the past. Second, the historic record generated from the trial would educate the Iraqi people, who were long misled by Saddam Hussein's propaganda, about the acts of aggression, war crimes, and crimes against humanity committed by the Ba'ath regime. Documenting the mass scale of these atrocities with credible evidence by a court perceived as fair would also help vindicate the American invasion and diminish support for opposition groups which continue to wage a guerilla war against U.S. and other foreign troops and officials stationed in Iraq. Third, the trial could send an important signal that the new Iraq will be based on principles of justice, fairness, human rights, and the rule of law. Fourth, the trial would act as a model for how other countries can deal with accountability for past atrocities after emerging from repression.

To achieve these objectives, however, the trial of Saddam Hussein must be perceived by the Iraqi people and those around the Middle East as legitimate and fair. If, in contrast, Saddam Hussein were to be permitted to take advantage of the tactics of Slobadan Milošević and portray his trial as "victor's justice" at the hands of a "puppet court," this would seriously undermine the goal of fostering reconciliation between the Iraqi Kurds, Shi'ites, and Sunnis. The historic record developed by such a trial would forever be questioned. And the trial would transform Saddam Hussein and his cronies into martyrs, fueling violent opposition to the United States and the new Iraqi government.<sup>13</sup>

Given these grave implications, we must ask whether the *Milošević* Trial Chamber was correct in its conclusion that former leaders have an

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<sup>12</sup> It is estimated that there were over 50,000 "full members" of the Ba'ath party in Iraq. *Special Report: Establishing the Rule of Law in Iraq*, SPECIAL REPORT 104 (United States Institute of Peace, Washington D.C.), Apr. 2003, at 8.

<sup>13</sup> For a detailed analysis of other problems concerning the Iraqi Special Tribunal, see generally Jose Alvarez, *Trying Hussein: Between Hubris and Hegemony*, 2 J. INT'L CRIM. JUST. 319 (2004); Claus Kress, *The Iraqi Special Tribunal and the Crime of Aggression*, 2 J. INT'L CRIM. JUST. 347 (2004) (in the context of rebuilding Iraq); Scharf, *supra* note 11, at 338; Yuval Shany, *Does One Size Fit All? Reading the Jurisdictional Provisions of the New Iraqi Special Tribunal Statute in the Light of the Statutes of International Criminal Tribunals*, 2 J. INT'L CRIM. JUST. 338 (2004); and Danilo Zolo, *The Iraqi Special Tribunal Back to the Nuremburg Paradigm?*, 2 J. INT'L CRIM. JUST. 313 (2004).

international right to act as their own lawyer in war crimes trials. Although common law/adversarial countries generally permit a defendant to decline appointed counsel and represent himself if he is determined to be of sound mind, this article demonstrates that the right to argue one's own case in court (rather than to act through a lawyer) is not a fundamental right enshrined in international law.

To this end, the article begins in Part II by critically examining the Trial Chamber decision in *Prosecutor v. Milošević*<sup>14</sup> and the justifications used for finding that Milošević is entitled to represent himself. In this context, this section explores the drafting history and scholarly commentary related to Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR), which provides that the defendant has the right "to defend himself in person or through legal assistance of his own choosing."<sup>15</sup> This inquiry demonstrates that the underlying purpose of the defendant's Article 14(3)(d) right is to ensure a fair trial, an objective that can be met through assignment of a qualified attorney who is vigilantly committed to representing his client's interests. Next, it analyzes the jurisprudence of the Human Rights Committee and the regional human rights institutions that are cited in the *Milošević* decision, and demonstrates that the *Milošević* decision was not in fact compelled by this body of precedent.

In Part III, the article explores the two main reasons why a court in a major war crimes trial should be able to require the defendant to work through counsel. First, it examines the likelihood that a defendant will act in a disruptive manner. Such seems to be inherent in certain types of defendants, in particular former rogue leaders who publicly challenge the court's authority to try them, thereby warranting appointment of counsel. It then focuses on the complexity of the case as a determining factor. Cases involving former rogue leaders accused of war crimes are particularly intricate. The concept of "equality of arms" and the unique need in these cases for an orderly trial to facilitate the peace and reconciliation process further militate against a right to self-representation in war crimes trials.

Finally, in Part IV, the article analyzes the relevant post-*Milošević* decisions from the ICTY, the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL). These recent

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<sup>14</sup> *Prosecutor v. Milošević*, Case No.: IT-02-54, Apr. 4, 2003 ("Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel"), at <http://www.un.org/icty/milosevic/trialc/decision-e/040403.htm> (last visited Oct. 10, 2004) [hereinafter *Milošević Reasoned Decision*].

<sup>15</sup> International Covenant on Civil and Political Rights, Dec. 19, 1996, art. 14 (3)(d), 999 U.N.T.S. 171 [hereinafter ICCPR].

decisions represent a novel compromise; namely, allowing the defendant to represent himself, but appointing a standby defense counsel ready to step in if the defendant gets too disruptive or the case gets too complex. While potentially an improvement over the *Milošević* approach, this new approach also has its problems, stemming from the requirement of a specific showing of disruptiveness or complexity before the court will turn the case over to the defense counsel. Waiting until the defendant actually disrupts the trial before turning the proceedings over to counsel will often be too late.

## II. THE ORIGIN OF THE CONTROVERSY

### A. Representing Milošević

The two ad hoc international tribunals created by the United Nations Security Council, the ICTY and ICTR, have sought to maintain the highest standards of prosecution of defendants by ensuring fair trials. The designers of the defense systems in the respective tribunals considered one of the most important aspects of a fair trial to be a credible defense of the defendant. For example, at both tribunals, the defendant may engage a lawyer at his own expense, but an indigent defendant will be assigned counsel for his defense at the expense of the tribunals.<sup>16</sup>

When Slobodan Milošević first appeared before the Trial Chamber (the *Milošević* Trial Chamber) as a defendant in 2001, he formally declined to appoint a lawyer for his defense, or to accept the assignment of a lawyer by the ICTY.<sup>17</sup> Eventually, the ICTY felt compelled to appoint three distinguished lawyers as *amici curiae* (friends of the court) to assist the ICTY, but not to represent Milošević directly.<sup>18</sup> Over the years, the prosecution team in the case, concerned that Milošević would struggle to defend himself in such a complex matter, repeatedly suggested that the *Milošević* Trial Chamber should assign defense counsel to Milošević. The Trial Chamber repeatedly rejected the proposal as far back as August 30, 2001, stating that “under customary international law, the defendant has a

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<sup>16</sup> See VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 230–36 (1995); VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 512–16, 520–29 (1998).

<sup>17</sup> Prosecutor v. Milošević, Case No.: IT-99-37-I, July 3, 2001, at 1–2, (“Initial Appearance”), at <http://www.Milosevic-trial.org/trial/2001-07-03.htm> (last visited Oct. 10, 2004).

<sup>18</sup> See MICHAEL P. SCHARF & WILLIAM A. SCHABAS, SLOBODAN MILOŠEVIĆ ON TRIAL: A COMPANION 78–79 (2002).



right to counsel, but he also has a right not to have counsel.”<sup>19</sup> On November 8, 2002, the prosecution again sought the appointment of defense counsel for Milošević,<sup>20</sup> only to have it rejected once more by the Trial Chamber.<sup>21</sup>

However, no detailed analysis for this “protected right” was made available by the Trial Chamber until the so-called “reasoned decision” of April 3, 2003, where it rejected for a third time the motion by the prosecution to have defense counsel imposed on Milošević.<sup>22</sup> The decision was based on an interpretation of Article 21 of the ICTY Statute, which incorporates the language of Article 14(3)(d) of the ICCPR. The Trial Chamber concluded that the “plain meaning” of Article 21(4)(d) does not “allow for the assignment of defense counsel for the [defendant] against his wishes in the present circumstances.”<sup>23</sup> For further authority, the *Milošević* Trial Chamber examined recognition of this “protected right” in national jurisdictions, in particular the United States. It noted that the U.S. Supreme Court in 1975 had held that the state could not constitutionally force a lawyer upon a defendant if he is literate, competent, and understanding, and voluntarily exercises his informed free will.<sup>24</sup> It is noteworthy that the Trial Chamber did not see fit to

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<sup>19</sup> Prosecutor v. Milošević, Case No.: IT-99-37-PT, Transcript, Aug. 30, 2001, at 18 (“Status Conference”).

We have to act in accordance with the Statute and our Rules which, in any event, reflect the position under customary international law, which is that the [defendant] has a right to counsel, but he also has a right not to have counsel. He has a right to defend himself, and it is quite clear that he has chosen to defend himself. He has made that abundantly clear. The strategy that the Chamber has employed of appointing an amicus curiae will take care of the problems that you have outlined, but I stress that it would be wrong for the Chamber to impose counsel on the [defendant], because that would be in breach of the position under customary international law.

*Id.*

<sup>20</sup> Milošević Reasoned Decision, *supra* note 14, at para. 10 (referring to “Submission of the Office of the Prosecutor on the Future Conduct of the Case in the Light of the State of the [defendant]’s Health and the Length and Complexity of the Case,” Nov. 8, 2002).

<sup>21</sup> Prosecutor v. Milošević, Case No.: IT-02-54, Transcript, Dec. 18, 2002, at 14574, available at <http://www.un.org/icty/transe54/021218IT.htm> (last visited Oct. 10, 2004). “[D]efence [sic] counsel will not be imposed upon the [defendant] against his wishes in the present circumstances. It is not normally appropriate in adversarial proceedings such as these. The Trial Chamber will keep the position under review.” *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Milošević Reasoned Decision, *supra* note 14, at para. 18.

<sup>24</sup> *Faretta v. California*, 422 U.S. 806, 835–36 (1975). The Supreme Court held that the state could not constitutionally force a lawyer upon a defendant if he is literate,

follow the practice of the civil law countries, which do not recognize a right to self-representation. The bulk of the Trial Chamber's reasoning centered on the text of the ICCPR and the regional human rights conventions, as well as the dicta of several human rights institutions. Yet, upon closer examination, none of the conventions or decisions relied upon by the Trial Chamber support the view that an international court cannot force a defendant of sound mind to forego the option of representing himself.

