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What minimum standards must the IHT follow when assigning public defenders in place of privately retained defense counsel so that the defendant's right to a fair trial is not prejudiced?

Thihan Nyun

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

**MEMORANDUM FOR
THE IRAQI HIGH TRIBUNAL**

**IHT ISSUE # 1: WHAT MINIMUM STANDARDS MUST THE IHT FOLLOW
WHEN ASSIGNING PUBLIC DEFENDERS IN PLACE OF PRIVATELY
RETAINED DEFENSE COUNSEL SO THAT THE DEFENDANT'S RIGHT TO A
FAIR TRIAL IS NOT PREJUDICED?**

**Prepared by Thihan Nyun
April 2006**

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. ISSUES*

On October 9, 2005, the Iraqi Presidency Council, pursuant to the approval by the Transitional National Assembly, adopted the Statute of the Iraqi High Tribunal (“IHT Statute”) and established the Iraqi High Tribunal (“IHT”) to prosecute Saddam Hussein and other former Iraqi leaders for war crimes, crimes against humanity, genocide, and the crime of aggression.¹ This memorandum will examine the scope of the IHT’s power to appoint defense counsel in compliance with the international right to counsel. More specifically, this memorandum examines the compatibility of the provisions safeguarding the right to counsel in the IHT Statute and the IHT Rules of Procedure and Evidence with the prevailing international standards. In doing so, this memorandum analyzes (1) when and in what manner the Tribunal can assign counsel; (2) the procedure by which to assign counsel; (3) the minimum level of proficiency required for defense counsel; (4) the right of an indigent defendant to choose court-appointed counsel; (5) the implications of assigning counsel against the accused’s wishes, especially if the accused has the ability to retain his own counsel; and (6) the need for a standby counsel to properly ensure the defendant’ right to an effective assistance of counsel.

* See E-mail from Eric H. Blinderman, Chief Legal Counsel, Regime Crimes Liaison Office, to Michael Scharf, Professor and Director, Frederick K. Cox International Law Center, Case Western Reserve University School of Law, IHT Research: Question 1 (on file with author). The focus of this paper derives from the E-mail, which states:

The current defense attorneys for Saddam Hussein have repeatedly threatened to boycott the IHT if the court does not accede to their every demand. On at least one occasion, the defense attorneys actually did walk out of the Court. In the event that the privately retained defense attorneys do boycott the trial, what standards must the court follow when appointing public defenders so that it does not violate international law? In other words, what is the level of proficiency that the Court should demand of public defenders? How much time should the Court grant to the new lawyers so that they may prepare adequately for trial? What steps should the Court take so that the defendant’s right to a fair trial is not prejudiced?

¹ Law of the Iraqi High Criminal Court, Preamble (2005) [hereinafter IHT Statute], *available online at* <http://www.law.case.edu/saddamtrial> (Reproduced in accompanying notebook at Tab 15).

B. SUMMARY OF CONCLUSIONS

1. The international community has determined that the right to a fair trial is a fundamental human right and that the right to counsel for the accused is instrumental in ensuring a fair trial.

Traditionally, a defense counsel in a common-law adversarial system balances aggressive state prosecutorial action to ensure a fair trial. The customary international law right to counsel evolved from (1) common practices of states in the treatment and protection of prisoners of war; (2) recognition of the need and the establishment of procedural safeguards during the Nuremberg and Tokyo war crimes trials; (3) extension of constitutional and common law rights and traditions into international law; and (4) widespread participation by states in the preparation, adoption, and acceptance of international agreements recognizing basic human rights principles as well as in providing general support for United Nations' resolutions that apply international human rights principles as international law.

Likewise, a number of international conventions also established the right to a fair trial and a corresponding right to counsel as basic human rights. For example, Article 10 of the Universal Declaration of Human Rights envisions a right to fair trial and guarantees that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal.”² Moreover, Article 6 of the European Convention for the Protection of Human Rights confers the right to counsel “when the interests of justice so require.”³ In addition, the right to counsel is protected as an essential right that safeguards the right to fair trial in the

² See Universal Declaration of Human Rights, G.A.Res. 217A, U.N.GAOR, 3d Sess., Supp. No. 1, art. 10, U.N.Doc. A/810 (1948) [hereinafter UDHR] (Reproduced in accompanying notebook at Tab 25).

³ See Convention on the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6(3)(c), 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter European Convention] (Reproduced in accompanying notebook at Tab 3).

