

2006

As For Self-Representation In The International Criminal Court, Is There An International Right To Self-Representation In War Crimes Trials, Or Should Defense Counsel Be Imposed From The Outset Of The Trial At The ICC? How Should The ICC Deal With A Defendant-Lawyer Who Uses Self-Representation To Disrupt The Orderly Trial Proceedings?

Chelan Bliss

Follow this and additional works at: https://scholarlycommons.law.case.edu/war_crimes_memos



Part of the [Criminal Procedure Commons](#), and the [International Law Commons](#)

This Memo is brought to you for free and open access by the War Crimes at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in War Crimes Memoranda by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW
INTERNATIONAL WAR CRIMES RESEARCH LAB

MEMORANDUM FOR THE
INTERNATIONAL CRIMINAL COURT

ISSUE:

AS FOR SELF-REPRESENTATION IN THE INTERNATIONAL CRIMINAL COURT, IS THERE AN INTERNATIONAL RIGHT TO SELF-REPRESENTATION IN WAR CRIMES TRIALS, OR SHOULD DEFENSE COUNSEL BE IMPOSED FROM THE OUTSET OF THE TRIAL AT THE ICC? HOW SHOULD THE ICC DEAL WITH A DEFENDANT-LAWYER WHO USES SELF-REPRESENTATION TO DISRUPT THE ORDERLY TRIAL PROCEEDINGS?

Prepared By Chelan Bliss
Fall 2006

TABLE OF CONTENTS

INDEX OF AUTHORITIES	iii
<u>I. INTRODUCTION AND SUMMARY OF CONCLUSIONS</u>	1
A. Issue	1
B. Summary of Conclusions	1
1. There is a universal right to self-representation in adversarial war crimes trials.	1
2. The right to self-representation in war crimes trials is not absolute.	2
3. The defendant retains power in the trial even when counsel is imposed upon him.	5
4. The potential for abuse of court and obstruction of proceedings is not extinguished when counsel is imposed upon the defendant.	6
<u>II. FACTUAL BACKGROUND</u>	6
<u>III. LEGAL ANALYSIS</u>	9
A. There is a universal right to self-representation in adversarial war crimes trials.	10
1. Common law and civil law treatment of self-representation differ.	10
2. International treaties and conventions recognize the right to self-representation.	14
3. The statutes that have created international tribunals and courts recognize a right to self-representation.	14
B. The right to self-representation in war crimes trials is not absolute.	18
1. There is debate over the drafters' intent and correct interpretation of the language that guarantees a right to self-representation in major treaties, conventions and tribunal statutes.	18
2. Categorical exceptions to the right to self-representation exist even in common law countries that recognize self-representation as an essential right.	20
3. References to exceptions and limitations often accompany the assertion of the right to self-representation, in domestic and international case history.	21
4. There are at least four circumstances that can justify the abridgement of the defendant's right to self-representation in a war crimes trial.	22
a. A court may impose counsel upon an incapable defendant.	22
b. A court may impose counsel upon an obstructionist defendant.	24
c. A court may impose counsel upon a defendant to protect the integrity of the court.	27
d. A court may impose counsel upon one defendant to protect the fairness of the trials of other defendants or co-defendants.	27
C. The defendant retains power in the trial even when counsel is imposed upon him.	28

D. The potential for abuse of court and obstruction of proceedings is not extinguished when counsel is imposed upon the defendant.	30
IV. <u>CONCLUSION</u>	34

INDEX OF AUTHORITIES

Statutes and Rules

1. American Convention on Human Rights, *opened for signature* Nov. 22, 1969, Art. 8(2)(d), 114 UNTS 123 (entered into force July 18, 1978).
2. Criminal Procedure Act of Scotland (1995) as amended by the Sexual Offences (Procedure and Evidence) Act (Scotland) (2002)
3. European Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, Art. 6(3), 213 UNTS 222 (entered into force Sept. 3, 1953), *as amended by* Protocol No. 11, May 11, 1994, ETS No. 155, 33 ILM 943 (1994)
4. Int'l Criminal Trib. for the Former Yugoslavia's Rules of Procedure and Evidence (2005). Rule 80
5. International Covenant on Civil and Political Rights, *opened for signature* December 16, 1966, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No.16) at 52, UN Doc. A/6316 (1996), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976)
6. Rome Statute of the International Criminal Court, July 17, 1998, Art. 67, UN Doc. A/CONF.183/9*(1998), 37 ILM 999 (1998)
7. Statute for the Special Court for Sierra Leone, Article 17(d)(4)
8. Statute of the Int'l Criminal Trib. for the Former Yugoslavia, SC Res, 827 (May 25, 1993) (amended 1998)
9. Statute of the International Criminal Tribunal for Rwanda, SC Res. 955, annex, Art. 20(4)(d) (Nov. 8, 1994)
10. Statute of the Iraqi Special Tribunal, Dec. 10 2003, 43 I.L.M. 231
11. U.S. CONST. art. VI

Cases

UNITED STATES

12. *Faretta v. California*, 422 U.S. 806 (US Supreme Court, 1975)
13. *Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 162 (2000)

14. McKaskle v. Wiggins, 465 U.S. 168, 184 (US Supreme Court, 1984)
15. United States v. Brock, 159 F.3d 1077 (7th Cir. 1998)
16. United States v. Farhad, 190 F.3d 1097 (1999)
17. United States v. Williams, 1999 U.S. App. LEXIS 32715 (10th Cir. 1999)
18. United States v. Cauley, 697 F.2d 486, 491 (2d Cir. 1983), cert denied, 459 U.S. 1222
19. United States v. West, 877 F.2d 281, 287 (4th Cir. 1989), cert. denied, 493 U.S. 959 (1989)
20. Savage v. Estelle, 908 F.2d 508, 513-15 (9th Cir. 1990), cert. denied, 501 U.S. 1255 (1991).

CANADA

21. R v. Swain (1991) 1 S.C.R. 933 (Canada)

UNHRC

22. Dave Marais v. Madagascar, Communication No. 49/1979 (08/29/2005)
23. Hill v. Spain, Communication No. 526/1993(04/02/1997)
24. Miguel Angel Estrella v. Uruguay, Communication No. 74/1980 (01/03/2006)

ECHR

25. Croissant v. Germany, 237-B Eur. Ct. H.R.
26. Philis v. Greece, 1997-IV Eur. Ct. H.R. 1074

ICTY

27. Prosecutor v. Seselj, Case No. IT-03-67-PT, (“Decision on Assignment of Counsel”) (Aug. 21, 2006)
28. Prosecutor v. Seselj, Case No. IT-03-67-PT, (“Decision on Prosecutor’s Motion for Order Appointing Counsel”) (May 9, 2003)
29. Prosecutor v. Seselj, Case No. IT-03-67-PT, (“Decision on Appeal Against the Trial Chamber’s Decision on Assignment of Counsel”) (Oct. 20, 2006)

30. Prosecutor v. Milosevic, Case No. IT-02-54, (“Reasons for Decision on Assignment of Counsel”) (Apr. 4 2003)
31. Prosecutor v. Milosevic, Case No. IT-02-54-T, (“Decision on Assigned Counsel’s Motion for Withdrawal”) (Dec. 7, 2004)
32. Prosecutor v. Milosevic, Case No. IT-02-54-T, (“Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel”), (November 1, 2004)
33. Prosecutor v. Milosevic, Case No. IT-02-54-T, (“Decision on Assigned Counsel Request for Certification of an Interlocutory Appeal Against the Decision on Assigned Counsel’s Motion for Withdrawal”) (Dec. 17, 2004)
34. Prosecutor v. Jankovic, Case No. IT-96-2312-PT, (“Decision Following Registrar’s Notification of Radovan Stankovic’s Request for Self-Representation”) (Aug. 19, 2005)

SCSL

35. Prosecutor v. Norman, (“*Decision on the Application of Samuel Hinga Norman for Self-Representation Under Article 17(4)(d) of the Statute of the Special Court*”), No. SCSL-04-14-T-125 (June 8, 2004)
36. Prosecutor v. Norman, No. SCSL-2004-14-T (June 14, 2004)

Law Review Articles

37. Nina Jorgensen , *Note and Comment: The Right of the Accused to Self-Representation Before International Criminal Tribunals*, 98 AM. J. INT’L. L. 711 (2004)
38. Nina Jorgensen, *Current Development: The Right of the Accused to Self-Representation Before International Criminal Tribunals*, 99 AM. J. INT’L. L. 663 (2005)
39. Marie Higgins Williams, *The pro se Criminal Defendant, Standby Counsel, and the Judge: A Proposal for Better-Defined Roles*, 71 U. COLO. L. REV. 789 (2000)
40. 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, 284 (1993)
41. Tiffany Buxton, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 CASE