### B. Article 14(3)(d) of the ICCPR

It is helpful to examine the drafting history of Article 14(3)(d) of the ICCPR in order to locate the origins of the provision and its true meaning. The United States provided the first substantive contributions to the First Session of the Drafting Committee of the Universal Declaration of Human Rights (Declaration), held from June 9–25, 1947. These provisions later became part of Article 14 of the ICCPR, but were originally aimed to be included in the proposed Articles 6 and 27 of the Declaration. It is noteworthy that the initial proposal for Article 14 of the ICCPR included only the right to consult with and be represented by counsel; there was no mention of a right to self-representation.<sup>25</sup> At the Second Session of the Drafting Committee, the United States introduced a revised draft Article,

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competent, and understanding, and voluntarily exercises his informed free will. The defendant initially represented himself against state charges of grand theft, but after the trial judge determined that the defendant had not intelligently and knowingly waived his right to counsel, he appointed a public defender, ruling that the defendant had no constitutional right to conduct his own defense. *Id.* at 806–10.

<sup>25</sup> See DAVID WEISSBRODT, *THE RIGHT TO A FAIR TRIAL UNDER THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 43–45 (2001). Weissbrodt quotes *Comments on the Secretariat Outline*, at 1, art. 6, U.N. Doc. E/CN.4/AC.1/8 (1947) as follows:

No one shall be deprived of life or personal liberty, or be convicted or punished for crime in any manner, save by judgment of a competent and impartial tribunal, in conformity with law, after a fair and public trial at which he has had the opportunity for a full hearing, the right to be confronted with the witnesses against him, the right of compulsory process for obtaining witnesses in his favour, and the right to consult with and be represented by counsel.

*Id.* at 44–45.

Further, according to *Comments on the Secretariat Outline*, at 5, art. 27, U.N. Doc. E/CN.4/AC.1/8 (1947), “[e]very person has the right to have any civil claims or liabilities determined without undue delay by a competent and impartial tribunal before which he has the opportunity for a fair hearing, and has the right to consult with and be represented by counsel.” *Id.* at 45

which provided that everyone is entitled to the aid of counsel.<sup>26</sup> It was not until the draft wording at the end of the Committee's Fifth Session that the eventual Article 14 of the ICCPR added that, in the determination of any criminal charge, one is entitled "[t]o defend himself in person or through legal assistance which shall include the right to legal assistance of his own choosing, or, if he does not have such, to be informed of his right and, if unobtainable by him, to have legal assistance assigned."<sup>27</sup>

At the Sixth Session, the United States stressed that, in its legal system, the defendant has the right to refuse the assigned counsel and ask for another if the assigned counsel does not perform properly. According to the official records, no discussion ensued concerning an absolute right to represent oneself; rather the delegates were solely concerned about the right to access counsel, the choice of counsel, and who pays for counsel if the defendant is indigent.<sup>28</sup> This evinces the limited weight the drafters placed on the wording which the *Milošević* Trial Chamber has interpreted as creating a right to self-representation.

It is noteworthy that distinguished scholars in the field have not read this clause as requiring a right of self-representation. According to Professor Cherif Bassiouni, "the right to self-representation complements the right to counsel and is not meant as a substitute thereof."<sup>29</sup> The purpose of the right to self-representation is to assure "the accused of the right to participate in his or her defense, including directing the defense, rejecting appointed counsel, and conducting his or her own defense *under certain circumstances*."<sup>30</sup> But this right is not unqualified as, Bassiouni continues,

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<sup>26</sup> See *id.* at 45 (quoting *Comments on the Secretariat Outline*, at 7, U.N. Doc. E/CN.4/AC.3/SR.9 (1947), where it says "In the determination of his rights and obligations, everyone is entitled to a fair hearing before an independent and impartial tribunal and the aid of counsel. No one shall be convicted and punished for crime except after public trial pursuant to law in effect at the time of the commission of the act charged.").

<sup>27</sup> *Id.* at 54 (quoting *Summary Record of the 110th Meeting*, at 8, [1979], U.N. Doc. E/CN.4/SR.110).

<sup>28</sup> *Id.* at 57.

<sup>29</sup> M. Cherif Bassiouni, *Human Rights In The Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 283 (1993).

<sup>30</sup> *Id.* (emphasis added). Bassiouni studied 139 constitutions to determine the level of international protections given to a defendant with respect to various types of rights. He found that the right to self-representation is guaranteed in 33 of the national constitutions that he surveyed, while more than 65 constitutions contain language pertaining to the right of defense. *Id.*

“representation of counsel is not only a matter of interest to the accused, but is also paramount to due process of the law and to the integrity of the judicial process.”<sup>31</sup> Accordingly, this can be accomplished only by ensuring that such self-representation is adequate and effective.<sup>32</sup> It logically follows that a court “should appoint professional counsel to supplement self-representation; conversely, whenever it is in the best interest of justice and in the interest of adequate and effective representation of the accused, *the court should disallow self-representation and appoint professional counsel.*”<sup>33</sup>

Even Manfred Nowak, author of the most authoritative commentary on the ICCPR, acknowledges that “it is *disputed* whether the State may introduce an absolute requirement of mandatory counsel in criminal trials and thereby force an accused to accept an ex-officio defense counsel when he cannot afford his own attorney.”<sup>34</sup> Nowak did not suggest that the State is prohibited from doing so, but only that there is ongoing debate about the propriety of such action, especially in regards to adversarial systems. It follows that the same debate would arise for a non-indigent defendant, as the provision in question makes no distinction based on financial capability.

It is also important to recognize that while most common law countries recognize a right of self-representation, civil law countries including France, Germany, and Belgium, among others, do not feel compelled to permit a defendant to represent himself.<sup>35</sup> In civil law countries, defense counsel can be imposed on the defendant in serious cases, which happen to be most criminal cases with the potential for long sentences. In France, during a trial, the presence of a lawyer is required before the *Cour d’Assises*,<sup>36</sup> which has

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 283–84 (emphasis added).

<sup>34</sup> MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 258 (1993) (emphasis added).

<sup>35</sup> Prosecutor v. Vojislav Šešelj, Case No.: IT-03-67-PT, May 9, 2003, at paras. 16–17 (“Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Šešelj”). This decision also refers to § 731 of the Danish Administration of Justice Act as requiring mandatory defense counsel in “specific circumstances.” Moreover, Article 71 of the Criminal Procedure Act of the Federal Republic of Yugoslavia provides that the defendant will be assigned defense counsel if the criminal offense has a penalty of more than ten years in prison. The decision also notes that defense counsel is mandatory even if the defendant has the “requisite legal qualifications.” Article 66 of the Criminal Procedure Code for the Federation of Bosnia and Herzegovina of November 20, 1998 similarly provides. *Id.* at n.34.

<sup>36</sup> Gerald L. Kock & Richard S. Frase, *The French Code of Criminal Procedure 2*, in THE AMERICAN SERIES OF FOREIGN PENAL CODES 29, 152, 164 (1988) (citing Articles

jurisdiction to try felonies (offenses punished by imprisonment with hard labor, for life, or for a fixed period of time).<sup>37</sup> Germany similarly requires mandatory defense counsel in certain situations, including where the defendant is charged with a serious offense, where the presiding judge finds that the assistance of defense counsel appears necessary because of the difficult factual or legal situation, or where it is evident that the defendant cannot defend himself.<sup>38</sup> In Belgium, the President of the court must verify whether the defendant has selected counsel of his choice to represent him in front of the *Cour d'Assises*; if the defendant has not so selected, the President must designate counsel for the defendant.<sup>39</sup>

Given the contrary widespread practice of the civil law countries, it would be difficult to properly conclude that the right to self-representation has in fact attained the level of customary international law, as the *Milošević* Trial Chamber surprisingly found. Moreover, the Human Rights Committee, which is the treaty body established to provide authoritative interpretation of the ICCPR,<sup>40</sup> has asserted that provisions in the ICCPR that represent customary international law may not be the subject of reservations, and it has identified an extensive list of such provisions.<sup>41</sup> At the same time, the Human

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274 and 317 of the French Code de procédure pénale, available at <http://droit.org/code/index-CPROCEPEL.html> (last visited Oct 10, 2004)).

<sup>37</sup> Valerie Dervieux, *The French System*, in EUROPEAN CRIMINAL PROCEDURES 218, 231 (Mireille Delmas-Marty and J.R. Spencer eds., 2002); Kock & Frase, *supra* note 36. Compare to “*délits*” and “*contraventions*,” where the punishment is much less severe and may only involve a fine.

<sup>38</sup> See STRAFPROZEBORDNUNG (CODE OF CRIMINAL PROCEDURE), art. 140, available at <http://www.iuscomp.org/gla/statutes/StPO.htm> (last visited Oct. 10, 2004); Rudolphe Juy-Birmann, *The German System*, in EUROPEAN CRIMINAL PROCEDURES 304–5 (Mireille Delmas-Marty & J.R. Spencer eds., 2002).

<sup>39</sup> See BELGIAN CODED INSTRUCTION CRIMINELLE, art. 293, available at [http://www.juridat.be/cgi\\_loi/legislation.pl](http://www.juridat.be/cgi_loi/legislation.pl) (last visited Oct. 10, 2004).

<sup>40</sup> ICCPR, *supra* note 15, art. 28.

<sup>41</sup> Human Rights Committee, General Comment 24 (52), *General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), available at <http://heiwwww.unige.ch/humanrts/gencomm/hrcom24.htm> (last visited Oct. 10, 2004).

Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and a fortiori when they have the

Rights Committee has stated that reservations to particular clauses of Article 14 may be acceptable, though a general reservation to the right to a fair trial would not be.<sup>42</sup> Consequently, it can be inferred that the absolute right to defend oneself has not achieved the status of customary international law.

The jurisprudence of the European Court of Human Rights provides further support for this view. Interpreting a clause in the European Convention with the same language as Article 14(d)(3) of the ICCPR, the European Court has “taken a relatively restrictive stance and affirmed the right of States to assign a defense counsel against the will of the accused in the administration of justice.”<sup>43</sup> The *Milošević* Trial Chamber dismissed the importance of this precedent because of the fact that the nature of the proceedings at the ICTY is adversarial, and the imposition of defense counsel is a feature of the inquisitorial system, which is most prevalent among the European states.<sup>44</sup> However, international and hybrid courts such as the ICTY, ICTR, International Criminal Court (ICC), SCSL, and the Special Iraqi Tribunal are *sui generis*, representing a blending of the common law and civil law approaches.<sup>45</sup> Thus, the practice of the civil law countries should not be discounted.

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*character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses of Article 14 may be acceptable, a general reservation to the right to a fair trial would not be.*

*Id.* at para. 8 (emphasis added).

<sup>42</sup> *Id.*

<sup>43</sup> NOWAK, *supra* note 34, at 259.

<sup>44</sup> Milošević Reasoned Decision, *supra* note 14, at paras. 24–25.