American Convention of Human Rights and the African Charter on Human and People's Rights.⁴ Lastly, Article 14(d) of the International Covenant on Civil and Political Rights guarantees that a person has a right "to defend himself in person or through legal assistance of his own choosing; to be informed...of this right; and to have legal assistance assigned to him...."⁵

2. The parameters of the right to counsel in international criminal proceedings are beginning to be developed and refined through the jurisprudence and the experience of the international ad hoc tribunals, hybrid courts, and the national common law courts.

Representing an amalgamation of both common law and civil law principles, the international ad hoc tribunals established to prosecute atrocity crimes in the former Yugoslavia and Rwanda, as well as the International Criminal Court (ICC), and the Special Court for Sierra Leone have applied international standards of justice and norms of fairness in their proceedings. In order to guarantee fairness in the proceedings that are predominantly adversarial, the statutes of the tribunals, the rules of procedure and evidence, and case law further articulate the right to counsel. Furthermore, the jurisprudence from these tribunals has contributed to the unraveling of the scope of the international law right to counsel.

The right to counsel as articulated in the case law of the ICTY, ICTR, and SCSL established the following baseline parameters: (1) the right to counsel and the right to be informed of this right attaches upon entering the jurisdiction of the court; (2) permit defendants to choose their counsel within limits; (3) provide adequate access to counsel but not equal recourses; and (4) permit a qualified right to self-representation. The jurisprudence of the ICTY, ICTR, and SCSL interpreting the respective statutes and rules of procedure and evidence

⁴ See African (Banjul) Charter on Human and Peoples' Rights, Jun. 27, 1981, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986) [hereinafter African Charter] (Reproduced in accompanying notebook at Tab 1); *see also* American Convention on Human Rights, Nov. 22, 1969, art. 8, para. 2(e), 1144 U.N.T.S. 144, 147 (entered into force Jul. 18, 1978) [hereinafter American Convention] (Reproduced in accompanying notebook at Tab 2).

⁵ See International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 14(d), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR] (Reproduced in accompanying notebook at Tab 8).

established that although the accused has the right to select counsel, this right is limited when the tribunal must compensate counsel.

3. In the event that the privately retained defense attorneys do boycott the trial or walk out of the Court, the IHT may assign public defenders in their place in the interests of justice.

Two related arguments bolster the competency of IHT to assign public defenders in place of privately retained attorneys when they threaten to boycott the proceedings or walk out in contempt of the Court. First, a defendant's right to defend himself through legal assistance of his own choosing is limited by the necessity to protect the overarching fairness, integrity, object, and purpose of the Tribunal. When a defense-team-instigated boycott of the proceedings or misconduct rises to disrupting and undermining the integrity of the Tribunal, the right to legal assistance of one's own choosing must yield to the overarching requirement of a fair trial. Second, a privately retained defense counsel's professional misconduct and contempt of the Court give rise to an implied waiver of the defendant's right to choose his own lawyer.

4. The IHT must establish a transparent procedure of assigning defense counsel to further guarantee the rights of the accused and provide adequate notice.

The IHT should use pre-existing directives on assignment of counsel from the ICTY, ICTR, and SCSL as models when developing its own regulatory procedure to assign defense counsel. The IHT's directive on assignment of defense counsel could include (1) a procedure for assigning counsel that clearly lays out the steps; (2) provisions that provide adequate notice to the defendants; (3) allocation of costs and expenses; (4) the scope of legal representation; and (5) a level of competence expected of defense counsel.

5. The IHT must require a high standard of qualifications from its defense attorneys.

A high standard of defense counsel qualifications ensure that defendants are represented by competent attorneys who satisfy minimum international human rights standards. The IHT

should model its standard of qualifications on the pre-existing standards from the ICC, ICTY, ICTR, and SCSL. The IHT must require prospective defense counsel to (1) be fluent in at least one of the working languages of Court; (2) be admitted to practice law in a State; (3) maintain an unblemished professional and criminal records; and (4) have 7-10 years of relevant practice experience in criminal law, international law, international humanitarian law, or international human rights law.

6. In addition to requiring a high standard of qualification for defense counsels, the IHT must institute additional measures to ensure that defendants receive an effective assistance of counsel.