- W. RES. J. INT'L L. 103 (2002)
42. Kate Kerr, *Fair Trials at International Criminal Tribunals: Examining the Parameters of the International Right to Counsel*, 36 GEO. J. INT'L L. 1227 (2005)
 43. Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C.L. REV. 621 (2005)
 44. Constantinos Hotis, A "Fair and Expeditious" Trial: A Reappraisal of Slobodan Milosevic's Right to Self-Representation before the International Criminal Tribunal for the Former Yugoslavia, 6 CHI. J. INT'L L. 775 (2006)
 45. Milan Markovic, *In the Interest of Justice? A Critique of the ICTY Trial Court's Decision to Assign Counsel to Slobodan Milosevic*, 18 GEO. J. LEGAL ETHICS 947 (2005)
 46. Michael P. Scharf, Christopher M. Rassi, *Do Former Leaders Have An International Right to Self-Representation In War Crimes Trials?*, 20 OHIO ST. J. ON DISP. RESOL. 3 (2005)
 47. Kenneth S. Sogabe, *Exercising the Right to Self-Representation in United States v. Farhad: Issues in Waiving a Criminal Defendant's Sixth Amendment Right to Counsel*, 30 GOLDEN GATE U. L. REV. 129 (2000)
 48. Eric Rieder, *The Right of Self-Representation in the Capital Case*, 85 COLUM. L. REV. 130 (1985)
 49. Nicolas M. Rouleau and Annelies Brock and Daisy Yu and Anne Heindel and Mario Cava and Tejal Jesrani, *Updates from the International Criminal Courts*, 12 HUM. RTS. BR. 33 (2005)
 50. SYMPOSIUM: Michael P. Scharf & Ahran Kang, *Milosevic & Hussein on Trial: Panel 3: The Trial Process: Prosecution, Defense and Investigation: Errors and Missteps: Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR, and SCSL*, 38 CORNELL INT'L L.J. 911 (2005)
 51. SYMPOSIUM: Mikhail Wladimiroff, *Milosevic & Hussein on Trial: Panel 3: The Trial Process: Prosecution, Defense, and Investigation: Former Heads of State on Trial*, 38 CORNELL INT'L L.J. 949 (2005)

Books and Other Media

52. GIDEON BOAS, "The Right to Self-Representation in International and Domestic Criminal Law-Limitations and Qualifications on that Right" in BELLIGERENT REPRISALS at 58 (2006)

53. VIRGINIA MORRIS AND MICHAEL SCHARF, *INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL OF THE FORMER YUGOSLAVIA*, (1995)
54. Ahmed Rasheed, *Judge Ejects Saddam from Baghdad Court*, Reuters, Oct. 10, 2006
55. MICHAEL SCHARF AND GREGORY MCNEAL, *SADDAM ON TRIAL* (2006)
56. Int’l Criminal Trib. for the Former Yugoslavia Press Release, “Vojislav Seselj Assigned Counsel by Trial Chamber” (Nov. 27, 2006)

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Issue*

Self-represented defendants in international war crimes trials have created serious problems in the courtroom. In the course of acting as their own counsel, some self-represented defendants have greatly slowed the trial process, required extensive assistance, abused witnesses, launched into irrelevant political speech and disparaged the court. This memo addresses the extent of the international right to self-representation in war crimes trials, and what limitations may pertain to its application.

B. Summary of Conclusions

1. The right to self-representation in adversarial international war crimes trials is almost *universally acknowledged* and constitutes customary international law.

The criminal defendant's right to self-representation is well established in international law. Defendants have represented themselves before major international war crimes tribunals, including the International Criminal Tribunal for the former Yugoslavia ("ICTY")¹ and the Special Court for Sierra Leone ("SCSL")². The founding statutes of these courts contain language interpreted as asserting a right to self-representation, as does Article 67 of the Rome Statute of the International Criminal Court

* As for self-representation in the International Criminal Court, is there an international right to self-representation in war crimes trials, or should defense counsel be imposed from the outset of the trial at the ICC? How should the ICC deal with a defendant-lawyer who uses self-representation to disrupt the orderly trial proceedings?

¹ Prosecutor v. Milosevic, Case No. IT-02-54-T, Dec. 7, 2004, "Decision on Assigned Counsel's Motion for Withdrawal" (Defendant Milosevic defended himself until his ill health caused the court to impose counsel on him) [Reproduced in Accompanying Notebook at Tab 31]

² Prosecutor v. Norman, Case No. SCSL-2004-14-T, June 14, 2004 [Reproduced in Accompanying Notebook at Tab 36]

(“ICC”).³ Domestic laws of many common-law countries guarantee this right; thirty-three countries proclaim a right to self-representation unambiguously in their constitutions, and many more countries respect a right to self-representation without an explicit constitutional mandate.⁴ Regional human rights treaties and conventions, such as Article 8(2)(d) of the American Convention on Human Rights (“ACHR”),⁵ Article 6(3) of the European Convention on Human Rights (“ECHR”),⁶ and the International Covenant on Civil and Political Rights (“ICCPR”),⁷ acknowledge a right to self-representation in criminal trials. Also, the Human Rights Committee has ruled that denial of a defendant’s right to self-representation can be a violation of the ICCPR.⁸ Collectively, this evidence establishes that a right to self-representation in adversarial criminal trials is customary international law.

2. The right to self-representation in international war crimes trials is *not absolute*.

While the right to self-representation is nearly universally acknowledged, international tribunals and domestic courts alike have conceded that it is not absolute.

³ Rome Statute of the International Criminal Court, July 17, 1998, Article 67, UN Doc. A/CONF.183/9*(1998), 37 ILM 999 (1998) [Reproduced in Accompanying Notebook at Tab 6]

⁴ 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, 284 (1993) [Reproduced in Accompanying Notebook at Tab 40]

⁵ American Convention on Human Rights, *opened for signature* Nov. 22, 1969, Art. 8(2)(d), 114 UNTS 123 (entered into force July 18, 1978). [Reproduced in Accompanying Notebook at Tab 1]

⁶ European Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, Art. 6(3), 213 UNTS 222 (entered into force Sept. 3, 1953), *as amended by* Protocol No. 11, May 11, 1994, ETS No. 155, 33 ILM 943 (1994) [Reproduced in Accompanying Notebook at Tab 3]

⁷ International Covenant on Civil and Political Rights, *opened for signature* December 16, 1966, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No.16) at 52 (entered into force Mar. 23, 1976) [Reproduced in Accompanying Notebook at Tab 5]

⁸ Hill v. Spain, Human Right Commission, Communication No. 526/1993(04/02/1997) [Reproduced in Accompanying Notebook at Tab 23]

The ICTY noted that “the right to self-representation is a qualified, not an absolute, right”.⁹

a. There is debate over the statutory intent and correct interpretation of key self-representation passages in treaties, conventions and the statutes that created international tribunals.

There is a textual debate over whether the oft-used phraseology “to represent himself in person or be represented by counsel of his own choosing” presents a binary and mutually exclusive choice. If the choice is mutually exclusive, there is further debate as to who gets to make the binary choice. If the choice is not mutually exclusive, there is discussion regarding how a defendant may both be assigned counsel and represent himself in his trial.¹⁰

There is also a debate over the legislative intent in creating such phraseology, especially as regards the drafting of the ICCPR.¹¹

b. Categorical exceptions undermine the fundamentality of the right to self-representation.

Some of the same common-law countries that so esteem the right to self-representation also carve out specific categorical exceptions to the right. In Scotland, the

⁹ Prosecutor v. Milosevic, Case No. IT-02-54-T, Dec. 7, 2004 (“Decision on Assigned Counsel’s Motion for Withdrawal”) para. 22 [Reproduced in Accompanying Notebook at Tab 31] and cited by Nina Jorgensen, *Current Developments: The Right of the Accused to Self-Representation Before International Criminal Tribunal for the Former Yugoslavia: Further Developments*, 99 AM. J. INT’L. L. 663 (2005), [hereinafter “Current Developments”], [Reproduced in Accompanying Notebook at Tab 38].