<sup>45</sup> See generally, Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 COLUM. J. TRANSNAT’L L. 725, 727–28 (1999); Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT’L L. 57, 80 (1999) (quoting an ICTY Trial Chamber:

[N]either the rules issuing from the common law tradition in respect of the admissibility of hearsay evidence nor the general principle prevailing in the civil law systems, according to which, barring exceptions, all relevant evidence is admissible, including hearsay evidence, because it is the judge who finally takes a decision on the weight to ascribe to it, are directly applicable before this Tribunal. The

### C. The Cases Cited in the Milošević Trial Chamber Decision

The *Milošević* Trial Chamber sought to derive support for its decision from the jurisprudence of the Human Rights Committee. Upon close examination, however, the precedent cited does not stand for the broad proposition asserted by the Trial Chamber.

In the vast jurisprudence of the Human Rights Committee, there is only one case relevant to the right to self-representation: the case of *Michael & Brian Hill v. Spain*.<sup>46</sup> As the *Milošević* Trial Chamber pointed out, in *Hill*, the Human Rights Committee found that the defendant had the right to defend himself pursuant to Article 14(3)(d) of the ICCPR.<sup>47</sup> But the *Hill* case is factually unique in several respects that discount the general applicability of the Human Rights Committee's finding. The case concerned the Hills' complaint that a series of lawyers appointed to represent them at various stages in the criminal proceedings were unable to communicate with them in their language, did not understand or ignored their instructions, and did not make much effort to prepare their defense.<sup>48</sup> The complaint to the Human Rights Committee centered on "their indignation at the judicial and bureaucratic system in Spain."<sup>49</sup> They claimed violations of the principle of equality of the parties at all stages of the trial.<sup>50</sup> The Hills "attribute[d] their conviction to a series of misunderstandings during the trial caused by the lack of proper interpretation."<sup>51</sup>

The report of the Human Rights Committee concluded that the right of Michael Hill to defend himself "was emphatically denied by the judiciary on two occasions. Michael Hill made clear his desire to defend himself well in advance of the Court proceedings via the official interpreter, Ms. Rieta."<sup>52</sup>

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International Tribunal is, in fact, a *sui generis* institution with its own rules of procedure which do not merely constitute a transposition of national legal systems. The same holds for the conduct of the trial which, contrary to the Defence arguments, is not similar to an adversarial trial, but is moving towards a more hybrid system);

Patricia M. Wald, *Judging War Crimes*, 1 CHI. J. INT'L L. 189, 192-94 (2000).

<sup>46</sup> *Michael & Brian Hill v. Spain*, Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993 (2 April 1997), available at <http://www1.umn.edu/humanrts/undocs/html/526-1993.html> (last visited Oct. 10, 2004).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at para. 3.1.

<sup>49</sup> *Id.* at para. 4.1.

<sup>50</sup> *Id.* at para. 4.2.

<sup>51</sup> *Id.* at para. 6.1.

<sup>52</sup> *Id.* at para. 10.6.

The report further recalled that Spain “[concedes] that its legislation does not allow a defendant person to defend himself in person, as provided for under the Covenant.”<sup>53</sup> The Human Rights Committee concluded that Michael Hill’s right to defend himself was not respected.

Yet, nowhere in the *Hill* decision did the Human Rights Committee say that the procedural codes of civil law systems, where it is common practice to assign mandatory counsel, are inconsistent with the ICCPR. The *Hill* decision makes clear that the review of the process must take into account the right of the defendant to participate in the proceedings, or to have counsel of whom he or she approves. In the *Hill* case, the defendant was unable to effectively participate in his defense because of the incompetence of the assigned counsel. It was the view of the Human Rights Committee that the only chance for Michael Hill to receive a fair trial under those circumstances would be to allow him to represent himself.

The *Milošević* Trial Chamber finished its review of *Hill* by noting “that the only case on the issue decided under these conventions which the Trial Chamber has been able to find did not allow for such an exception.”<sup>54</sup> In other words, *Hill* is the sole definitive support offered by the *Milošević* Trial Chamber for the idea that Milošević has an absolute fundamental international right to refuse assigned counsel. The *Milošević* Trial Chamber overstated the significance of *Hill* by saying that the Human Rights Committee rejected the imposition of defense counsel on an unwilling defendant.<sup>55</sup> The Human Rights Committee’s position can most fairly be characterized as reiterating that a defendant has the right to represent himself, where the interests of justice so require.

While *Hill* was the only case the *Milošević* Trial Chamber could find to support its position, it had to contend with the adverse precedent of *Croissant v. Germany*, in which the European Court for Human Rights held that there had been no violation of Article 6(3)(c) and that “it is for the courts to decide whether the interests of justice require that the defendant be defended by counsel appointed by them.”<sup>56</sup>

In that case, *Croissant*, a German national, faced criminal proceedings in connection with his activities as the lawyer of various members of the “Red Army Faction.”<sup>57</sup> He was initially represented by two lawyers of his choice

<sup>53</sup> *Id.* at para. 14.2.

<sup>54</sup> Milošević Reasoned Decision, *supra* note 14, at para. 36.

<sup>55</sup> *Id.* at para. 37.

<sup>56</sup> *Croissant v. Germany*, 16 Eur. Ct. H.R. at 135, (1992), available at <http://hudoc.echr.coe.int/Hudoc1doc/HEJUD/sift/321.txt> (last visited Oct. 10, 2004).

<sup>57</sup> *Id.* at para. 6.



in the criminal proceedings.<sup>58</sup> On application by the prosecuting authority, the President of the German Regional Court designated a third court-appointed defense counsel.<sup>59</sup> Croissant objected to the appointment of another counsel, and to the choice of the individual.<sup>60</sup> The court found that, “[w]hen appointing defense counsel the national courts must certainly have regard to the defendant’s wishes; indeed, German law contemplates such a course . . . . However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.”<sup>61</sup>

In an effort to distinguish this case, the *Milošević* Trial Chamber correctly points out that *Croissant* did not concern the wishes of one defendant to represent himself, but it did deal with the power of the court to subject a non-indigent defendant to counsel. In the end, neither case constitutes particularly good authority on the issue of the right of self-representation.

It is noteworthy that the Trial Chamber did opine in passing that “the right to defend oneself in person is not absolute,” though it did not explain the contours of the exceptions to the asserted right, other than to refer to Rule 80(B) of the ICTY Statute, which deals with the removal of a defendant from the courtroom.<sup>62</sup> In the next section, this article explores the likelihood that the defendant will act in a disruptive manner, and the complexity of the case, as factors warranting the appointment of counsel in a war crimes trial involving a former rogue leader.

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<sup>58</sup> *Id.* at para. 7.

<sup>59</sup> *Id.* at para. 8.

<sup>60</sup> *Id.* at para. 9.

<sup>61</sup> *Id.* at para. 29.

<sup>62</sup> *Id.* at para. 40. See Amended Rules of Procedure and Evidence of the ICTY, Rule 80(B), available at <http://www.un.org/icty/legal/doc/index.htm> (last visited Oct. 10, 2004) [hereinafter ICTY Rules] (“The Trial Chamber may order the removal of a [defendant] from the courtroom and continue the proceedings in the absence of the [defendant] if the [defendant] has persisted in disruptive conduct following a warning that such conduct may warrant the removal of the defendant from the courtroom.”).

### III. THE CASE FOR REQUIRING A FORMER ROGUE LEADER TO ACT THROUGH COUNSEL

#### A. *Likelihood that the Defendant Will Act in a Disruptive Manner*

The likelihood that a defendant will act in a disruptive manner may be inherent with certain types of defendants, especially former rogue leaders who publicly challenge the court's authority to try them. It is particularly useful then to examine U.S. jurisprudence on limiting the right of self-representation in the case of disruptive defendants.

In *Faretta v. California*, the United States Supreme Court held that a defendant has a Sixth Amendment right to conduct his or her own defense in a criminal case.<sup>63</sup> However, it is important to recognize that the Supreme Court qualified this pronouncement by stating that such a "right of self-representation is not a license to abuse the dignity of the courtroom."<sup>64</sup> As discussed below, since *Faretta*, several courts have found that self-representation may be terminated if the defendant acts in a disruptive manner.

Under American jurisprudence, the right to counsel is the paramount right in relation to the right to self-representation.<sup>65</sup> As the United States Court of Appeals for the First Circuit has reasoned, "if [the right to counsel is] wrongly denied, the defendant is likely to be more seriously injured than if denied his right to proceed *pro se*."<sup>66</sup> In *Tuitt v. Fair*, the appellant, convicted of armed robbery and carrying a firearm without lawful authority, alleged that his right to counsel was infringed when he was denied his requests for a continuance and for a substitution of counsel, or for permission to proceed unrepresented.<sup>67</sup> On appeal, the First Circuit held that "[t]he right to counsel is subject to practical constraints,"<sup>68</sup> such that "the right of an accused to choose his own counsel cannot be insisted upon in a manner that

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<sup>63</sup> *Faretta v. California*, 422 U.S. 806, 835 (1975).

<sup>64</sup> *Id.* at 834 n.46.

<sup>65</sup> *Tuitt v. Fair*, 822 F.2d 166, 177 (1st Cir. 1987); *United States v. Mack*, 362 F.3d 597, 601 (9th Cir. 2004); *United States v. Cauley*, 697 F.2d 486, 491 (2d Cir. 1983); *United States v. West*, 877 F.2d 281, 286–87 (4th Cir. 1989); *United States v. Harris*, 317 F. Supp. 2d 542, 544–45 (D.N.J. 2004).

<sup>66</sup> *Tuitt*, 822 F.2d at 177.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* (referring to where the trial court required the appellant to definitively waive counsel before allowing him to represent himself because it was not convinced that the appellant had done so).

will obstruct reasonable and orderly court procedure.”<sup>69</sup> Similarly, in *United States v. Mack*, the United States Court of Appeals for the Ninth Circuit stated that a defendant’s right to self-representation does not overcome the court’s right to maintain order in the courtroom.<sup>70</sup> The court further reasoned that “[a] defendant does not forfeit his right to representation at trial when he acts out. He merely forfeits his right to represent himself in the proceeding.”<sup>71</sup> The United States Court of Appeals for the Second Circuit in *United States v. Cauley* refused to allow a disruptive defendant to dismiss his legal aid lawyer and proceed unrepresented.<sup>72</sup> The court found that his “behavior in court was that of an easily angered man,”<sup>73</sup> and noted that the defendant “interrupted the cross-examination . . . with shouted obscenities.”<sup>74</sup> He also refused to answer questions posed to him. In *United States v. West*, the United States Court of Appeals for the Fourth Circuit held similarly.<sup>75</sup> The appellant in that case attacked the court’s “integrity and dignity by characterizing it as the ‘home team’ on the side of the government.”<sup>76</sup> The court held that the lower court was correct in finding that the appellant forfeited his right to self-representation by “flouting the responsibility” given to him.<sup>77</sup> Most recently, in *United States v. Harris*, the federal district court in New Jersey turned down a defendant’s request to self-representation.<sup>78</sup> As justification for this, the court found that the defendant refused to acknowledge the authority of the court, showed disrespect for the court, and that his attempts to proceed unrepresented were meant to disrupt the court.<sup>79</sup>

The above forms of disruption have accompanied the cases of former rogue leaders currently before international courts and tribunals. As the description of Milošević’s antics in the introduction illustrates, such individuals openly question the legitimacy of the court, act disrespectfully to

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<sup>69</sup> *United States v. Poulack*, 556 F.2d 83, 86 (1st Cir. 1977).