Although a high standard for attorney qualifications is needed to meet minimum international human rights standards, a qualified counsel does not necessarily mean an effective counsel. A newly assigned counsel, even if he is highly qualified, will have some difficulty assisting his new client if he has not been present in the courtroom or does not know the defense strategy. In the IHT context, this scenario came into fruition when Judge Rahman promptly replaced the Saddam Hussein's defense team on January 29, 2006 with a new team of six court-appointed lawyers, who sat silently as the trial proceeded.

The reluctance of these court-appointed lawyers in cross examining the witnesses raises serious questions about fairness. In order to alleviate effective assistance concerns, the IHT should employ highly qualified standby counsel to represent defendants who need court assigned counsel. In addition to the benefit of not introducing delay, employment of standby counsel reinforces IHT's conviction to take necessary steps to ensure the right to fair trial.

II. FACTUAL BACKGROUND

The IHT's need to assign public defenders in place of privately retained defense attorneys can arise under a number of circumstances: the assassination of defense counsel; the withdrawal

of defense counsel for personal and professional reasons; the ability of the accused to retain defense counsel; and possible boycott by defense attorneys because of IHT's refusal to meet their every demand. Despite their ethical duties, the defense attorneys in the Saddam Hussein trial have either threatened to boycott the trial proceedings or actually walked out of the Court because of many disagreements over security and other concerns.⁶ Likewise, a recent increase in sectarian violence in Iraq, coupled with inadequate security, makes future kidnapping and assassination of defense counsel an alarming possibility.

On October 20, 2005, Saadoun Sughaiyer al-Janabi, an attorney representing one of Saddam Hussein's co-defendants was kidnapped from his office in Baghdad.⁷ Mr. Janabi's body, with two bullet wounds to the head, was found near his Baghdad office by the Iraqi authorities shortly after he was reportedly kidnapped by armed men who identified themselves as interior ministry employees.⁸ Mr. Janabi was defending the former head of Saddam Hussein's Revolutionary Court, Awad Hamed al-Bandar, against charges accusing the latter of ordering the massacre of 143 Shia residents in the town of Dujail in 1982.⁹ At the three-hour hearing which opened the trial, Mr. Janabi was one of several defense lawyers who mounted vociferous objections to the opening statements by Jaafar al-Musawi, the chief prosecutor.¹⁰

⁶ See John F. Burns, *Hussein's Lawyers Refuse to Work with Iraqi Court*, N. Y. TIMES, Oct. 27, 2005, at A14 (Reproduced in accompanying notebook at Tab 60); see also Ewen MacAskill, *Saddam's Legal Team Stops Work after Lawyer is Shot Dead*, THE GUARDIAN (London), Nov. 10, 2005, at 19 (Reproduced in accompanying notebook at Tab 66).

⁷ Sam Jones, *Lawyer for Saddam Co-Defendant Kidnapped*, THE GUARDIAN (London), Oct. 21, 2005, at 23 (Reproduced in accompanying notebook at Tab 63).

⁸ Ellen Knickmeyer & Bassam Sebti, *Attorney for a Defendant In Hussein Trial Is Slain*, WASH. POST, Oct. 22, 2005, at A15 (Reproduced in accompanying notebook at Tab 64).

⁹ *Id.*

¹⁰ John F. Burns, *Lawyer's Slaying Raises Questions on Hussein Trial*, N. Y. TIMES, Oct. 22, 2005, at A1 (Reproduced in accompanying notebook at Tab 59).

In a separate incident, gunmen ambushed two other defense lawyers in the Saddam Hussein trial—Adel Muhammad al-Zubaidi and Thamir Mahmoud al-Khuzai—killing the former and seriously wounding the latter.¹¹ Both lawyers were representing Barzan Ibrahim al-Tikriti, Mr. Hussein’s half brother and former head of Iraq’s intelligence service, and Taha Yassin Ramadan, a former vice president under Mr. Hussein.¹² Despite vowing to boycott the trial proceedings over security concerns, Saddam Hussein’s defense team has repeatedly rejected offers by Iraqi officials and the U.S. military to provide security arrangements on the basis that it would compromise their independence.¹³ Although recognizing the defense team’s need for independence from the Iraqi government, many legal experts have criticized the Hussein defense team’s strategy to boycott the trials as an attempt to discredit the proceedings, force delays, and bring about venue change.¹⁴

Furthermore, unlike the judges and the prosecutors in Saddam Hussein’s trial, whose identities have been kept secret to prevent insurgent reprisals against them, the names of the defense lawyers have not been withheld and they openly appear on camera during trial.¹⁵ In addition to concerns that the slayings of the defense lawyers would damage the credibility of Iraq’s judicial system, Richard Dicker, a lawyer with Human Rights Watch, emphasized that the slayings would have a chilling effect on the willingness of competent lawyers to vigorously

¹¹ John F. Burns, *Ambush of Defense Lawyers in Hussein Trial Kills One*, N. Y. TIMES, Nov. 9, 2005, at A8 (Reproduced in accompanying notebook at Tab 61).