¹⁰ GIDEON BOAS, “*The Right to Self-Representation in International and Domestic Criminal Law-Limitations and Qualifications on that Right*” in BELLIGERENT REPRISALS at 58 (2006) [Reproduced in Accompanying Notebook at Tab 52]

¹¹ Michael P. Scharf, Christopher M. Rassi, *Do Former Leaders Have An International Right to Self-Representation In War Crimes Trials?*, 20 OHIO ST. J. ON DISP. RESOL. 3 (2005) [Reproduced in Accompanying Notebook at Tab 11].

defendant in a sexual crime case is not allowed to represent himself in court.¹² In the United States, defendants are not allowed to represent themselves on appeal.¹³ Many other countries have categorical exceptions, and this tendency to limit self-representation undermines the fundamentality of the right, since it can be categorically swept aside in favor of judicial effectiveness or witness sensitivity.

c. *There are at least four circumstances that can justify the imposition of counsel upon the defendant in a war crimes trial: defendant incapacity, defendant obstructionism, threat to interests of other defendants, and jeopardy of court integrity.*

A court may impose some form of counsel upon a defendant who is *incapable* of adequately conducting his own defense, if needed to protect the integrity of the court or the fairness of the trial. When ICTY defendant Milosevic's illness worsened, the court appointed counsel against the defendant's will.¹⁴ Milosevic's health needs hampered the trial process and slowed the proceedings to a near standstill.¹⁵

A court may also curtail a defendant's right to self-representation if the defendant engages in consistently *obstructionist* behavior. The specific behavioral threshold that would justify this imposition is not clearly defined. In the domestic case of *United States v. Williams*, a court held that the defendant's behavior must be more than "bizarre" to trigger the imposition of counsel, and that the behavior must include an intentional

¹² Criminal Procedure Act of Scotland (1995) as amended by the Sexual Offences (Procedure and Evidence) Act (Scotland) (2002) [Reproduced in accompanying notebook at Tab 2].

¹³ Boas, *supra* [Reproduced in accompanying notebook at Tab 52].

¹⁴ Prosecutor v. Milosevic, Decision on Appeal of Assigned Counsel's Motion for Withdrawal, No. IT-02-54-T, para. 22 (Dec. 7, 2004), [Hereinafter "Counsel Motion for Withdrawal"], [Reproduced in accompanying notebook at Tab 31].

¹⁵ *Id.*

disregard for the rules of the court.¹⁶ A recent ruling in *Prosecutor v. Seselj* greatly defers to trial court discretion.¹⁷ Counsel has been imposed upon obstructionist defendants in the ICTY case of *Prosecutor v. Jankovic*¹⁸ and in the domestic case *United States v. Brock*,¹⁹ among others.

The right to self-representation can be curtailed if the failure to impose counsel upon the defendant will otherwise compromise the *integrity* of the court, endanger witnesses, or imperil the fairness of the trials of *co-defendants* or defendants in other trials.²⁰ The court has responsibilities to more than just the one defendant.

3. If circumstances trigger the court to restrict a defendant's right to self-representation, the defendant is not necessarily reduced to a passive role in his or her defense, but retains some power in the planning, strategy and execution of his or her case.

The defendant is not reduced to a passive role when counsel is imposed upon him or her, but generally retains control over the direction and strategy of his or her case. The defendant may even retain the right to address the court, the witnesses, and to submit documents. He might just lose the right to perform these tasks *exclusively*, or the court might just want standby counsel to take over when the defendant is being uncooperative.

¹⁶ *Prosecutor v. Seselj*, (“*Decision on Assignment of Counsel*”), *supra* [Reproduced in accompanying notebook at Tab 27] quoting *United States v. Williams*, 1999 U.S. App. LEXIS 32715 (10th Cir. 1999), [Reproduced in accompanying notebook at Tab 17].

¹⁷ *Prosecutor v. Seselj*, Case No. IT-03-67-PT, (“*Decision on Appeal Against the Trial Chamber’s Decision on Assignment of Counsel*”) (Oct. 20, 2006) (hereinafter “*Counsel Appeal*”) [Reproduced in accompanying notebook at Tab #].

¹⁸ *Prosecutor v. Jankovic*, (“*Decision on Defence Counsel*”), para 74-79 [Reproduced in accompanying notebook at Tab 35].

¹⁹ *United States v Brock*, 159 F.3d 1077, 1080-1 (7th Cir. 1998) [Reproduced in accompanying notebook at Tab 15].

²⁰ *Prosecutor v. Norman*, *supra*, [Reproduced in accompanying notebook at Tab 36].

4 The potential for abuse of the court does not disappear when counsel is imposed upon the defendant.

The accused retains some power in the direction and content of his or her case, even after counsel has been imposed. In some courts, the accused may still submit documents, address the court, or question witnesses.²¹ In fulfilling these roles, the defendant may still be able to engage in obstructionist behavior.²² Additionally, the defendant may cause difficulties for the court by refusing to communicate or cooperate with his assigned counselor, even to the point that the fairness of his trial is compromised.²³

II. FACTUAL BACKGROUND

High-profile defendants in international war crimes trials have chosen to represent themselves in court without legal counsel, and in the execution of their defense, have sometimes caused serious problems for the courts. These trial problems have related to the defendant's incapacity to effectively interact with the court and follow the ground rules of procedure, or the defendant's engagement in obstructionist behavior and unwillingness to submit to the rules of the court.

Obstructionist behavior or incapable defense can jeopardize the integrity of an entire trial. The extent of damage possible is apparent when looking at the example of Seselj, a defendant at the ICTY. He used his right to self-defense to obstruct the court and interrupt the orderly proceedings of the trial. He did this by harassing witnesses, making

²¹ Nina Jorgensen, *Note and Comment: The Right of the Accused to Self-Representation Before International Criminal Tribunals*, 98 AM. J. INT'L L. 711 (2004) at 723-4 (hereinafter "Note and Comment") [Reproduced in accompanying notebook at Tab 37].

²² *Id.*

²³ *Id.*

irrelevant speeches, making offensive remarks regarding the court and judges, and by submitting bizarre documents to the court.²⁴

For example, Seselj took repetitive issue with the traditional garb of the judges, declaring that the robes were reminiscent of the Catholic Inquisition or the uniforms of Nazi SS soldiers²⁵. He went so far as to address the court as follows: “My EEG shows nervousness of the heart caused by the frustrations and the psychological sufferings I am undergoing looking at your robes.... I have lost 18 kilogrammes because of my psychological frustration due to your robes, I don’t know how else to explain it.”²⁶ He would not set aside this complaint even after multiple declarations by the judge that the judicial attire would not change.²⁷ The court wasted time to deal with this irrelevant issue. Seselj also rebuked the authority of the court, and refused to cooperate, declaring that he had “no intention whatsoever of submitting” required documents.²⁸

Seselj took direct and personal aim at the officers of the court, and at the court itself. He wrote books with titles like, “Genocidal Israeli Diplomat Theodor Meron”, “In the Jaws of the Whore Del Ponte”, and “The Lying Hague Homosexual, Geoffrey Nice”.²⁹ He submitted documents that advised members of “the Hague Tribunal Registry [that

²⁴ Prosecutor v. Seselj, “Decision on Assignment of Counsel”) *supra* [reproduced in accompanying notebook at Tab 27].

²⁵ *Id.* at 13453

²⁶ *Id.*

²⁷ Transcript quote of the defendant at a Status Conference on October 4th, 2004, as quoted in Prosecutor v. Seselj, “Decision on Assignment of Counsel”, *supra* at 13453, [reproduced in accompanying notebook at Tab 27].

²⁸ *Id.* at 13451

²⁹ *Id.* at 13454

they] can only accept to suck my cock” and composed other, similarly offensive documents for admission to the court.³⁰

Perhaps most alarmingly, Seselj sent confidential documents to outside experts without court permission.³¹ This was a security concern, as access to the documents was restricted in order to protect the witnesses. Seselj maintained that he had the power to disclose the documents to whomever he wished.³² With these actions, Seselj endangered more than the integrity of the court or the trial, he may have endangered the safety of the witnesses.

Other examples abound. Saddam Hussein made a spectacle of his trial by engaging in obstructionist behavior and screaming offensive remarks at the judges.³³ ICTY defendant Slobodan Milosevic also used his trial as a forum for irrelevant and obstructionist political speech.³⁴

Incapacity of the defendant to execute his own defense can also be destructive to the proceedings. Milosevic’s self-representation slowed his trial substantially because he was too ill to work on his trial full-time, costing the trial 66 trial days and eventually reducing the trial to three days per week.³⁵

³⁰ *Id.* at 13450

³¹ *Id.*

³² *Id.* at 13448

³³ Ahmed Rasheed, *Judge Ejects Saddam from Baghdad Court*, REUTERS, Oct. 10, 2006 [Reproduced in accompanying notebook at Tab 57].