<sup>70</sup> *Mack*, 362 F.3d at 601 (referring to where the appeals court reversed the trial court’s conviction because the district court removed the defendant from the courtroom, leaving nobody to represent him. The court found this was a structural error which violated the defendant’s rights under the Sixth Amendment).

<sup>71</sup> *Id.*

<sup>72</sup> *United States v. Cauley*, 697 F.2d 486, 491 (2d Cir. 1983).

<sup>73</sup> *Id.* at 490.

<sup>74</sup> *Id.* at 491.

<sup>75</sup> *United States v. West*, 877 F.2d 281, 286 (4th Cir. 1989).

<sup>76</sup> *Id.* at 287.

<sup>77</sup> *Id.*

<sup>78</sup> *United States v. Harris*, 317 F. Supp. 2d 542, 546 (D.N.J. 2004).

<sup>79</sup> *Id.* at 546.

the judges, make speeches during cross-examination, and browbeat witnesses. Drawing from the U.S. jurisprudence, in the alternative to a blanket rule, international courts and tribunals could cite specific indicia of disruptiveness on a case-by-case basis in determining whether self-representation should be revoked. However, as discussed in greater detail in Section B below, in the context of the trial of former rogue leaders, where the eyes of the world are watching the proceedings and the complexity of the case demands careful execution, the court should not wait until the defendant actually disrupts the trial before appointing counsel, because by then it is too late.

### B. *The Complexity of the Case and the Need for an Orderly Trial*

International courts and tribunals are initiated in response to the gravest of atrocities committed in the history of mankind. Cases involving former rogue leaders accused of war crimes are particularly complex. Consequently, the right to self-representation may be inherently incompatible with war crimes trials involving such defendants in four respects. First, war crimes courts or tribunals prosecute violations of international humanitarian law, and have the overwhelming obligation of bringing the perpetrators to justice. The gamut of legal skills used in ordinary domestic criminal cases is insufficient for the trial of an accused war criminal.<sup>80</sup> Defense counsel must be fluent in substantive and procedural legal aspects of international humanitarian law, comparative law, and trial and written advocacy skills.<sup>81</sup> Second, international courts such as the ICTY, ICTR, and ICC are *sui generis*, representing a blending of the common law and civil law approaches.<sup>82</sup> The judges are from both systems, and the procedural and substantive outcomes will depend on a mixture of the two legal systems. Even though the procedure tends to be closer to an adversarial model, characteristic of common law countries, the international courts can be characterized as hybrid.<sup>83</sup> Third, mounting a defense to a war crimes charge

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<sup>80</sup> Mark S. Ellis, *Achieving Justice Before the International War Crimes Tribunal: Challenges for the Defense Counsel*, 7 DUKE J. COMP. & INT'L L. 519, 523 (1997).

<sup>81</sup> Mark S. Ellis, *The Evolution of Defense Counsel Appearing Before the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 949, 970–71 (2003).

<sup>82</sup> See generally May & Wierda, *supra* note 45, at 727–28; Murphy, *supra* note 45, at 80; Wald, *supra* note 45, at 192–94.

<sup>83</sup> See STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 194 (2001).

has proven to be quite daunting. In the first ICTY case of *Prosecutor v. Tadić*, defense counsel was already spending 12 to 14 hours a day, 6 days a week in preparation for cross-examinations and direct examinations of witnesses.<sup>84</sup> Milošević, with his defense set to begin in July 2004, will have the difficult task of dealing with an even larger number of witnesses; he is seeking to have nearly 1,400 witnesses testify in his trial (including former president Bill Clinton, British Prime Minister Tony Blair, and German Chancellor Gerhard Schroeder).<sup>85</sup> Fourth, due to the nature of the crimes and the geographic location of the courts in relation to the actual “crime scenes,” access to the sites, evidence, and witnesses is especially challenging.<sup>86</sup>

Taking the above factors into account, it is not surprising that the ICTY has questioned the weight to be accorded on the decisions of the Human Rights Committee, the international body which interprets the ICCPR.<sup>87</sup> One commentator has suggested that the early jurisprudence and basic legal documents of the ICTY suggest the phenomenon of a “chipping away of certain rights of fair trial and a tendency in the jurisprudence to side-step international human rights jurisprudence under the ICCPR—and other regional bodies—by distinguishing the ICTY’s obligations from those of state parties to the ICCPR.”<sup>88</sup> Yet there is a need to interpret the provisions of the ICCPR based on the “object and purpose” of international courts and tribunals. Thus, the ICTY should not rely too heavily on the interpretation of the Human Rights Committee, but rather adopt its own interpretations of Article 14 of the ICCPR and its impact on its Statute.<sup>89</sup>

Although domestic courts in common law countries do not impose defense counsel on an unwilling defendant in the absence of disruptive conduct, some courts have propounded on the matter of competent self-representation in complex cases and offer useful commentary. The domestic courts limit their decisions to the case of indigent defendants without representation. It is, however, axiomatic that the reasoning for such decisions should be applied to all self-represented defendants in complex cases. The same complexities and challenges for similarly-situated defendants to overcome are present, whether one is indigent seeking representation, or a rogue leader seeking to defend oneself to prove a point.

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<sup>84</sup> Ellis, *supra* note 80, at 529.

<sup>85</sup> *World in Brief*, WASH. POST, June 18, 2004, at A24.

<sup>86</sup> *See, e.g.*, Ellis, *supra* note 80, at 533.

<sup>87</sup> James Sloan, *The International Criminal Tribunal for the Former Yugoslavia and Fair Trial Rights: A Closer Look*, 9 LEIDEN J. INT’L L. 479, 485 (1996).

<sup>88</sup> *Id.* at 480.

<sup>89</sup> *Id.* at 485–86.

The Supreme Court of India has found the fairness of a trial may be implicated in circumstances where a defendant cannot understand all the legal implications of the trial and appellate proceedings, as intricate questions of law and fact are involved which require the skillful handling of a competent lawyer, especially when the best of the public prosecutors appear on the other side of the courtroom.<sup>90</sup> Even though the court limits the effect of its judgment to indigent defendants, it can be argued that the issue of the complexity of a trial is relevant whether the defendant is indigent or not. Indigence does not lead to complexity. Rather, complexity follows from the nature of the case, not the circumstances of the defendant. The court reasoned that:

Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise; and a failure of equal justice is on the cards where such supportive skill is absent for one side. Our judicature, molded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer-power for steering the wheels of equal justice under the law.<sup>91</sup>

A self-represented defendant, regardless of his or her status as an indigent or non-indigent, may be insufficiently qualified to represent himself or herself adequately in a complex case and in such circumstances should be provided with counsel. After all, to quote the Indian Supreme Court above, “justice under the law” will not be realized if a non-indigent defendant chooses to represent himself under similar circumstances.

This inference is further supported by Australian jurisprudence. The Supreme Court of South Australia considered the case of applicants who were granted leave to appeal to the Court of Criminal Appeal against their convictions for murder and attempted murder.<sup>92</sup> The court considered that the applicants could not conduct their own appeal effectively; they were convicted following a trial that lasted several months, and “the grounds of appeal and the application to call fresh evidence at the hearing of the appeal

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<sup>90</sup> *Hussainara Khatoon & Others (IV) v. Home Secretary*, A.I.R. 1979 S.C. 1369, 1374–75 (State of Bihar, Patna) [hereinafter *Hussainara Khatoon*] (referring to where the Supreme Court of India held that there is a constitutional right of every defendant who is unable to secure the legal services of a lawyer to have counsel assigned, provided that the defendant wants legal representation); *R.V. KEKLAR, R.V. KELKAR’S CRIMINAL PROCEDURE* 472 (1993).

<sup>91</sup> *Hussainara Khatoon*, at 1373 (quoting the Court in *Maneka Gandhi v. Union of India*, A.I.R. 1978 S.C. 597).

<sup>92</sup> *R. v. Gillard & Preston*, 77 S.A. St. R. 366 (2000), at para. 1.

[gave] rise to questions of some complexity.”<sup>93</sup> The court held that they should be allowed to apply to the court for an order assigning solicitors and counsel to represent them at the hearing of the appeal, as allowing them to proceed self-represented would not be in the interests of justice.<sup>94</sup>

Decisions of the Australian High Court are also helpful in understanding the court’s apprehension in allowing a defendant to proceed without counsel in complex matters. In the landmark case of *Dietrich v. R.*, the Australian High Court held that proceedings may be stayed when an indigent defendant is facing prosecution for a serious offense without legal representation (for no fault of his or her own).<sup>95</sup> In the absence of exceptional circumstances, the proceedings should be adjourned, postponed, or stayed until legal representation was available.<sup>96</sup> In the recent judgment of *Milat v. R.*, the High Court discussed the application of Order 69A r 15(2) of the High Court Rules which provides for the determination of applications for special leave to appeal without oral argument.<sup>97</sup> The High Court ultimately held that an unrepresented accused did not have the right to present oral arguments in his application for special leave to appeal.<sup>98</sup>

But the High Court in *Milat* further took into account, albeit in passing, the “ever-increasing workload of the court,” and the need for efficient administration of the court’s business.<sup>99</sup> The court discussed the teachings of experience, and “that the most important part of the oral discussion—the

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<sup>93</sup> *Id.* at para. 5

<sup>94</sup> *Id.* at para. 11.

<sup>95</sup> *Dietrich v. R.*, 177 C.L.R. 292 (1992) (finding that the trial of an indigent accused, charged with a serious offense, who through no fault on his or her part is unable to obtain legal representation, should in the absence of exceptional circumstances be adjourned, postponed or stayed until legal representation is available).