¹² *Id.*

¹³ Solomon Moore, *The Conflict in Iraq; 2nd Hussein Trial Defense Lawyer Slain*, L. A. TIMES, § A, at 1 (Reproduced in accompanying notebook at Tab 67).

¹⁴ *Id.*

¹⁵ Ellen Knickmeyer and Bassam Sebt, *Lawyer of Hussein Co-Defendant Slain; Abductee’s Body Found in Baghdad; Safety of Trial Participants Questioned*, WASH. POST, Oct. 23, 2005, at A19 (Reproduced in accompanying notebook at Tab 65).

defend the accused.¹⁶ While this possible chilling effect may raise additional concerns over the fairness of the proceedings, the most immediate repercussion of these assassinations is Saddam Hussein's defense team's use of what they perceive to be inadequate security as a bargaining chip, a delay tactic, and a reason to boycott the proceedings.

In response to Mr. Janabi's assassination, the Iraqi Bar Association called for a one-day strike and urged lawyers to stop working with the IHT until the murder is properly investigated and solved.¹⁷ Citing worries about their personal safety and their inability to mount a proper defense for their clients in the current climate of insecurity, the defense lawyers for Saddam Hussein and his co-defendants had threatened to boycott the proceedings.¹⁸ As a sign of future challenges to come, the defense team refused to attend a special court hearing to take testimony from a dying former intelligence officer at a private hospital because their security demands were not met.¹⁹ In such a situation, the IHT will be forced into a difficult position to either safeguard the defendant's right to counsel by assigning a new defense counsel or giving in to the defense team's every demand.

In addition to boycotting the trial proceedings, the Saddam Hussein's defense team has walked out of the Court in protest, and in some instances, has had its members thrown out of the

¹⁶ Jonathan Steele, *Kidnap in Baghdad: Saddam Trial: Killing of Lawyer Casts Doubt on Iraqi Justice, Rights Groups Say*, THE GUARDIAN (London), Oct. 22, 2005, at 3 (Reproduced in accompanying notebook at Tab 68).

¹⁷ Jonathan Steele, *Lawyer's Killing Prompts Call for Boycott of Saddam's Trial*, THE GUARDIAN (London), Oct. 24, 2005, at 14 (Reproduced in accompanying notebook at Tab 69).

¹⁸ Borzou Daragahi & Zainab Hussein, *Hussein's Attorneys Refuse to Attend Hearing; Lawyers Skip a Special Interview and Demand Their Own Bodyguards After Colleague Is Killed*, L. A. TIMES, Oct. 24, 2005, § A, at 7 (Reproduced in accompanying notebook at Tab 62).

¹⁹ *Id.*

courtroom.²⁰ The courtroom showdown that erupted on January 29, 2006 ousting a co-defendant and a defense attorney from the courtroom provoked a walkout by the rest of the defense team and resulted in subsequent appointment of defense counsel by the new chief judge.²¹ The defense team walked out in protest after Judge Raouf Rasheed Abdel Rahman imposed order in the courtroom by removing Barzan Ibrahim al-Tikriti and a defense attorney for their refusal to abide by his commands.²² Despite objections by Mr. Hussein and his co-defendants, Judge Rahman promptly replaced the defense team with a new team of six court-appointed lawyers, who sat silently as the trial proceeded.²³

III. LEGAL DISCUSSION

Before I discuss the particulars of evidence, some general considerations which may affect the credit of this trial in the eyes of the world should be candidly faced. There is a dramatic disparity between the circumstances of the accusers and the accused that might discredit our work if we should falter in even minor matters, in being fair and temperate....We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspiration to do justice.

Justice Robert H. Jackson (November 20, 1945)²⁴

A. INTERNATIONAL RIGHT TO COUNSEL

From the Nuremberg Tribunals to the Saddam Hussein Trial, there exists an inherent tension between retribution and fairness. Although the establishment of international tribunals to

²⁰ Richard Boudreaux, *New Judge Lays Down the Law in Hussein Trial; Expulsions by the Jurist Trigger an Exodus, Including the Defense Team and the Ex-Dictator. Some legal Analysts Question Trial's Fairness*, L. A. TIMES, Jan. 30, 2006, § A, at 6 (Reproduced in accompanying notebook at Tab 58).