³⁴ Michael Scharf and Christopher Rassi, *Do Former Leaders Have An International Right to Self-Representation in War Crimes Trials?*, 20 OHIO ST. J. ON DIP. RESOL. 3 (2005) at 4, [Reproduced in accompanying notebook at Tab 46].

³⁵ Boas, *supra* at 72, [Reproduced in accompanying notebook at Tab 52], quoting *Prosecution v. Slobodan Milosevic, Reasons for Decision on Assignment of Defence Counsel*, Case No. IT-02-54-T, (Sept. 22, 2004), [reproduced in accompanying notebook at Tab 30]

Courts are struggling to deal with such defendants. If a defendant is able to slow the trial to a standstill, mock the judge regularly, and harass or endanger the witnesses, that defendant has the power to imperil the whole integrity of the court. It is doubtful that the result of such a trial would be meaningful. On the other hand, the integrity of a trial can also be damaged when defendants are deprived of essential rights. If self-representation is a fundamental right, it is perilous to the integrity of the court to disregard it. In defining the limitations of the right to self-representation, courts are trying to address and balance these concerns.

III. LEGAL DISCUSSION

A. There is a universal right to self-representation in adversarial international war crimes trials.

According to M. Cherif Bassiouni, 65 countries' domestic constitutions impliedly recognize a right to self-representation, and the constitutions of another 33 countries directly guarantee this right.³⁶ In the U.S., for example, the Supreme Court held (in *Faretta v. California*)³⁷ that a defendant in a criminal trial has a constitutional right to self-representation, implied in the Sixth Amendment of the Constitution of the United States.³⁸

Even when a right to self-representation is not found in a country's constitution, the country may still offer criminal self-representation to its defendants as a rule of court procedure or other law. Many domestic courts around the world recognize a right to self-

³⁶ M. Cherif Bassiouni, *supra* at 284, [Reproduced in accompanying notebook at Tab 40].

³⁷ *Faretta v. California*, 422 U.S. 806 (1975), [Reproduced in accompanying notebook at Tab 12].

³⁸ U.S. CONST. art. VI [Reproduced in accompanying notebook at Tab 11].

representation for criminal defendants, especially courts in nations that have adversarial trial systems³⁹. Regional human rights conventions, like the ECHR⁴⁰ and supranational human right treaties and conventions, such as the ICCPR⁴¹ also recognize this right. International war crimes tribunals reference the right to self-representation in their statutes and case histories, and the Rome Statute of the ICC⁴² also contains this language. Finally, the Human Right Committee has recognized a right to self-representation in its case history.⁴³ Collectively, these sources provide strong evidence that the right to self-representation, at least within adversarial-style proceedings, is customary international law.

1. Self-Representation has been more venerated in adversarial common law traditions than in inquisitorial civil law traditions, and while international war crimes trials include elements of both traditions, they are more adversarial than inquisitorial in nature.

Self-representation is as old as criminal trials themselves, but over time a recognition that appointed counsel could benefit the defendant and the court led to laws requiring the availability of counsel, even when the defendant cannot afford an attorney. This preference for counsel-represented defendants led to compulsory representation in many civil law countries, or systems of inquisitorial trial procedures.⁴⁴ In adversarial

⁴⁰ ECHR statute, *supra* [Reproduced in accompanying notebook at Tab 3]

⁴¹ ICCPR Statute, *supra* at 14(3) [Reproduced in accompanying notebook at Tab 5].

⁴² Rome Statute, *supra* [Reproduced in accompanying notebook at Tab 6].

⁴³ Hill v. Spain, Human Rights Committee, Communication No.526/1993, U.N. Doc. CCPR/C/59/D/526/1993, (April 2, 1997) [Reproduced in accompanying notebook at Tab 23].

⁴⁴ Boas, *supra* at 40-42 [Reproduced in accompanying notebook at Tab 52].

trial systems on the other hand, such, self-representation was retained as an option for defendants, even though it was widely considered that the defendant would be better off if represented by counsel.⁴⁵

There is an underlying divergence of emphasis between the two court systems, with civil law traditions focusing upon *protecting* the interests of the defendant and the court, and common law traditions focusing on honoring the *freewill* of the defendant. Gideon Boas asserts that, “the two differ profoundly in their treatment of the issue, logically divided by the different premises which underlie their systems of law”.⁴⁶

Both common law and civil law traditions are of interest to international war crimes tribunals, because the tribunals utilize elements of both traditions. War crimes trials “apply neither the common law nor the civil law in their practice. They represent procedurally what might be termed a ‘third way’”.⁴⁷ But though war crimes courts have been composed with elements of both traditions, they are adversarial in many ways.

a. In civil law traditions, the emphasis has been upon a fair trial and good guardianship of the defendant, and laws have evolved to require counsel in high-stakes criminal trials.

Some civil law countries, such as the Federal Republic of Yugoslavia, grant the right to self-representation only to defendants who are accused of crimes of lesser severity, such as crimes that involve more than ten years of prison.⁴⁸ The higher the stakes, the more likely that an inquisitorial trial system will require counsel.

⁴⁵ *Id.*

⁴⁶ *Id.* at 40

⁴⁷ *Id.* at 41

⁴⁸ Nina Jorgensen, “Note and Comment”, *supra* at 715 [reproduced in accompanying notebook at Tab 37].

France has a similar system. The French Code of Criminal Procedure requires that counsel must represent every defendant who has been charged with a “serious” offense.⁴⁹

Germany’s procedure is similar to that of France. The Code of Criminal Procedure of Germany requires counsel for all defendants “charged with a serious criminal offense”.⁵⁰

Other civil law countries have similar provisions, requiring counsel for all defendants faced with serious charges. In Spain and Norway, for example, counsel must represent the accused unless the crime charged could not result in a sentence of jail time.⁵¹

b. *In common law countries, the emphasis has been upon the freewill of the defendant, and laws have evolved that allow the defendant to choose whether or not to accept legal assistance.*

Traditionally, common law countries have valued a defendant’s right to self-representation highly, but increasingly, these same countries have been restricting the right and weighing it against other responsibilities of the court.

In the United States, self-representation was a privilege granted by the judge to the defendant until 1975, when *Faretta v. California*⁵² proved that the defendant should make that choice. The US Supreme Court found that the criminal defendant’s right to

⁴⁹ Boas, *supra* at 51 [reproduced in accompanying notebook at Tab 52].

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Prosecutor v. Seselj, supra* at 13459, “Decision on Assignment of Counsel” [Reproduced in accompanying notebook at Tab 27], quoting *Faretta v. California*, 422 U.S. 806, (1975) [Reproduced in accompanying notebook at Tab 12].

self-representation is implied in the Sixth Amendment of the Constitution of the United States.⁵³

The right to self-representation has prevailed in common law countries, even where the courts felt that self-representation was not in the defendant's best interest. In *Faretta v. California*, the U.S. Supreme Court held that self-representation was a right that had been respected by the courts even before the country's birth.⁵⁴ The defendant's right to waive all counsel and represent himself in trial was obeyed in the Ninth Circuit case *US v. Farhad*, but not without some expression of reservation.⁵⁵ Judge Reinhardt noted that the self-represented defendant "was convicted in a proceeding so fundamentally flawed that, were it not for *Faretta*, it would undoubtedly offend even minimal constitutional standards of fairness".⁵⁶

c. International war crimes trials are more adversarial than inquisitorial in nature.

Judge Robinson, who presided over the Milosevic case at the ICTY, described the tribunal as "primarily or essentially adversarial," although he noted that, "it is not entirely adversarial" and borrows some elements from inquisitorial law.⁵⁷ The structure of the ICTY is similar to that of other war crimes tribunals. While international war crimes courts do borrow from both traditions, the weight of the adversarial-system influence favors the adoption of adversarial-system safeguards.

⁵³ *Faretta v. California*, *supra* [Reproduced in accompanying notebook at Tab 12]

⁵⁴ *Id.*

⁵⁵ *United States v. Farhad*, 190 F.3d 1097 (1999) [reproduced in accompanying notebook at Tab 34].

⁵⁶ *Id.*

⁵⁷ Boas, *supra*, p 56-57 [Reproduced in Accompanying Notebook at Tab 52]

2. International human rights treaties and conventions recognize a right of the accused to defend himself in person.

The ECHR, the ACHR and the ICCPR all contain provisions that reference an accused's right to self-representation.