<sup>96</sup> *Id.* at 315.

<sup>97</sup> *Milat v. R.*, 205 A.L.R. 338, 340 (2004) (finding that Order 69A r 15(2) of the High Court rules is directed to persons in the unrepresented applicant’s position and was designed to assist, not hinder, their special leave applications, and does not require that the unrepresented applicant, who was at the time incarcerated, be brought to the court to make oral submissions in support of his appeal). The Order provides that,

Where an application is listed for hearing and it appears to the Court or a Justice that a party is likely to be unable, or that it is likely to be impracticable for a party, to appear personally or by a legal representative to present oral argument, the Court may direct that the party’s case be considered on the basis of his or her summary of argument and any reply without oral argument from that party.

*Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 345.

testing of the arguments by a Socratic dialogue—is rarely effective in the case of applicants who are without legal representation . . . because they generally lack the experience and legal knowledge to respond effectively to the justices' questions."<sup>100</sup>

The concept of “equality of arms” further supports the position that a defendant in a trial for war crimes should not have the absolute right of self-representation. Article 20(1) of the ICTY Statute and Article 19(1) of the ICTR Statute firmly embrace the right to “equality of arms” in their practices, stating that “[t]he Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.”<sup>101</sup> The jurisprudence of both the ICTY and ICTR has dealt extensively with the issue of “equality of arms” between the prosecution and the defense. Thus, in *Prosecutor v. Tadić*, the Appeals Chamber took the view that “equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.”<sup>102</sup>

From the inception of the ad hoc tribunals, “equality of arms” between the defense and the prosecution has been a contentious issue. The opening act of the ICTY, the *Tadić* case, is the perfect example of where defense counsel cried foul due to a violation of the principle of “equality of arms.” Defense counsel argued that the “inequality of arms” had hampered the preparation of their defense.<sup>103</sup> It is hard not to find credibility in such a statement when one considers the “myriad of documents” that defense counsel must review, as compared to the manpower that is employed in the Office of the Prosecutor.<sup>104</sup> It is not surprising that this has been and continues to be the primary concern raised by defense counsel with the Registrar of the ICTY.<sup>105</sup>

One must remember that the relationship between the ICTY itself and the Office of the Prosecutor is also complex, and makes the defendant an

<sup>100</sup> *Id.*

<sup>101</sup> INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA STATUTE, art. 20(1), at <http://www.un.org/icty/legaldoc/index.htm> (last visited Oct. 10, 2004) [hereinafter ICTY STATUTE]; INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, art. 19(1), available at <http://www.un.org/icty/ENGLISH/basicdocs/statute.html> (last visited Oct. 10, 2004) [hereinafter ICTR STATUTE].

<sup>102</sup> *Prosecutor v. Dusko Tadić*, Case No.: IT-94-1-A, Jul. 15, 1999, at para. 48, (“Judgement”), at <http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf> (last visited Oct. 10, 2004).

<sup>103</sup> Ellis, *supra* note 81, at 963.

<sup>104</sup> *Id.* at 964.

<sup>105</sup> *Id.*



underdog from the outset. This is obvious if one observes the full name of the ICTY—the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991—“conflates the court and the Prosecutor in one phrase and thus inadvertently reinforces this focus.”<sup>106</sup> Moreover, as pointed out by the current Deputy Registrar of the ICTY, for those who have stepped foot in the building, “one can hardly fail to notice that in its very physical layout, with Prosecutor and Court located ‘cheek by jowl’ and defense counsel situated generally off site, there is perhaps a metaphor for where the defense fits into the scheme of things.”<sup>107</sup> One defense lawyer has complained, “We don’t have a place to put our robes on. There’s no place to hang up our coats, or to lay down our briefcases! We have been mistreated by this tribunal!”<sup>108</sup> It is not surprising that the defendants before the courts, especially Milošević, frequently argue that the fora represent “victor’s justice.”<sup>109</sup>

By analogy, it can be argued that the correct interpretation of these provisions in the Statutes of the *ad hoc* tribunals<sup>110</sup> and in Article 67(1)(d) of the ICC Statute<sup>111</sup> referring to the right to counsel take the complexity of the trials into account, places limits on the right of a defendant to conduct his or her own defense. This interpretation is acceptable as it satisfies the procedural qualms of the respective statutes and the particular nature of war crime trials. The defense systems in these international courts and tribunals make provision for specific rules on the appointment, qualifications, and assignment of defense counsel in the Rules of Procedure,<sup>112</sup> as well as codes of conduct and directives for the assignment of defense counsel.<sup>113</sup>

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<sup>106</sup> David Tolbert, *The ICTY and Defense Counsel: A Troubled Relationship*, 37 NEW ENG. L. REV. 975, 976 (2003).

<sup>107</sup> *Id.*

<sup>108</sup> *Judging Genocide*, THE ECONOMIST, June 16, 2001, at 23.

<sup>109</sup> See Scharf, *supra* note 2, at 921–23.

<sup>110</sup> ICTY STATUTE, art. 21(4)(d); ICTR STATUTE, art. 20(4)(d).

<sup>111</sup> INTERNATIONAL CRIMINAL COURT STATUTE, available at <http://www.un.org/law/icc/statute/rome fra.htm> (last visited Oct. 10, 2004).

Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the defendant’s choosing, to be informed, if the defendant does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the defendant lacks sufficient means to pay for it.

*Id.*

<sup>112</sup> See ICTY RULES, Rules 44–46; see INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA RULES OF PROCEDURE AND EVIDENCE, Rules 44–46, available at

The ICC has taken the protections first established by the *ad hoc* tribunals a step further. Rule 22(1) of the ICC Rules of Procedure states that defense counsel must be competent in criminal law and procedure, as well as possess the necessary relevant experience in criminal proceedings, and possess an excellent knowledge or fluency in at least one of the working languages of the ICC (English or French).<sup>114</sup> The ICC was designed to remedy some of the deficiencies of its predecessors. Moreover, it is largely accepted that the recent trend in the establishment of defense organizations,<sup>115</sup> and an International Criminal Bar Association, have been furthered by the pursuit of equality of representation. It seems at odds with a system that makes such an effort to promote “equality of arms” and extensive qualifications upon defense counsel to accept that potentially unqualified defendants would be allowed to defend themselves. After all, the most competent of defendant, and most academically trained, such as Milošević and Šešelj (both of whom are lawyers),<sup>116</sup> would, notwithstanding their own

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<http://www.ictt.org/ENGLISH/rules/260503/270503e&fnew.pdf> (last visited Oct. 10, 2004) [hereinafter ICTR RULES].

<sup>113</sup> In the ICTR, there is the Directive on Assignment of Defence Counsel, *available at* <http://www.ictt.org/ENGLISH/basicdocs/defence/index.htm> (last visited Oct. 10, 2004); *see also* CODE OF PROFESSIONAL CONDUCT FOR DEFENCE COUNSEL, *at* <http://www.ictt.org/ENGLISH/basicdocs/codeconduct.htm> (last visited Oct. 10, 2004). In the ICTY, there is the Directive on Assignment of Defence Counsel, and The Code of Professional Conduct for Defence Counsel Appearing before the International Tribunal, *at* <http://www.un.org/icty/legaldoc/index.htm> (last visited Oct. 10, 2004).

<sup>114</sup> ICTR RULES, Rule 22(1), *available at* [http://www.icc-cpi.int/library/basicdocuments/rules\(e\).html](http://www.icc-cpi.int/library/basicdocuments/rules(e).html) (last visited Oct. 10, 2004).

A counsel for the defence shall have established competence in international or criminal law and procedure, as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings. A counsel for the defence shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court. Counsel for the defence may be assisted by other persons, including professors of law, with relevant expertise.

*Id.*

<sup>115</sup> Association of Defence Counsel (ADAD) before the ICTR; Association of Defence Counsel Practicing before the International Criminal Tribunal for the former Yugoslavia (ADC-ICTY); Association Internationale des Avocats de la Défense/International Criminal Defence Attorneys Association (AIAD/ICDAA).

<sup>116</sup> *Profile: Vojislav Šešelj*, BBC News World Edition, Dec. 29, 2003, *at* <http://news.bbc.co.uk/2/hi/europe/2317765.stm> (last visited Oct. 10, 2004) (stating that Šešelj is highly educated, became the youngest Ph.D. holder in Yugoslavia, and went on to teach first at the University of Michigan and then at Sarajevo universities); *see Key Milošević Ally Defects to the Opposition: Rightwing Maverick Offers His Support to Kostunica's Coalition*, THE GUARDIAN (London), Sept. 30, 2000, at 19 (stating that Šešelj

training, have difficulty following the rules of procedure of an international court, as well as standard international criminal law practices.

It is also worth stressing that there is a unique need in these cases for an orderly trial to facilitate the peace and reconciliation process. After all, the ICTY was created to “contribute to the restoration and maintenance of peace.”<sup>117</sup> Justice in the form of legitimate trials can facilitate national reconciliation.<sup>118</sup> It can potentially bring a definitive halt to violence in conflict areas, such as the Balkans, by allowing victims to forgive and reconcile with those who committed the atrocities.<sup>119</sup> An orderly and fair trial can also allow a new government to detach itself from past practices of the former regime. Furthermore, a historic record from such a legitimate trial can educate the population from an affected country about what really happened during the crises, possibly ensuring that such horrific acts are not repeated in the future.<sup>120</sup> But if the trial is chaotic, the goal of fostering reconciliation can be undermined. Although the Nuremberg trials have been criticized to a certain extent, they were for the most part seen as fair and effective, and Germans speak of them with respect.<sup>121</sup>

Former ICTY and ICTR Prosecutor Louise Arbour explained the importance of the appearance of an orderly and fair trial, even before the judgment is handed down: “even though there is no criminal responsibility for governments under the statute, there is only one court that counts—the court of public opinion.”<sup>122</sup> Unfortunately, due to Milošević’s antics, the ICTY is not seen as a beacon of justice back in Serbia. The ICTY is

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graduated at the top of his class in law school in Belgrade); DUSKO DODER & LOUISE BRANSON, *MILOŠEVIĆ: PORTRAIT OF A TYRANT* 24 (1999) (stating that Milošević is himself a lawyer who graduated near the top of his class from the University of Belgrade School of Law).

<sup>117</sup> See United Nations Security Council Resolution on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law Committed in the Territory of the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 1, U.N. Doc. S/RES/827 (1993).

<sup>118</sup> Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 *HUM. RTS. Q.* 573, 586 (2002).