²¹ *Id.*

²² Robert F. Worth, *Hussein Trial Erupts, and Expulsions Ensue*, N. Y. Times, § A, at 13 [hereinafter Worth] (Reproduced in accompanying notebook at Tab 70).

²³ *Id.*

²⁴ Robert H. Jackson, *Opening Statement Before the International Military Tribunal*, in TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 98-155 (1947); also available at <http://www.roberthjackson.org/Man/theman2-7-8-1/> (Reproduced in accompanying notebook at Tab 72).

prosecute war criminals serve to record history, educate the world, and function as a future deterrent, these proceedings are often accused of resembling ‘show trials’ that further the victors’ interests.²⁵ In order to overcome the appearance of victor’s justice, it is important to not only prosecute the accused, but to ensure that the truth-seeking function of the tribunal occurs within the constraints of a fair trial.

Moreover, the international community, through customary international law and formal treaties, has determined that the right to a fair trial is a basic human right.²⁶ As such, when the international community sets out to prosecute those responsible for atrocity crimes, international law requires that the trials be fair. To ensure that the trials are fair, the international norms require that the accused be represented by effective counsel. Thus, the right to counsel preserves the legitimacy of the tribunal by safeguarding the defendant’s right to a fair trial.

However, the right to counsel guaranteed in various international treaties and national constitutions, means more than the right to have a lawyer present in the courtroom. Interrelated procedural protections further safeguard the substantive right to counsel. Some of the procedural rules that provide substance to the international right to counsel may include: when the right attaches; when the right is waived; the parameters of the defendant’s right to choose his counsel; the limitations on the defendant’s right to self-representation; the qualifications of the defense counsel; when and in what manner the Court may appoint counsel; and equality of arms. Despite the importance of many of the issues presented above, this memorandum focuses on the scope of the IHT’s authority to assign defense counsel in a way that does not violate international law.

²⁵ M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 24 (1997) [hereinafter Bassiouni, *The Need to Establish the ICC*] (Reproduced in accompanying notebook at Tab 51).

²⁶ See *infra* Sections III(A)(1)-(2).

1. Right to Counsel under Customary International Law

Customary international law results from a “general and consistent practice of states followed by them from a sense of legal obligation.”²⁷ The practice of states necessary to create customary law must be general and consistent; both action and inaction may constitute state practice, which includes “diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy, whether they are unilateral or undertaken in cooperation with other states....”²⁸ A second requirement for a practice of states to become customary international law is that the states follow the general and consistent practice from a sense of legal obligation—*opinio juris sive necessitatis*.²⁹

The customary international law right to counsel evolved from (1) the common practices of states in the treatment and protection of prisoners of war; (2) the recognition of the need and establishment of procedural rules of law during the Nuremberg and Tokyo trials to protect the defendant’s right to a fair trial; (3) extension of constitutional and common law rights and traditions into international law; and (4) the virtually universal participation of states in the preparation, adoption, and acceptance of basic human rights principles enshrined in various international and regional instruments. More importantly, the analysis of the customary international law right to counsel provides guidance of minimum standards of representation required in war crimes trials.

First, the customary international law basis for requiring effective legal representation at war crimes trials originated with the efforts to improve treatment and protection of prisoners of

²⁷ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) [hereinafter Restatement (Third)] (Reproduced in accompanying notebook at Tab 17).

²⁸ *Id.* at Comment b.

²⁹ *Id.* at Comment c.

war.³⁰ The right of prisoners of war to receive defense representation was initially codified in the 1929 Geneva Convention.³¹ Article 61 provides that “[n]o prisoner of war may be sentenced without having had an opportunity to defend himself.”³² Furthermore, Article 62 guarantees, “[t]he prisoner of war shall have the right to be assisted by a qualified advocate of his own choice....”³³ The Third Geneva Convention of 1949 (Geneva III) further supplemented the 1929 Geneva Convention by expanding the legal rights of prisoners of war before judicial and tribunal hearings.³⁴ Article 99 of Geneva III ensures that “[n]o prisoner of war may be convicted without having had an opportunity to present his defense and the assistance of a qualified advocate or counsel.”³⁵