The ECHR (Art. 6(3))⁵⁸ and the ACHR (Art. 8(2)(d))⁵⁹ both include a right of the accused to defend himself in person “or” to be assisted by legal counsel. The ECHR states that a defendant holds the right “to defend himself in person or through legal assistance of his own choosing.”⁶⁰ The ACHR contains comparable language, recognizing a right “of the accused to defend himself personally or to be assisted by legal counsel of his own choosing”.⁶¹

The final draft of the International Covenant on Civil and Political Rights (“ICCPR”), ratified in 1976 and followed by 160 parties, contains a provision guaranteeing a right of self-representation. Article 14(3) of the ICCPR pledges to the accused the right “to defend himself in person or through legal assistance.”⁶²

3. The statutes that created international war crimes tribunals and the International Criminal Court have recognized the right to self-representation, as have the cases decided by these courts.

The statutes that created major international war crimes tribunals such as the ICTR, ICTY, SCSL, the Charter that governed the Nuremberg trials, and the statute that

⁵⁸ ECHR, *supra* at Article 6(3) [Reproduced in accompanying notebook at Tab 3].

⁵⁹ ACHR, *supra* at Article 8(2)(d) [Reproduced in accompanying notebook at Tab 1].

⁶⁰ ECHR *supra* [Reproduced in accompanying notebook at Tab 3].

⁶¹ ACHR *supra* [Reproduced in accompanying notebook at Tab 1].

⁶² ICCPR, *supra* [Reproduced in accompanying notebook at Tab 5].

created the ICC, all recognize a defendant's right to self-representation. The ICTY declared a right to self-representation in Article 21(4)(d) of its founding statute, where it is stated that the accused has the right to "defend himself in person or through legal assistance of his own choosing".⁶³ The ICTR contains identical language in Article 20(4)(d) of its founding statute.⁶⁴ Similarly, the Statute for the SCSL outlined a right to self-representation in Article 17(d)(4) of its founding statute.⁶⁵ Article 16 of the Charter that governed the Nuremberg trials also defined a right to self-representation.⁶⁶

a. *The ICTY recognizes a defendant's right to self-representation.*

The Statute of the ICTY references a right to self-defense for the defendant in a criminal trial in its Article 21. The article declares that the defendant has the right to "defend himself in person or through legal assistance of his own choosing."⁶⁷

This provision has been recognized in ICTY case history as signifying a right to self-representation for criminal defendants. In *Prosecutor v. Milosevic*, the ICTY held that defendants "have the presumptive right to represent themselves notwithstanding a

⁶³ Statute of the International Criminal Tribunal for the Former Yugoslavia, SC Res. 827, annex, Art. 20(1) (May 25, 1993), (hereinafter "Statute for the ICTY") [Reproduced in accompanying notebook at Tab 8].

⁶⁴ Statute of the International Criminal Tribunal for Rwanda, SC Res. 955, annex, Art. 20(4)(d) (Nov. 8, 1994), [Reproduced in accompanying notebook at Tab 9].

⁶⁵ Statute for the Special Court for Sierra Leone, Article 17(d)(4), [Reproduced in accompanying notebook at Tab 7].

⁶⁶ "Charter of the International Military Tribunal", Article 16(d) (1945), VIRGINIA MORRIS AND MICHAEL SCHARF, INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL OF THE FORMER YUGOSLAVIA, (1995) at 681 [Reproduced at Tab 53]

⁶⁷ Statute of the ICTY, *supra* at Article 21, [Reproduced in accompanying notebook at Tab 8].

Trial Chamber's judgment that they would be better off if represented by counsel."⁶⁸ The court further analyzed the Statute by stating that:

The drafter of the Statute clearly viewed the right to self-representation as an indispensable cornerstone of justice, placing it on a structural par with defendants' right to remain silent, to confront witnesses against them, to a speedy trial, and even to demand a court-appointed attorney if they cannot afford one themselves.⁶⁹

b. The ICTR recognizes a defendant's right to self-representation.

The ICTR Statute's Article 20 describes a defendant's right to self representation in language that is identical to that used in the ICTY.

c. The SCSL Statute also declares that a defendant has a right to self-representation.

The Statute of the SCSL provides a right to self-representation in Article 17(d)(4). Article 17 includes the right of the defendant 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" among the "minimum guarantees" to which the defendant is entitled.⁷⁰ In *Prosecutor v. Norman*, the SCSL Trial Chamber held that "as a matter of statutory construction, Article 17(4)(d) does guarantee to an accused person, first and foremost, the right to self-representation".⁷¹

⁶⁸ Prosecutor v. Seselj, "Decision on Assignment of Counsel", *supra* [Reproduced in Accompanying Notebook at Tab 27] citing Prosecutor v. Milosevic, Case No. IT-02-54-T, ("Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel"), (November 1, 2004) [Hereinafter "Milosevic Interlocutory Appeal"], [Reproduced in Accompanying Notebook at Tab 32]

⁶⁹ *Id.*

⁷⁰ Boas, *supra* at 57 [Reproduced in Accompanying Notebook at Tab 52].

⁷¹ Prosecutor v. Norman, *supra* [Reproduced in Accompanying Notebook at Tab 35].

d. The Rome Statute that created the International Criminal Court (“ICC”) recognizes a defendant’s right to self-representation.

The Rome Statute, which created the ICC, uses language that is very similar to those references to the right to self-representation expressed in the ICTY, ICTR and SCSL statutes. Article 67 of the Rome Statute declares that a defendant may “conduct [his] defence in person or through legal assistance of the accused’s choosing”.⁷²

e. The Charter of the historic tribunal at Nuremberg also recognized a defendant’s right to self-representation.

The historic Nuremberg Trials, which predate and inform all the modern international war crimes tribunals, were governed by similar language. Article 16 of the Nuremberg charter guarantees “a defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of counsel.”⁷³

4. The case history of the Human Rights Committee recognizes a right to self-representation.

The right to self-representation played a pivotal role in the Human Rights Committee case *Hill v. Spain*.⁷⁴ Hill’s request to represent himself in a Spanish court was denied. Spain argued that the ICCPR right to self-representation was inconsistent with Spanish court tradition. Spain was found in violation of the ICCPR for denying Hill his right to self-representation.⁷⁵

⁷² Rome Statute, Article 67, *supra* [Reproduced in accompanying notebook at Tab 6].

⁷³ “Charter of the International Military Tribunal”, *supra* [Reproduced in Accompanying Notebook at 53]

⁷⁴ *Hill v. Spain*, *supra*, [Reproduced in accompanying notebook at Tab 23].

⁷⁵ *Id.*

B. The right to self-representation in international war crimes trials is not absolute, and counsel may be imposed upon the accused in some circumstances.

The right to self-representation in international war crimes trials is not absolute, and can be abridged if the defendant is not capable of executing his or her defense, if the defendant's obstructionist behavior damages the court's integrity, or if the failure to impose counsel upon the defendant will result in an unfair trial for the defendant or other defendants.

The courts weigh the defendant's right to self-representation against what the ICTY calls its "fundamental duty" to provide a fair and expeditious trial.⁷⁶ In *Prosecutor v. Milosevic*, the ICTY observed, "assignment of counsel against the wishes of the accused is a developing area of the law both in national and international jurisdictions"⁷⁷, but though ambiguity exists, the ICTY was at least unanimous in recognizing that "the right to self-representation is a qualified, not an absolute, right."⁷⁸

1. There is debate over the legislative intent and textual interpretation of the language of the ICCPR, suggesting that it might not lay out an absolute right to self-representation.

There is debate over the significance of the sentence that recognizes a defendant's right to defend himself in person "or" have counsel of his choosing. The wording is found in similar permutations in many statutes.

⁷⁶ Constantinos Hotis, A "Fair and Expeditious" Trial: A Reappraisal of Slobodan Milosevic's Right to Self-Representation before the International Criminal Tribunal for the Former Yugoslavia, 6 CHI. J. INT'L L. 775, *778 (2006) [Reproduced in accompanying notebook at Tab 44].

⁷⁷ Nina Jorgensen, "Current Developments", *supra* at 663 [Reproduced in accompanying notebook at Tab 38], quoting *Prosecutor v. Milosevic*, "Milosevic Counsel Motion for Withdrawal", *supra* [Reproduced in accompanying notebook at Tab 31].