<sup>119</sup> Scharf, *supra* note 2, at 916; see also Michael P. Scharf, *The Prosecutor v. Dusko Tadić: An Appraisal of the First International War Crimes Trial Since Nuremberg*, 60 *ALB. L. REV.* 861, 873–75 (1997).

<sup>120</sup> Scharf, *supra* note 2, at 916.

<sup>121</sup> RATNER & ABRAMS, *supra* note 83, at 187–90; Scharf, *supra* note 2, at 932.

<sup>122</sup> Louise Arbour & Aryeh Neier, *History and Future of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 13 *AM. U. INT’L L. REV.* 1495, 1501 (1998).

perceived in Serbia as “revenge on the victor’s part,” and “a western plot, directed mainly at them.”<sup>123</sup> If the court of public opinion is the court that counts most, Milošević is winning the case.<sup>124</sup>

#### IV. THE ASSIGNMENT OF STANDBY COUNSEL

The *Prosecutor v. Šešelj* and *Prosecutor v. Norman* cases of the ICTY and the SCSL, respectively, represent a compromise between the needs of international justice and the right to self-representation. In these cases, the tribunals allowed the defendant to represent himself, but appointed a standby defense counsel ready to step in as soon as the defendant got too disruptive or the case got too complex. Although an improvement over self-representation in war crimes trials, this approach is problematic as well to the extent that it requires a specific showing of disruptiveness or complexity before the court will turn the case over to the defense counsel. There might be a limited scope for the defendant to take part in the proceedings, but the judges should have the power (and discretion) to require counsel to act in court from the beginning in order to maintain the decorum and fairness of the proceedings.

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<sup>123</sup> *Judging Genocide*, *supra* note 108.

<sup>124</sup> Scharf, *supra* note 2, at 930–31. Yet, history teaches that the positive effect of a war crimes trial may take generations to materialize, and that contemporary opinion polls may not be an accurate barometer of the success of the endeavor. Opinion polls conducted by the U.S. Department of State from 1946 through 1958, for example, indicated that a large majority of West Germans considered the Nuremberg proceedings to be nothing but a show trial, representing victor’s justice rather than real justice. See PETER MAGUIRE, *LAW AND WAR: AN AMERICAN STORY* 241 (2001). By 1953, the State Department had concluded that the Nuremberg and Control Council Law No. 10 trials had failed to “reeducate” West Germans. According to a recently de-classified 1953 State Department report: “From the political point of view, the crux of the war criminals problem in Germany is the refusal of a large number of Germans to accept the principles underlying the [Nuremberg] trials or the findings of the trials. In spite of all the Western powers have said to the contrary, the trials are generally portrayed as acts of political retribution without firm legal basis.” *Id.* at 246. Two generations later, however, the German people largely speak of the Nuremberg Tribunal with respect, and Germany is the foremost supporter of the permanent International Criminal Court, a modern day Nuremberg Tribunal. See, e.g., *German Attitudes Toward Jews, The Holocaust and the U.S.*, at <http://www.ajc.org/InTheMedia/PublicationsPrint.asp?did=708> (last visited Oct. 10, 2004).

### A. *International Criminal Tribunal for the Former Yugoslavia Revisited*

After the decision in *Milošević*, a second Trial Chamber (the *Šešelj* Trial Chamber) took a different approach.<sup>125</sup> In its “Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence,” the *Šešelj* Trial Chamber found that Vojislav Šešelj should be assisted by standby counsel, and the court reserved the right to assign counsel under Rule 44(A).<sup>126</sup> This was a victory for the prosecution, as it provided a mechanism to rein in Šešelj, even though the *Šešelj* Trial Chamber claimed to reject the prosecution’s motion in so far as that motion sought an order “directing the Registrar to appoint legal counsel to assist the accused Šešelj with the preparation and conduct of his defence.”<sup>127</sup>

Šešelj, a popular politician, surrendered himself to the ICTY on February 24, 2003.<sup>128</sup> At his initial appearance, on February 26, 2003, he stated that his decision to defend himself was a definite one, but that “it is possible that I will engage an assistant and a legal advisor who will never appear on my behalf in this courtroom. They will never appear in this courtroom. I retain this exclusivity of appearing in the courtroom on the side of the accused.”<sup>129</sup> Further attempts to question Šešelj’s decision led to the same answer—that he fully intended to represent himself. Similar to the *Milošević* motion, the prosecution in *Šešelj* sought an order from the *Šešelj* Trial Chamber directing that legal counsel be appointed to assist the defendant with his defense in view of the fact that “the interests of justice require such action due to the complexity of the case; the Defendant’s express intention to cause harm to the Tribunal and to use the proceedings as a forum for Serb national interests; the consequent possibility of a disorderly trial; the necessity to safeguard the administration of justice; and the public interest in the restoration of peace in the former Yugoslavia.”<sup>130</sup>

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<sup>125</sup> Prosecutor v. Vojislav Šešelj, Case No.: IT-03-67-PT, May 9, 2003 (“Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Šešelj”).

<sup>126</sup> *Id.* at Disposition.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at para. 2.

<sup>129</sup> Prosecutor v. Vojislav Šešelj, Case No.: IT-03-67-PT, Transcript, Feb. 26, 2003, at 6, at <http://www.un.org/icty/transe87/030226IA.htm> (last visited Oct. 10, 2004).

<sup>130</sup> Prosecutor v. Vojislav Šešelj, Case No.: IT-03-67-PT, May 9, 2003, at para. 3 (“Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Šešelj”).

The *Šešelj* Trial Chamber first noted that Article 21 of the ICTY Statute “does not on its face exclude the possibility of offering an accused the assistance of assigned counsel where the interests of justice so require. The need may arise for unforeseeable reasons to protect an accused’s interests and to ensure a fair and expeditious trial.”<sup>131</sup>

The *Šešelj* Trial Chamber took on the difficult task of fleshing out the phrase “in the interests of justice.” The Chamber enumerated a non-exhaustive list of factors to consider in determining whether the right to a fair trial is achieved. The list clearly included many of the problems that had arisen in the course of the *Milošević* Trial that was taking place elsewhere in the building:

It includes the right to a fair trial, which is not only a fundamental right of the Accused, *but also a fundamental interest of the Tribunal related to its own legitimacy.* In the context of the right to a fair trial, *the length of the case, its size and complexity need to be taken into account. The complex legal, evidential and procedural issues that arise in a case of this magnitude may fall outside the competence even of a legally qualified accused,* especially where that accused is in detention without access to all the facilities he may need. *Moreover, the Tribunal has a legitimate interest in ensuring that the trial proceeds in a timely manner without interruptions, adjournments or disruptions.*<sup>132</sup>

The *Šešelj* Trial Chamber noted that the attitude and actions of *Šešelj* “are indicative of obstructionism on his part.”<sup>133</sup> The *Šešelj* Trial Chamber was mindful of the recent decision in *Milošević*, yet understood that both the rights of *Šešelj* and the interests of justice were clearly at risk. The *Šešelj* Trial Chamber sought to separate itself from the *Milošević* Trial Chamber, even though one has to assume that a completely opposite decision would not reflect favorably on the ICTY, where earlier in the year the latter chamber surprised the legal world by upholding *Milošević*’s request to represent himself. It is inconceivable that the circumstances surrounding *Milošević*—where his health is in issue and where his ability to cope with the workload and the expeditiousness of the trial are severely questioned—do not rise at least to the level of prejudice contemplated by the *Šešelj* Trial Chamber. The *Šešelj* Trial Chamber concluded that imposing standby counsel would fulfill

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<sup>131</sup> *Id.* at para. 11.

<sup>132</sup> *Id.* at para. 21 (emphasis added).

<sup>133</sup> *Id.* at para. 26; *see also* paras. 22–25 (for the reasoning of the *Šešelj* Trial Chamber).

the requirements of Rule 44(A), as well as leave Šešelj's right to defend himself intact.<sup>134</sup>

The term standby counsel is not self-explanatory, and the Šešelj Trial Chamber made it abundantly clear that the function of standby counsel is not to assist the Šešelj Trial Chamber in the manner of *amicus curae*. According to the Šešelj Trial Chamber, the role of the standby counsel is to "safeguard a fair and expeditious trial," and encompasses the benefits of a regular relationship between a client and its counsel, such as counsel-client privilege between Šešelj and standby counsel.<sup>135</sup> Moreover, the same requirements are imposed on standby counsel by the ICTY as on regular counsel working in cases before the ICTY.<sup>136</sup>

The Šešelj Trial Chamber defined the role of standby counsel as (1) assisting Šešelj in the preparation of his case and offering advice in the pre-trial phase and at trial whenever requested by the defendant, and to be engaged actively in the substantive preparation at all times in order to take over at any time, especially in exceptional circumstances if the Trial Chamber removes Šešelj from the courtroom under Rule 80(B); (2) receiving copies of all documents sent to Šešelj; (3) being present in the courtroom at all times; (4) addressing the Trial Chamber upon request of Šešelj or the Chamber; and (5) dealing with witnesses and the most sensitive of issues, without depriving Šešelj of his right to control only the content of the examination.<sup>137</sup>

The Šešelj Trial Chamber did not mask its disagreement with the Milošević Trial Chamber. In a complete departure from the ruling in *Milošević*, the Šešelj Trial Chamber lent support to the argument that ICCPR Article 14(3)(d), and similar provisions in regional conventions and its own Statute do not declare that the right to work through legal counsel is derivative of the primary right to represent oneself. As the Šešelj Trial Chamber observed: "It would be a misunderstanding of the word 'or' in the phrase 'to defend himself in person or through legal assistance of his own choosing' to conclude that self-representation excludes the appointment of counsel to assist the Accused or vice versa."<sup>138</sup> The Šešelj Trial Chamber held that Šešelj could file a power of attorney under Rule 44(A) to receive additional assistance from counsel.<sup>139</sup>

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<sup>134</sup> *Id.* at para. 28.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at para. 30.

<sup>138</sup> *Id.* at para. 29.