The International Military Tribunal at Nuremberg (IMT) and the International Military Tribunal for the Far East at Tokyo (IMTFE) also promulgated procedural rules guaranteeing the right to counsel for the indicted German and Japanese war criminals.³⁶ Echoing the fairness concerns of the lead American Prosecutor, Supreme Court Justice Robert Jackson, Article 16 of the Nuremberg Charter provides, “[a] Defendant shall have the right to conduct his own defense

³⁰ Joshua E. Kastenberg, *The Right to Assistance of Counsel in Military and War Crimes Tribunals: An International and Domestic Law Analysis*, 14 IND. INT’L & COMP. L. REV. 175, 180-185 (2003) [hereinafter Kastenberg] (providing a detailed history of prisoner of war rights) (Reproduced in accompanying notebook at Tab 55).

³¹ *Id.* at 183.

³² Convention Relative to the Treatment of Prisoners of War, Jul. 27, 1929, art. 61, 47 Stat. 2021, *also available at* <http://www.yale.edu/lawweb/avalon/lawofwar/geneva02.htm> (Reproduced in accompanying notebook at Tab 5).

³³ *Id.* at art. 62.

³⁴ Kastenberg, *supra* note 30, at 184.

³⁵ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 99, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III] (Reproduced in accompanying notebook at Tab).

³⁶ Kastenberg, *supra* note 30, at 185; for a detailed account of IMT and IMTFE, *see* Bassiouni, *The Need to Establish the ICC*, *supra* note 25, at 23-42.

before the Tribunal or to have the assistance of Counsel.”³⁷ In establishing the right to counsel as a subset of the right to a fair trial, the Nuremberg and Tokyo war crimes tribunals set a “standard from which later international trials could not deviate.”³⁸

In the United States, the right to “Assistance of Counsel” is protected under the Sixth Amendment to the Constitution.³⁹ In addition, the United States’ standing on the international stage has allowed its constitutional and common law traditions and norms to have a tremendous impact on the development of international law. Many other nations around the world have also incorporated the right to counsel, directly or through reference, in their respective national constitutions and laws.⁴⁰ Lastly, there is a widespread participation by states in the preparation, adoption, and acceptance of international agreements recognizing basic human rights principles as well as in providing general support for United Nations resolutions that apply international human rights principles as international law.⁴¹

2. Right to Counsel under International and Regional Treaties

In addition to its status as customary international law, the international right to counsel is also created by various international and regional agreements that are intended for adherence

³⁷ Charter of the International Military Tribunal (IMT). Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), Aug. 5, 1945, art. 16, 59 Stat. 1544, 82 U.N.T.S. 280 [hereinafter Nuremberg Charter] (Reproduced in accompanying notebook at Tab 3).

³⁸ Kastenberg, *supra* note 30, at 186.

³⁹ U.S. Const. Amend. VI. (Reproduced in accompanying notebook at Tab 75).

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, 281 n.222 (1993) (indicating that more than 65 national constitutions guarantee the right to assistance of counsel) (Reproduced in accompanying notebook at Tab 50).

⁴¹ Office of the High Commission on Human Rights, *Ratification Status of ICCPR*, available at <http://www.ohchr.org/english/countries/ratification/4.htm> [hereinafter Ratification Status of the ICCPR] (as of April 23, 2006 there are 156 nations party to the ICCPR) (Reproduced in accompanying notebook at Tab 73).

by states generally and are in fact widely accepted.⁴² The accused right to counsel and its parent right, the right to a fair trial, are protected under two international agreements: the Universal Declaration of Human Rights (“UDHR”) and the International Covenant on Civil and Political Rights (“ICCPR”).⁴³ Additionally, the right to counsel is recognized as a subset of the right to fair trial under regional agreements such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention of Human Rights, and the African Charter on Human and People’s Rights.⁴⁴

Two provisions contained in the UDHR safeguard procedural fairness for all accused persons subject to judicial proceedings. Article 10 of the UDHR guarantees that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”⁴⁵ Likewise, Article 11 calls for a presumption of innocence, protection from wrongful imprisonment, and prohibition of unjust punishment.⁴⁶ However, since the UDHR was adopted as a statement of principles, the question of whether the UDHR is legally binding under international law remains somewhat controversial.

It is possible to argue that even if the UDHR itself is not legally binding, at least some of the principles contained in it have attained the status of customary international law because (1) the UDHR is an authoritative interpretation of the human rights provisions in the U.N. Charter,

⁴² Restatement (Third), *supra* note 27, at § 102(3).