⁷⁸ *Prosecutor v. Milosevic*, "Milosevic Interlocutory Appeal", *supra* at 664 [Reproduced in accompanying notebook at Tab 32].

a. *There is debate over the word “or” in the sentences granting a right to self-representation in the ACHR, ECHR, ICCPR, and the statutes of the tribunals.*

There is debate over the meaning of these two provisions, regarding the significance of the word “or” in both conventions. The debate centers around whether the two clauses are mutually exclusive, and if not, whether a defendant can both defend himself in person and be assisted by court-imposed legal counsel. Even if it is determined that the two clauses are mutually exclusive, there is debate over who has ultimate control over the binary choice of self-representation or counsel.

The first debate is whether the word “or” means that the two clauses are mutually exclusive. If the two clauses are mutually exclusive, the defendant cannot both defend himself in person and be appointed counsel. In that case, forcing counsel upon the defendant is more of an imposition, because it rules out self-representation. The defendant has *lost* his right. But if the two clauses are not mutually exclusive, then the imposition is less overwhelming. Counsel can be imposed upon the defendant without the defendant wholly losing his right to defend himself in person. So, if the clauses are not mutually exclusive, the defendant who has been forced to team with a counselor has not *lost* his right to self-representation; it has merely been abridged.

The second debate is over whether the defendant or the court has ultimate control over the choice of whether the accused defends himself in person or is appointed counsel.

b. *There is debate over the legislative intent in drafting Article X of the ICCPR, upon which the other courts have based their statutes.*

There is debate over the ICCPR’s legislative intent, and how important self-representation was to the framers of the covenant. The ICCPR did not contain a provision

guaranteeing a right of self-representation to criminal defendants until the Fifth Session of the Drafting Committee. When the phrase “to defend himself in person or through legal assistance” was inserted, it was part of a new sentence that guaranteed the defendant representation even if he could not afford to pay counsel. It was this latter part of the sentence that was focused upon in the Drafting Committee sessions.⁷⁹ Michael Scharf suggests that the lateness and relaxed attitude with which the self-representation language was added to the covenant show that a right to absolute self-representation was unlikely foremost in the framers’ minds.⁸⁰

2. Categorical exceptions to the right to self-representation exist even in common law countries that recognize self-representation as an essential right.

The United States does not consider the right to self-representation to apply on appeal. The US Supreme Court observed, “the government’s interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant’s interest in acting as his own lawyer”.⁸¹

Sometimes, defendants are denied self-representation based on the nature of the allegations against them, in the interest of trial integrity and fairness. In Scotland, defendants may not represent themselves in court if they have been accused of sexual crimes.⁸² This restriction is not based on any incapacity of the defendant, or predicated

⁷⁹ Michael Scharf and Christopher Rassi, *supra* at 11 [reproduced in accompanying notebook at Tab 46].

⁸⁰ *Id.*

⁸¹ *Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 162 (2000) [reproduced in accompanying notebook at Tab 13].

⁸² Section 288C(1) of the Criminal Procedures Act (1995) as amended by the Sexual Offences (Procedure and Evidence) Act (2002) (Scotland) [reproduced in accompanying notebook at Tab 2].

upon bad courtroom behavior, but rather on the nature of the trial. Presumably, the legislature wants to avoid direct examination of victims of sexual crimes by their accused abuser.

Canada restricts the self-representation rights of defendants who have been accused of sexual crimes against minors.⁸³ Canada observes this qualification even though it's Charter of Rights and Freedoms, a part of its Constitution, has been interpreted as a constitutional guarantee that counsel will not be imposed upon an unwilling defendant.⁸⁴ England observes a right to self-representation too, but is similarly uneasy with the defendant's personal examination of witnesses in sexual crime trials.⁸⁵ England goes a step further than Canada, prohibiting the defendant from personally cross-examining child witnesses to sexual crime, even if those children were not the defendant's accuser.⁸⁶ Scotland goes much further, revoking the right to self-representation in sexual-offense trials altogether.⁸⁷

3. References to exceptions often accompany assertion of the right in domestic and international case history.

Faretta v. California, established that criminal defendants have the right to self-representation in American courts, yet the decision admits that the right has limitations.⁸⁸

It held that counsel must not be imposed upon a *qualified* defendant, one who is "literate,

⁸³ Boas *supra* at 46 (The limitation only prohibits the defendant's personal cross-examination of the minor witness). [Reproduced in Accompanying Notebook at Tab 52].

⁸⁴ R v. Swain (1991) 1 S.C.R. 933 (Canada) [Reproduced in Accompanying Notebook at Tab 21]

⁸⁵ Boas *supra* at 47 [reproduced in accompanying notebook at Tab 52].

⁸⁶ *Id.*

⁸⁷ Criminal Procedure Act (Scotland), *supra* [reproduced in accompanying notebook at Tab 2].

⁸⁸ *Faretta v. California*, *supra* [Reproduced in accompanying notebook at Tab 12].

competent and understanding” and follows “ground rules” of court procedure.⁸⁹ It can be inferred from these two qualifications that the incompetent defendant, or the defendant who is unwilling to cooperate with the court’s ground rules, *may* be denied self-representation.

4. There are at least four circumstances that can justify the abridgement of the defendant’s right to self-representation in a war crimes trial.

Courts may limit a defendant’s right to represent himself if the defendant is incapable of mounting a sufficient defense, unwilling to follow court procedures or otherwise obstructionist, or if the defendant’s self-representation would endanger the fairness of the trial to co-defendants, defendants in other trials or witnesses.

a. A court may impose counsel upon a defendant who is *incapable* of adequately preparing his own defense.

A defendant must be capable of competently executing his defense if he is to represent himself. This is perhaps the least disputed of the limitations to the right to self-representation. The limitation has been recognized both in domestic trials and trials before international war crimes tribunals.

Article 21 of the ICTY Statute ensures that a defendant may “defend himself in person or through legal assistance of his own choosing”.⁹⁰ As with the ACHR and ECHR provisions, there is debate about this wording. The debate centers on whether the two clauses separated by the word “or” are mutually exclusive or not, and if not mutually

⁸⁹ *Id.*

⁹⁰ Statute of the ICTY, *supra* [Reproduced in accompanying notebook at Tab 8].

exclusive, whether the defendant always gets to choose between legal counsel “of his own choosing” and representing himself.⁹¹ The alternative is that he is only promised that one of the two options will be available to him, and the court makes the decision whether or not the defendant may act without representation.

Additionally, there is a second provision in the ICTY Statute to consider. Article 20 charges the court with the responsibility for maintaining the trial’s fairness and expeditiousness, and the protection of the rights of the accused as well as the rights of the witnesses.⁹² This article has been understood as an over-arching authority, against which other procedural guarantees must be squared.⁹³ For example, a defendant who is wholly mentally incompetent cannot defend himself without aide of counsel, even if he so desires, because it would so frustrate the purposes of the trial and jeopardize the fairness and speediness of the trial. This is not a special exception outlined in the ICTY Statute, but can be inferred from the court’s duty to ensure an orderly and fair trial, as required by Article 21.⁹⁴

When Milosevic’s health deteriorated greatly, the ICTY imposed counsel upon him. The Appeals Chamber of the ICTY held that the defendant’s right to exclusively represent himself in court must “yield to the overarching right to a fair trial”, and that the

⁹¹ Nina Jorgensen, “Note and Comment”, *supra* at 724 [Reproduced in accompanying notebook at Tab 37].

⁹² ICTY Statute, *supra* at Article 20 [Reproduced in accompanying notebook at Tab 8].

⁹³ Nina Jorgensen, “Note and Comment”, *supra* at 724 [Reproduced in accompanying notebook at Tab 37].

⁹⁴ ICTY Statute, *supra* at Article 21 [Reproduced in accompanying notebook at Tab 8].

66 trial days that had been lost as a result of Milosevic's poor health were too great an imposition upon the speediness of the trial for him to continue unaided⁹⁵.

- b. A court may impose counsel upon a defendant if his or her *obstructionist* behavior is depriving the tribunal of integrity, imperiling the fairness of the trial to the defendant, or jeopardizing the fairness of the trials of other defendants.**

Courts have the authority to revoke a defendant's right to self-defense when the defendant's uncooperative or offensive behavior has been so bad that it endangers the trial's integrity. International tribunals and domestic courts have recognized this authority of the court.

- i. International tribunals have revoked a defendant's right to self-representation when the defendant has engaged in severely obstructionist behavior.*

Several high-profile international war crimes trials have been characterized by obstructionist behavior on the part of the defendant. Milosevic made irrelevant political speeches.⁹⁶ Saddam Hussein engaged in tirades against the court and the judges.⁹⁷ Seselj wrote insulting court documents, offensive books about officers of the court, and disparaged witnesses.⁹⁸ It is clear that at some point, obstructionist behavior can seriously compromise the integrity of the court, but the specific threshold that would

⁹⁵ Nina Jorgensen, "*Further Developments*", *supra* at 664, [Reproduced in accompanying notebook at Tab 38].