<sup>139</sup> *Id.*

## B. Special Court for Sierra Leone

The Special Court for Sierra Leone (SCSL) Statute has a similar provision concerning the right to counsel.<sup>140</sup> In a recent decision, a SCSL Trial Chamber found that the defendant Samuel Hinga Norman could not represent himself without the assistance of standby counsel.<sup>141</sup> Norman is being tried with Moinina Fofana and Allieu Kondewa in the Civil Defense Forces (CDF) case. Norman indicated in a letter of June 3, 2004, after the opening statement of the prosecutor, that he wished to represent himself and that he was dispensing of his defense counsel that had been acting on his behalf since March 2003.<sup>142</sup>

In requiring the appointment of standby counsel, the SCSL Trial Chamber sought to distinguish Norman's situation from that of *Milošević*. First, Norman is being tried with two co-defendants.<sup>143</sup> Second, Norman did not signal his intention to represent himself from the outset.<sup>144</sup> The SCSL Trial Chamber then turned to the characteristics of the CDF trial that made it impossible for Norman to represent himself. These factors, however, were also present in *Milošević*. According to the SCSL Trial Chamber, the right of counsel is an essential and necessary component of a fair trial.<sup>145</sup> Without counsel, the judges are forced to be a proactive participant in the proceedings instead of the arbiter, which is one of the greatest characteristics of an adversarial proceeding.<sup>146</sup> The SCSL Trial Chamber turned to the complexity of the case and the intricacies of international criminal law, as well as the national and international interest in the "expeditious completion of the

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<sup>140</sup> See STATUTE OF THE SPECIAL COURT FOR SIERRA LEONE, art. 17(4)(d), available at <http://www.sc-sl.org/scsl-statute.html> (last visited Oct. 10, 2004) [hereinafter SCSL].

<sup>141</sup> Prosecutor v. Sam Hinga Norman, Case No.: SCSL-04-14-T, June 8, 2004, at para. 32 ("Decision on the Application of Samuel Hinga Norman for Self-Representation Under Art. 17(4)(d) of the Statute of the Special Court").

<sup>142</sup> *Id.* at paras. 3–5.

<sup>143</sup> *Id.* at para. 19.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at para. 26.

<sup>146</sup> *Id.*



trial.”<sup>147</sup> The trial judges were also concerned with the impact on the court’s timetable.<sup>148</sup>

The decision to appoint standby counsel is not a wise one in these two instances, as it appears as though history will almost certainly repeat itself. The situation surrounding Šešelj’s trial best illustrates this concern. Like Milošević, Šešelj is popular in Serbia, where he was the 2002 front-runner for the Presidency before his surrender to the Tribunal.<sup>149</sup> As acknowledged by the Šešelj Trial Chamber, Šešelj has tried to use the ICTY for political gain outside of the courtroom, good cause for concern has been shown that he may be disruptive in proving his point, and he has repeatedly stated that he does not consider the Tribunal to be a legitimate legal body.<sup>150</sup> Although Šešelj is a lawyer, he does not have the requisite legal qualifications to mount a defense to the complex charges brought against him. The Šešelj Trial Chamber has also questioned his competence at the most basic levels—his submissions have not been legally sufficient, and he has refused to accept a device for typing his motions and to take notes for fear that he might receive an electric shock.<sup>151</sup> The assignment of standby counsel is not sufficient in these circumstances; such defendants should be fully represented by highly qualified attorneys from the outset.

### C. *International Criminal Tribunal for Rwanda*

The ICTR has vocally endorsed the mandatory assignment of defense counsel,<sup>152</sup> but due to the particular requests of Jean-Bosco Barayagwiza, and the popular and widely-cited concurrence in the decision, it is not clear how the ICTR would treat a defendant that seeks self-representation, such as Milošević, Šešelj, and Norman. Nevertheless, the ICTR has not qualified the assignment of mandatory counsel.

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<sup>147</sup> *Id.* Norman objected to the idea of standby counsel and threatened to boycott attendance, before eventually agreeing to the decision to have his former legal team serve as standby counsel, in conformity with the definition outlined by the Šešelj Trial Chamber. Statement by the Trial Chamber on the State of the Proceedings in the Trial of the CDF Group of Indictes, June 15, 2004.

<sup>148</sup> *Id.*

<sup>149</sup> *Profile: Vojislav Šešelj*, *supra* note 116.

<sup>150</sup> See Šešelj Decision, *supra* note 35, at para. 4 (Šešelj has intimated to behaving in a ‘disruptive, obstructionist or scandalous’ manner); see also *id.* at paras. 22–23.

<sup>151</sup> *Id.* at paras. 7, 23–24.

<sup>152</sup> Prosecutor v. Jean-Bosco Barayagwiza, Case No.: ICTR-97-19-T, Nov. 2, 2000 (“Decision on Defence Counsel Motion to Withdraw”). All documents from this case are available through the ICTR website, <http://www.ictt.org> (last visited Oct. 10, 2004).

Even though the ICTR judges decided only at the 12th Plenary Session held in 2002 to add Rule 45 *Quater* to the ICTR's Rules of Procedure and Evidence which provides that a Trial Chamber may, in the interest of justice, instruct the Registrar to assign counsel to represent the interests of the defendant,<sup>153</sup> the ICTR was required to address this situation in a case some time earlier.<sup>154</sup> Rule 45 *Quater* in essence codified this power that the Trial Chamber had previously exercised.<sup>155</sup>

The jurisprudence of the ICTR has left open the possibility of assigning counsel to a defendant on a case-by-case basis in the interests of justice. The ICTR Trial Chamber dealt with this issue in the *Barayagwiza* case in 2000. Barayagwiza, also a lawyer by training, was a founding member of the *Coalition pour la Défense de la République* (CDR) party, and was a member of the *comité d'initiative*, which organized the founding of the company *Radio Télévision Libre des Mille Collines, S.A.*<sup>156</sup> He also held the post of Director of Political Affairs in the Ministry of Foreign Affairs.<sup>157</sup> The ICTR Trial Chamber took the right to self-representation as articulated in the Statute as a starting point, but noted that according to international (and some national) jurisprudence, this right is not absolute.<sup>158</sup>

The Registrar declined Barayagwiza's request on January 5, 2000 for the withdrawal of his counsel, J.P.L. Nyaberi.<sup>159</sup> Barayagwiza sought the withdrawal citing reasons of "lack of competence, honesty, loyalty,

<sup>153</sup> ICTR RULES, 109 Rule 45 *Quater*.

<sup>154</sup> Kingsley Chiedu Moghalu, *International Humanitarian Law from Nuremberg to Rome: The Weighty Precedents of the International Criminal Tribunal for Rwanda*, 14 PACE INT'L L. REV. 273, 300–01 (2002). Some commentators point to the precedent of Jean-Paul Akayesu before the ICTR in establishing that the defendant is entitled to self-representation. This is so because Akayesu fired his counsel after being convicted and was permitted to act on his own at the sentencing phase of his trial. See William A. Schabas, *Article 67 Rights of the Defendant*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 845, 857 (Otto Triffterer ed., 1999). However, this case may not be a good indicator as to the practice of the ICTR, and definitely does not lead one to believe that the right is absolute, as the trial was over.

<sup>155</sup> Moghalu, *supra* note 154, at 301.

<sup>156</sup> Prosecutor v. Jean-Bosco Barayagwiza, Case No.: ICTR-99-52-T, at para. 6 ("Judgement").

<sup>157</sup> *Id.*

<sup>158</sup> See generally Prosecutor v. Jean-Bosco Barayagwiza, Case No.: ICTR-97-19-T, Nov. 2, 2000 ("Decision on Defence Counsel Motion to Withdraw").

<sup>159</sup> Prosecutor v. Jean-Bosco Barayagwiza, Case No.: ICTR-99-52-T, at para. 82 ("Judgement").

diligence, and interest.”<sup>160</sup> The Registrar’s decision was confirmed by the President of the ICTR on January 19, 2000,<sup>161</sup> but on January 31, 2000, the Appeals Chamber ordered the withdrawal of Barayagwiza’s defense counsel, J.P.L. Nyaberi, and ordered the assignment of new counsel and co-counsel for Barayagwiza. Carmelle Marchessault and David Danielson were subsequently appointed lead and co-counsel for Barayagwiza, respectively.<sup>162</sup>

Nevertheless, Barayagwiza declined to accept the assigned counsel. Marchessault and Danielson informed the ICTR Trial Chamber that Barayagwiza would not be attending the trial, and had instructed counsel not to represent him at the trial, based on his inability to have a fair trial due to the previous decisions of the ICTR in relation to his provisional release.<sup>163</sup> The ICTR Trial Chamber ordered counsel to continue representing Barayagwiza. Counsel filed a motion to withdraw on October 26, 2000, given their client’s instructions not to represent him at trial, which was denied on November 2, 2000, on the basis that the ICTR Trial Chamber had to ensure the rights of Barayagwiza.<sup>164</sup> The ICTR Trial Chamber held Barayagwiza’s behavior to be “an attempt to obstruct proceedings. In such a situation, it cannot reasonably be argued that Counsel is under an obligation to follow them, and that [sic] not do so would constitute grounds for withdrawal.”<sup>165</sup> It referred to the “well established principle in human rights law that the judiciary must ensure the rights of the accused, taking into account what is at stake for him.”<sup>166</sup> The ICTR Trial Chamber further noted that assigned counsel “represents the interest of the Tribunal to ensure that the Accused receives a fair trial. The aim is to obtain efficient representation and adversarial proceedings.”<sup>167</sup> It was only on February 6, 2001 that the ICTR Trial Chamber directed the Registrar to withdraw their assignment and appoint new counsel for Barayagwiza because he had terminated their mandate.<sup>168</sup>

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at para. 83.

<sup>164</sup> *Id.*

<sup>165</sup> Prosecutor v. Jean-Bosco Barayagwiza, Case No.: ICTR-97-19-T, Nov. 2, 2000, at para. 24 (“Decision on Defence Counsel Motion to Withdraw”).

<sup>166</sup> *Id.* at para. 23.

<sup>167</sup> *Id.* at para. 21.

<sup>168</sup> Prosecutor v. Jean-Bosco Barayagwiza, Case No.: ICTR-99-52-T, at para. 83 (“Judgement”).

Judge Gunawardana took the decision a step further. He highlighted, in his separate concurrence, the court's power to control its own proceedings.<sup>169</sup> He discussed the effect a decision to grant the withdrawal of counsel would have on the administration of justice of the trial.<sup>170</sup> He submitted that Article 20(4)(d),<sup>171</sup> the now infamous provision founded on ICCPR Article 14(3)(d), is "an enabling provision for the appointment of a 'standby counsel,'" and in such circumstances the ICTR should make use of court-appointed standby counsel.<sup>172</sup>

## V. CONCLUSION

Iraqi authorities organizing the Iraqi Special Tribunal have sent the message that they want their Tribunal to encompass the principles and lessons adopted by the "true" international tribunals that have preceded it.<sup>173</sup> Article 20(d)(4) of the Special Tribunal Statute includes the same language regarding self-representation as the other instruments previously discussed: "to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing."<sup>174</sup> The Iraqi Special Tribunal should not, however, follow the approach of the *Milošević* Trial Chamber, which permitted the former Serb leader to represent himself in court, despite doing so in a thoroughly disruptive manner.