⁴³ See UDHR, *supra* note 2, art. 10; see also ICCPR, *supra* note 5, art. 14(d).

⁴⁴ See European Convention, *supra* note 3, art. 6, para. 3(c); American Convention, *supra* note 4, art. 8, para. 2(e); and African Charter, *supra* note 4, art. 7, para. 1(c).

⁴⁵ UDHR, *supra* note 2, art. 10.

⁴⁶ *Id.* art. 11.

and (2) some principles were already legally binding through other international agreements. In *Filartiga v. Pena-Irala*, the United States Court of Appeals for the Second Circuit recognized that at least some of the UDHR provisions have become binding as customary international law through widespread state practice.⁴⁷

The civil and political rights protected in the UDHR are codified into binding treaty law through the International Covenant on Civil and Political Rights (ICCPR). However, unlike the UDHR, the ICCPR requires member states to refrain from actions that would violate the civil and political rights of individuals—freedoms and immunities which a member state can respect by leaving the individual alone.⁴⁸ Since Iraq is party to the ICCPR,⁴⁹ it is obligated under the treaty to “respect and ensure to all individuals within its territory and subject to its jurisdiction” the right to counsel.⁵⁰ Under Article 14(d) of the ICCPR, every person has the right to

[d]efend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.⁵¹

Although the UDHR and ICCPR did not provide the exact scope of the right to counsel, they establish an international norm that assistance by defense counsel balances the prosecutorial aggressiveness in an adversarial system to ensure a fair trial.

⁴⁷ *Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2nd Cir. 1980) (Reproduced in accompanying notebook at Tab 32).

⁴⁸ ICCPR, *supra* note 5, art. 2(1) (Article 2(1) requires that “[e]ach state party...undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized...without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”).

⁴⁹ Ratification Status of the ICCPR, *supra* note 41, Iraq signed the ICCPR on February 18, 1969 and ratified it on January 25, 1971.

⁵⁰ ICCPR, *supra* note 5, art. 2(1).

⁵¹ *Id.* art. 14(d).

Regional human rights instruments also echo the right to counsel protected in the UDHR and the ICCPR in similar terms. Under Article 6, paragraph 3(c) of the European Convention on Human Rights, everyone charged with a criminal offense has the right “to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require....”⁵² Likewise, Article 8, paragraph 2(e) of the American Convention of Human Rights guarantees every person accused of a criminal offense “[t]he inalienable right to be assisted by counsel provided by the State, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law....”⁵³ Lastly, Article 7, paragraph 1(c) of the African Charter on Human and Peoples’ Rights provides “the right to defense, including the right to be defended by counsel of his choice....”⁵⁴

B. INTERPRETATIONS OF THE RIGHT TO COUNSEL PROVISIONS BY THE HUMAN RIGHTS COMMITTEE AND THE EUROPEAN COURT OF HUMAN RIGHTS

Both the Human Rights Committee and the European Court of Human Rights have interpreted the parameters of the right to counsel protected in Article 14(d) of ICCPR, and Article 6, paragraph 3(c) of the European Convention on Human Rights, respectively. More specifically, the decisions focused on the right of the accused to choose his own court appointed counsel. Although both judicial bodies placed limitations on the indigent defendant’s right to choose court appointed counsel, both the Human Rights Committee and the European Court of Human Rights emphasized the importance of the accused’s wishes and required the courts to establish minimum standards in ensuring effective assistance of counsel. However, these

⁵² European Convention, *supra* note 3, art. 6, para. 3(c).

⁵³ American Convention, *supra* note 4, art. 8, para. 2(e).

⁵⁴ African Charter, *supra* note 4, art. 7, para. 1(c).

decisions did not address the scope of the tribunal’s authority to assign counsel when the accused has the ability to obtain a counsel of his own choosing.

1. Interpretation of Article 14(d) of the ICCPR by the Human Rights Committee

The United Nations Human Rights Committee (“Committee”) scrutinized Article 14(d) of the ICCPR in a series of decisions on Jamaica—*Wright v. Jamaica*,⁵⁵ *Kelly v. Jamaica*,⁵⁶ *Berry v. Jamaica*,⁵⁷ and *Collins v. Jamaica*.⁵⁸ Although violations of Article 14(d) rights based on ineffective assistance of counsel were established, the Committee did not recognize the right of an indigent defendant to choose his own court appointed counsel.