⁹⁶ Prosecution v. Slobodan Milosevic, "Reasons for Decision on Assignment of Defence Counsel", *supra* [reproduced in accompanying notebook at Tab 30].

⁹⁷ Rasheed, *supra* [reproduced in accompanying notebook at Tab 54].

⁹⁸ Prosecutor v. Seselj, "Decision on Assignment of Counsel", *supra*, [reproduced in accompanying notebook at Tab 27].

justify the court in imposing counsel upon the defendant is not clearly defined in the rules of any of the international criminal tribunals.

Milosevic lost his right to exclusive self-representation because of his illness-induced incapacity, not obstructionist behavior, even though his behavior in court was sometimes alarming. According to Michael Scharf and Christopher Rassi, “Bending over backward to maintain the appearance of fairness, the Trial Chamber has permitted Milosevic to treat the witnesses, prosecutors, and themselves in a manner that would earn ordinary defense counsel expulsion from the courtroom”.⁹⁹

⁹⁹ Michael P. Scharf and Christopher Rassi, *supra* [Reproduced in Accompanying Notebook at Tab 46].

The ICTY also dealt with an uncooperative self-represented defendant in *Prosecutor v. Seselj*¹⁰⁰, but in that case it found that the behavior of the defendant’s obstructionist behavior went too far, and imposed counsel upon him. The defendant focused on offensive and irrelevant matter, both in court speech, and in documents, and continued to disparage when outside court. He attempted to intimidate the witnesses, discredit the judges, and incite hatred against the attorneys. For example, he referred to the witnesses as “dirty toilet paper” whom “generations will be unable [to claim as] their relative” and accused them all of being liars who were blackmailed into testifying by the court.¹⁰¹ In summary, the court found that the defendant demonstrated “deliberate disrespect for the rules” and that his behavior “compromise[d] the dignity of the Tribunal and jeopardize[d] the very foundations upon which its proper functioning is based.”¹⁰²

The recent developments in the case of *Prosecutor v. Seselj* confirm that the right to self-representation can be abridged in the case of obstructionist behavior, and give concrete parameters for how and when a court may impose counsel upon an obstructionist defendant.¹⁰³ Seselj was once a law professor in Belgrade.¹⁰⁴ But despite his capabilities in the courtroom, Seselj engaged in severe obstructionist behavior, refusing to follow court rules or submit documents, and focusing his efforts on attacking

¹⁰⁰ *Prosecutor v. Seselj*, *supra*, [reproduced in accompanying notebook at Tab 27].

¹⁰¹ *Id.* at 13446-13445

¹⁰² *Id.* at 13442

¹⁰³ *Prosecutor v. Seselj*, “Decision on Appeal Against the Trial Chamber’s Decision on Assignment of Counsel” *supra* [Reproduced in Accompanying Notebook at Tab 29]

¹⁰⁴ Nina Jorgensen, “Note and Comment”, *supra* [Reproduced in accompanying notebook at Tab 37].

the court, judges, lawyers and witnesses.¹⁰⁵ Seselj's behavior prompted the ICTY Trial Chamber to appoint counsel over the defendant's objections. The ICTY Appeals Chamber reversed this decision, but it did so only on the basis that Seselj was not given a specific warning that his continued obstructionist behavior would lead to the imposition of counsel upon him. The Appeals Chamber, while reversing the imposition of counsel upon Seselj on these grounds, nevertheless affirmed that had Seselj been given proper warning, the court would have been appropriate in imposing counsel upon him.¹⁰⁶

ii. Domestic courts have also revoked the right to self-representation from defendants who are deliberately obstructionist.

Domestic courts have also forced counsel upon the obstructionist criminal defendant. In the U.S., disruptive behavior led to the curtailment of the defendant's right to self-representation in *United States v. Brock*. In that case, the court found that defendant Brock's "refusal to answer the court's questions" made proceeding in the trial "extremely difficult" and justified the revocation of the defendant's right to execute his own defense.¹⁰⁷

In *Brock's* predecessor case, *Faretta v. California*, the court qualified the right to pro se criminal defense by stating that the "right to self-representation is not a license to

¹⁰⁵ Prosecutor v. Seselj, *supra* [Reproduced in accompanying notebook at Tab 29].

¹⁰⁶ *Id.*

¹⁰⁷ United States v. Brock, *supra*, [reproduced in accompanying notebook at Tab 15].

abuse the dignity of the courtroom” and that deliberate, “serious and obstructionist misconduct” could result in the appointment of standby counsel.¹⁰⁸

- c. Counsel may be imposed upon a defendant if allowing the defendant to represent himself would endanger the *fairness* of his trial, or the *integrity* of the court, even without a showing of defendant incapacity or obstructionist behavior.**

Courts have the authority to revoke a defendant’s self-representation, independent of any action or behavior of the defendant. The court has a broader responsibility to justice and to ensuring a trial of integrity, and can curtail the defendant’s right to self-representation if necessary.

- d. Counsel may be imposed upon a defendant if allowing the defendant to represent himself without counsel would jeopardize the fairness of the trials of *co-defendants* or other defendants.**

The court has responsibility to more than one defendant, and cannot allow one defendant’s preference for self-representation to jeopardize the fairness of the trial of codefendants or defendants in other trials.

In *Prosecutor v. Norman*, the SCSL found that Article 17(4) of the Statute for the Special Court for Sierra Leone¹⁰⁹ did “guarantee to an accused person, first and foremost, the right to self-representation”¹¹⁰ in the following language: “he or she shall be entitled to the following minimum guarantees, in full equality.... to be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or

¹⁰⁸ *Faretta v. California*, *supra*, [reproduced in accompanying notebook at Tab 12], cited in *Prosecutor v. Seselj*, *supra*, [reproduced in accompanying notebook at Tab 27].

¹⁰⁹ Statute for the SCSL, Article 17(d)(4), *supra* [reproduced in accompanying notebook at Tab 7].

¹¹⁰ *Prosecutor v. Norman*, “Decision on the Application for Self Representation under Article 17(4)(d) of the Statute of the Special Court”, *supra*, [reproduced in accompanying notebook at Tab 35].

her own choosing.”¹¹¹ Yet the court denied Norman’s petition to represent himself, because it found that the right was impliedly qualified by another phrase in Article 17 (4)(d), “to have legal assistance assigned to him or her, in any case where the interests of justice so require.”¹¹² Unlike Milosevic, Norman was joined by codefendants, and the court felt that his self-representation might imperil the fairness and speediness of the trials of these co-defendants.

The court in *Norman* also noted that non-represented defendants, who have inadequate legal training, require extensive intervention and assistance from the court to conduct ordinary court procedure. *Norman* noted that there is a tension between handholding the defendant through all the procedures and simultaneously “remain[ing] the arbiter”.¹¹³

C. A court may impose counsel either during the pre-trial phase or at any time during the trial, and may consider evidence of the defendant’s behavior before the trial began.

In deciding to impose counsel, Courts are not restricted to any one point in the trial. Circumstances change throughout a trial, and the defendant who is capable and cooperative one day may become gravely ill or uncontrollable the next.

In *United States v. Brock*, counsel was imposed upon the defendant based only on his pre-trial behaviors, before the trial had even begun. The court justified this decision, stating that the defendant’s pretrial behavior “was sufficient to allow the district judge to

¹¹¹ Statute for the SCSL, Article 17(d)(4), *supra* [reproduced in accompanying notebook at Tab 7].

¹¹² *Id.*

¹¹³ *Id.*

conclude that there was a strong indication that Brock would continue to be disruptive at trial”.¹¹⁴

Milosevic complained about the timing with which the court imposed counsel upon him, pointing out that the imposition came just as the defense was about to start its case, but his objection did not sway the court.¹¹⁵

In *Prosecutor v. Norman*, the SCSL imposed counsel upon a defendant even though the defendant was boycotting the trial. It found that the absence of the accused defendant does not prevent the court from imposing counsel upon him and continuing the trial without him, if that defendant has previously been part of the trial and has later chosen not to participate.¹¹⁶

Not only may the *decision* to impose counsel come at any time of the trial, the court may also consider *evidence* of the defendant’s behavior from any part of the trial, or even his behavior outside the trial proceeding. In *Prosecutor v. Seselj*, the ICTY considered evidence of the defendant’s pre-trial behavior when evaluating the risk of his continued destructive behavior. They looked even to his actions and statements before he arrived in the Hague.¹¹⁷

D. When a court imposes counsel upon a defendant, the accused retains some power in the planning, strategy and execution of his or her case.