This article has demonstrated the fallacy of the *Milošević* Trial Chamber's conclusion that the defendant's right to self-representation is

<sup>169</sup> Prosecutor v. Jean-Bosco Barayagwiza, Case No.: ICTR-97-19-T, Nov. 2, 2000 ("Decision on Defence Counsel Motion to Withdraw, Concurring and Separate Opinion of Judge Gunawardana").

<sup>170</sup> *Id.*

<sup>171</sup> ICTR STAT. art. 20(4)(d).

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

*Id.*

<sup>172</sup> Prosecutor v. Jean-Bosco Barayagwiza, Case No.: ICTR-97-19-T, Nov. 2, 2000 ("Decision on Defence Counsel Motion to Withdraw, Concurring and Separate Opinion of Judge Gunawardana").

<sup>173</sup> See Marlise Simons, *The Struggle for Iraq: Justice; Iraqis Meet with War Crimes Trial Experts*, N.Y. TIMES, Apr. 7, 2004, at A9.

<sup>174</sup> THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL, art. 20(d)(4), at [http://www.cpa-iraq.org/human\\_rights/Statute.htm](http://www.cpa-iraq.org/human_rights/Statute.htm) (last visited Aug. 10, 2004).

protected as a customary international law right. The underlying purpose of the defendant's right "to defend himself in person or through legal assistance of his own choosing" is to ensure a fair trial, an objective that can best be met in cases of former leaders accused of international crimes by assigning the defendant a highly qualified attorney who is vigilantly committed to representing his client's interests.

The *Šešelj* Trial Chamber of the ICTY has attempted to avoid a repeat of the *Milošević* situation by assigning standby counsel over the objection of the defendant. This novel approach has also been recently employed by the ICTR and SCSL. It is significant that these international tribunals have recognized that assignment of counsel to an unwilling defendant is permissible under international law and is sometimes necessary to safeguard the legitimacy of the proceedings. However, in light of the likelihood of disruptive behavior, the nature and the complexity of the trials, and the prominence placed on the concept of "equality of arms" in the context of war crimes trials, counsel should be required to represent such defendants in court from the outset, rather than waiting for the trial to unravel before being directed to step in.

## VI. POSTSCRIPT

As this article was in final page proofs, on September 22, 2004, with the *Milošević* trial about to begin the defense phase, the Trial Chamber (now composed of Patrick Robinson, O-Gon Kwon, and Iain Bonomy) decided to revisit Judge May's ruling that Slobodan Milošević had a right to represent himself in the courtroom. As discussed in this article, there were two independent grounds upon which Judge May's ruling could potentially have been reversed.

First, the Trial Chamber might have held that the language of the ICTY Statute does not in fact give the defendant the right to self-representation. The language from the Yugoslavia tribunal statute originally comes from an identically worded clause contained in the European Convention on Human Rights and in the International Covenant on Civil and Political Rights. The negotiating record of these treaties indicates that the drafters' concern was with effective representation, not self-representation. In other words, the drafters felt that a defendant should have a right to either be represented by a lawyer or to represent himself; they did not state that each defendant must be asked to choose between the two. Unlike Britain and the United States, most countries of the world do not allow criminal defendants to represent

themselves under any circumstances, and this has been deemed consistent with international law by the European Court of Human Rights.”<sup>175</sup>

Second, even if Judge May was correct in his reading of the law, as providing a right to self-representation, the Trial Chamber could find that he was wrong to treat that right as absolute. As authority for his position, Judge May cited the U.S. Supreme Court’s 1975 ruling in *Faretta v. California*,<sup>176</sup> which held that there was a fundamental right to self-representation in U.S. courts. But the U.S. high court also added a caveat, which Judge May overlooked, stating that “the right of self-representation is not a license to abuse the dignity of the courtroom.”<sup>177</sup> U.S. appellate courts have subsequently held that the right of self-representation is subject to exceptions—such as when the defendant acts in a disruptive manner or when self-representation interferes with the dignity or integrity of the proceedings.<sup>178</sup>

In its ruling on September 22, the Trial Chamber focused on this second ground, ruling that Milošević’s poor health, which repeatedly disrupted the trial, justified appointment of counsel to represent him in court for the remainder of the proceedings. In its view:

If at any stage of a trial there is a real prospect that it will be disrupted and the integrity of the trial undermined with the risk that it will not be conducted fairly, then the Trial Chamber has a duty to put in place a regime which will avoid that. Should self-representation have that impact, we conclude that it is open to the Trial Chamber to assign counsel to conduct the defense case, if the Accused will not appoint his own counsel.<sup>179</sup>

Following the Trial Chamber’s decision of September 22, Milošević refused to cooperate in any way with assigned counsel. Believing that they could not adequately represent the defendant without such cooperation, assigned counsel brought an interlocutory appeal to the ICTY Appeals

<sup>175</sup> NOWAK, *supra* note 34, at 259; *Croissant v. Germany*, 16 Eur. Ct. H.R. 135, 151 para. 29 (1992), available at <http://hudoc.echr.coe.int/Hudoc1doc/HEJUD/sift/321.txt> (last visited Nov. 15, 2004).

<sup>176</sup> *Faretta v. California*, 422 U.S. 806, 841 (1975).

<sup>177</sup> *Id.* at 834 n.46.

<sup>178</sup> *United States v. Mack*, 362 F.3d 597, 601 (9th Cir. 2004); *United States v. West*, 877 F.2d 281, 287 (4th Cir. 1989); *Tuitt v. Fair*, 822 F.2d 166, 177 (1st Cir. 1987); *United States v. Cauley*, 697 F.2d 486, 491 (2d Cir. 1983); *United States v. Harris*, 317 F. Supp. 2d 542, 544–45 (D.N.J. 2004).

<sup>179</sup> *Prosecutor v. Milošević*, Case No.: IT-02-54-T, Sept. 22, 2004, at para. 33 (“Reasons for Decision on Assignment of Defence Counsel”).

Chamber (consisting of Theodor Meron, Fausto Pocar, Florence Mumba, Mehmet Guney, and Ines Monica Weinberg de Roca).

Based on the language of the ICTY Statute (without any analysis of the negotiating record of the international instruments from which the language originated), the Appeals chamber agreed that defendants have “a presumptive right to represent themselves before the Tribunal.”<sup>180</sup> The Appeals Chamber also agreed with the Trial Chamber that the right was subject to limitations. According to the Appeals Chamber, the test to be applied is that “the right may be curtailed on the grounds that a defendant’s self-representation is substantially and persistently obstructing the proper and expeditious conduct of his trial.”<sup>181</sup> Applying this test, the Appeals Chamber concluded that the Trial Chamber had not abused its discretion in deciding to restrict Milošević’s right to self-representation.<sup>182</sup>

However, the Appeals Chamber felt that the Trial Chamber’s order requiring Milošević to act through appointed counsel went too far, and that the proportionality principle required that a more “carefully calibrated set of restrictions” be imposed on Milošević’s trial participation.<sup>183</sup> Under these, when he is physically able to do so, Milošević must be permitted to take the lead in presenting his case—choosing which witnesses to present, questioning those witnesses, giving the closing statement, and making the basic strategic decisions about the presentation of his defense.<sup>184</sup> “If Milošević’s health problems resurface with sufficient gravity, however, the presence of Assigned Counsel will enable the trial to continue even if Milošević is temporarily unable to participate.”<sup>185</sup>

It is noteworthy that both the *Milošević* Trial Chamber and Appeals Chamber concluded that self-representation was a fundamental (though qualified) right. In so doing, the Appeals Chamber impliedly overruled the reasoning of the Trial Chamber in the case of *Prosecutor v. Šešelj*.<sup>186</sup> As discussed above, in ordering that the defendant Vojislav Šešelj be represented by “standby counsel” in order to rein in his disruptive behavior,

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<sup>180</sup> *Prosecutor v. Milošević*, Case No.: IT-02-54-AR73.7, Nov. 1, 2004, at para. 9 (“Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel”).

<sup>181</sup> *Id.* at para. 13.

<sup>182</sup> *Id.* at para. 15.

<sup>183</sup> *Id.* at paras. 17–18.

<sup>184</sup> *Id.* at para. 19.

<sup>185</sup> *Id.* at para. 20.

<sup>186</sup> *Prosecutor v. Vojislav Šešelj*, Case No.: IT-03-67-PT, May 9, 2003 (“Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Šešelj”).

the *Šešelj* Trial Chamber had taken the position that ICCPR Article 14(3)(d), and similar provisions in regional conventions and its own statute do not declare that the right to work through legal counsel is derivative of the primary right to represent oneself. As the *Šešelj* Trial Chamber observed: “It would be a misunderstanding of the word ‘or’ in the phrase ‘to defend himself in person or through legal assistance of his own choosing’ to conclude that self-representation excludes the appointment of counsel to assist the Accused or vice versa.”<sup>187</sup> In contrast, by interpreting the phrase as creating a presumptive right of self-representation, the ICTY Appeals Chamber decision is likely to fuel a spate of cases before the European Court of Human Rights, challenging the practice throughout Europe of requiring defendants to act through counsel.

It is also significant that both the ICTY Trial Chamber and Appeals Chamber focused only on Milošević’s health as the source of disruption justifying restriction on his right of self-representation. Evidently, neither Chamber felt that his trial antics rose to the level of “substantial and persistent” disruption that would justify requiring him to act through defense-counsel. If adopted by other tribunals, the stringent test formulated by the ICTY Appeals Chamber will make it difficult for judges to maintain decorum in future war crimes trials. In particular, Saddam Hussein, whose war crimes trial is set to begin in 2005, would be able to argue that he, too, has a right to represent himself before the Iraqi Special Tribunal despite his obvious intentions to use self-representation as a means of undermining the dignity of the proceedings and disrupting the trial. If Hussein were allowed to follow Milošević’s playbook—using the unique opportunity of self-representation to launch daily attacks against the legitimacy of the IST—this would seriously undermine the goal of fostering reconciliation between the Iraqi Kurds, Shi’ites and Sunnis; the historic record developed by such a trial would forever be questioned; and the trial could transform Hussein and his subordinates into popular martyrs, potentially fueling violent opposition to the new Iraqi government.

In the final analysis, justice demands that former leaders like Milošević and Hussein be given fair trials. This article has made the case that this can best be guaranteed by appointing distinguished counsel to defend them, not by permitting them to act as their own lawyers.

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<sup>187</sup> *Id.* at para. 29.