¹¹⁴ United States v. Brock, *supra*, [reproduced in accompanying notebook at Tab 15], quoted in *Prosecutor v. Seselj*, *supra*, [reproduced in accompanying notebook at Tab 27].

¹¹⁵ Nina Jorgensen, “Current Developments”, *supra* [Reproduced in accompanying notebook at Tab 38].

¹¹⁶ *Prosecutor v. Norman*, *supra* [Reproduced in accompanying notebook at Tab 36].

¹¹⁷ *Prosecutor v. Seselj*, “Decision on Assignment of Counsel” *supra*, [Reproduced in accompanying notebook at Tab 27].

Even when circumstances properly enable the court to curtail a defendant's right to self-representation, the defendant is not reduced to a passive role in his case. There are several possibilities as to the defendant's new role and his or her imposed counsel's role, but in any case, the defendant retains some power in the planning, strategy and execution of his or her case. The ICTY has even asserted that the appointment of standby counsel is not at all inconsistent with the right to self-representation.¹¹⁸

¹¹⁸ Nina Jorgensen, "Note and Comment", *supra* at 721 [reproduced in accompanying notebook at Tab 37].

Potential roles for the assigned counsel are diverse, and include both traditional defense counsel and hybrid roles. The assigned counsel can take the form of standby counsel. As defined in *Seselj*, standby counsel confer with the accused, create motions and court documents, and are available in the courtroom as a protective measure in that the court can call upon the standby counsel to question witnesses if the accused is doing so improperly, or call upon the standby counsel to “take over the defence” completely if the defendant’s conduct is overly disruptive under Rule 80(b)¹¹⁹.

The defendant’s role is also variable because, by default, he retains whatever power is not assigned to the imposed counsel. In the US Supreme Court decision *McKaskle v. Wiggins*, the appointment of counsel to the defendant against the defendant’s wishes was upheld, but with the caveat that the defendant would be allowed to control the content and direction of his defense, and that he be allowed to question or call witnesses as long as he was “able and willing to abide by the rules of procedure and courtroom protocol”.¹²⁰

The ICTY has made similar rulings. In *Prosecutor v. Krajisnik*, it stated that the defendant would be assigned counsel against his wishes, but would retain some ability to question or call witnesses, especially after a successful “experimental” period.¹²¹ In *Prosecutor v. Milosevic*, the ICTY Appeals Chamber upheld the trial court’s decision to impose counsel on a partly incapacitated defendant, but did not uphold the specific roles that the trial court had assigned to the appointed counsel and the defendant. The Appeals

¹¹⁹ *Id.*

¹²⁰ *Prosecutor v. Seselj*, supra, [Reproduced in accompanying materials at Tab 27] quoting *McKaskle v. Wiggins*, 465 U.S. 168, 184 (US Supreme Court, 1984) [Reproduced in accompanying materials at Tab 14].

Court held that the court could not reduce Milosevic to a “visibly second-tier role in the trial” and must ensure that the defendant’s role is diminished only to the minimum extent necessary to compensate for the defendant’s deficiencies.¹²²

E. The Potential for Abuse of the Court and Obstruction of the Proceedings is Not Necessarily Extinguished When Counsel is Imposed Upon the Defendant.

If a defendant is seriously committed to undermining the court in any way he can, and if he feels he has nothing to lose in the trial process, because his guilty verdict is certain, he can still find ways to be disruptive, despite the introduction of counsel.

The accused might retaliate against the court by refusing to cooperate or communicate with the imposed counsel, even to the point that the fairness of his trial is compromised. Counsel can help a trial to go more efficiently and fairly; the counselor can be called upon to take over the questioning of a witness who would otherwise be abused on the stand by the defendant; the counselor can be held to deadlines and standards in the presentation of documents to the court. The counselor can also be sanctioned, and his or her reputation is always on the line, encouraging the counselor to keep the trial running as smoothly as possible. But if the defendant is antagonistic toward the court and the imposed counsel, the counselor will have little control over the defendant’s behavior.

When the ICTY imposed counsel upon defendant Seselj, the trial did not transform into an orderly proceeding. Seselj’s counsel, Lazarevic, accused Seselj of making unfounded accusations against him and his family. The attorney notified the

¹²² Prosecutor v. Milosevic, “Interlocutory Appeal”, *supra* [Reproduced in accompanying notebook at Tab 32].

court that he was suing Seselj in a domestic court.¹²³ The ICTY considered the attorney's separate suit against his own client as sufficient conflict of interest to oust him from the proceedings and replace him.¹²⁴

ICTY defendant Blagojevic is another example of a defendant who was paired with counsel against his will. Blagojevic and his assigned counsel, Michael Karnavas, had a falling out, and Blagojevic "capriciously sought his removal."¹²⁵ Blagojevic's attempt to eject Karnavas from the case failed, and Karnavas remained as an unwanted attorney. Boas suggests that Karnavas's continued dedication to the case, and his uninterrupted good defense work show "great courage" and stand as "an example of how counsel might remain and represent an unwilling and uncooperative accused."¹²⁶

The accused may still be able to disrupt the proceedings, beyond boycotting or ignoring his counsel. The defendant who has been forced to accept counsel still retains a great deal of power in the planning and execution of his case, possibly including the ability to address court or question witnesses. He may be able to engage in some of the same disruptive behaviors that forced the court to assign counsel to him in the first place.

For example, Saddam Hussein was not self-represented in his trial before the Iraqi High Tribunal, yet he managed to be very problematic in court.¹²⁷ He sometimes boycotted the trial, and at other times he insulted the judges repeatedly and launched into

¹²³ Nina Jorgensen, "Note and Comment", *supra* [reproduced in accompanying notebook at Tab 37].

¹²⁴ *Id.*

¹²⁵ Boas, *supra* at 91 [reproduced in accompanying notebook at Tab 18].

¹²⁶ *Id.*

¹²⁷ Rasheed, *supra* [reproduced in accompanying notebook at Tab 20]

long speeches that had nothing to do with the case.¹²⁸ One reason that he was able to create so much disorder was that there exists in Iraq a procedural tradition, not embedded in statutes or rules, that the accused may always engage witnesses once his counsel has retired from questioning them, and that the accused may also address the court directly, without needing to be on the stand.¹²⁹ The Iraqi High Tribunal is a sort of hybrid court, mainly of a domestic nature, and it honored this Iraqi tradition.¹³⁰ Saddam used these traditional rights to make irrelevant political speeches, insult the court, and prevent an orderly trial.¹³¹

IV. CONCLUSION

At least within the context of an adversarial, or non-inquisitorial, type of court, the defendant's right to self-representation is customary international law. While some countries still hold that the right is almost absolute, a shift is taking place. More and more restrictions are being placed upon the right to self-representation, even in common law countries that once spoke of the right in absolute terms, like the United States.

Self-representation in an international war crimes trial, particularly if the defendant is high profile, can be very troublesome. Without curtailing an uncooperative and obstructionist defendant's right to self-representation, the court will have little control over outlandish behavior. Even cooperative, self-represented defendants can be difficult because self-representation compromises the court's role as arbiter. It requires the court to continually assist some defendants, even to the point that it may act almost as part of

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

the defense team. Besides blurring the role of arbiter, continual assistance of defendants can be distracting for the court, which has other important work to do. The system works better when defense counsel, not the court, takes the primary responsibility to submit appropriate documents, reply to motions, and follow the rules of procedure in the courtroom. A court that must handhold a defendant throughout the trial is doing itself a disservice.

It is difficult but necessary to find balance between the court's need to create a trial of integrity and its desire to respect the rights of the defendant. But as *Seselj* has shown, a court has many options available to fulfill its overarching responsibility of producing as fair a trial as possible. These options include the abridgement or revocation of the defendant's right to self-representation.

Courts have flexibility in addressing the particular situations of each trial, and can consider the defendant's current and past behavior. Courts need not wait until years of uncooperative behavior have damaged the court to justify the imposition of standby counsel. Also, the court need not revoke all of the defendant's powers. The defendant can retain most of the rights he had before standby counsel was appointed, and then if his behavior or capacity does not improve, more of the power to interact in court can shift to the standby counsel. Courts cannot take away the defendant's right to control the content of his defense from behind the scenes, but they can control the manner in which the defendant interacts with the court in the courtroom, and to the minimal extent necessary, can restrict a defendant's role in the trial.