In *Wright v. Jamaica*, the defendant and co-defendant were convicted on retrial and sentenced to death for murder.⁵⁹ After exhausting the domestic remedies, the defendants petitioned the Human Rights Committee and claimed that their rights under Article 14(d) of ICCPR were violated when (1) the defendant was not represented by counsel at the preliminary hearing and (2) the court appointed counsel representing the co-defendant did not take a statement from him, did not meet him until the beginning of the trial, and conceded that he could not support the appeal.⁶⁰ The Committee, in finding Article 14(d) violations, held that while

⁵⁵ *Wright v. Jamaica*, Communication No. 459/1991, U.N. Doc. CCPR/C/55/D/459/1991 (1995), available at <http://www1.umn.edu/humanrts/undocs/html/459-1991.html> [hereinafter *Wright v. Jamaica*] (Reproduced in accompanying notebook at Tab 49).

⁵⁶ *Kelly v. Jamaica*, Communication No. 253/1987, U.N. Doc. CCPR/C/41/D/253/1987 (1991), in *Selected Decisions of the Human Rights Committee under the Optional Protocol, Vol. 4*, at 60-67, U.N. Doc. CCPR/C/OP/4 (2004) [hereinafter *Kelly v. Jamaica*] (Reproduced in accompanying notebook at Tab 35).

⁵⁷ *Berry v. Jamaica*, Communication No. 330/1998, U.N. Doc. CCPR/C/50/D/330/1998 (1994), available at <http://www1.umn.edu/humanrts/undocs/html/330-1988.html> [hereinafter *Berry v. Jamaica*] (Reproduced in accompanying notebook at Tab 29).

⁵⁸ *Collins v. Jamaica*, Communication No. 240/1987, U.N. Doc. CCPR/C/43/D/253/1987 (1991), in *Selected Decisions of the Human Rights Committee under the Optional Protocol, Vol. 4*, at 100-107, U.N. Doc. CCPR/C/OP/4 (2004) [hereinafter *Collins v. Jamaica*] (Reproduced in accompanying notebook at Tab 30).

⁵⁹ *Wright v. Jamaica*, *supra* note 55, at ¶¶ 2.1-2.2.

⁶⁰ *Id.* at ¶ 3.4.

Article 14(d) of ICCPR “does not entitle the accused to choose counsel provided to him free of charge, the Court should ensure that the conduct of the case by the lawyer is not incompatible with the interests of justice.”⁶¹

Likewise, in *Kelly v. Jamaica*, the Committee held that while Article 14(d) of ICCPR “does not entitle the accused to choose counsel provided to him free of charge, measures must be taken to ensure that counsel, once assigned, provides effective representation in the interests of justice.”⁶² In *Kelly*, the defendant contested his conviction for murder on grounds that the court appointed counsel’s argument before the appeals court that the appeal has no merit, without informing the defendant, violated his right under Article 14(d) because it effectively left the defendant without legal representation.⁶³ In finding a violation of Article 14(d), the Committee held that, at a minimum, the court appointed counsel has a duty to “consult with and inform the accused if he intends to withdraw an appeal or to argue before the appeal court that the appeal has no merit.”⁶⁴

However, a violation of Article 14(d) due to ineffective assistance of counsel arises only when court appointed counsel for indigent defendants violates the court rules or professional code of ethics. In *Berry v. Jamaica*, the Committee concluded that there was no violation of Article 14(d) because the failure of the defendant’s counsel to bring up certain issues before the court, even though it prejudiced the outcome of the trial, could not be attributed to the state party since the lawyer was privately retained.⁶⁵ Furthermore, in determining when the alleged

⁶¹ *Id.* at ¶ 10.5.

⁶² *Kelly v. Jamaica*, *supra* note 56, at ¶ 5.10.

⁶³ *Id.* at ¶ 3.5.

⁶⁴ *Id.* at ¶ 5.10.

⁶⁵ *Berry v. Jamaica*, *supra* note 57, at ¶ 11.3

professional misconduct rises to ineffective assistance of counsel that constitutes a violation of Article 14(d), the Human Rights Committee, in *Collins v. Jamaica*, held that “in the absence of clear evidence of professional negligence on the part of counsel, it is not for the Committee to question the latter’s professional judgment.”⁶⁶

2. Interpretation of Article 6, para. 3(c) of the European Convention on Human Rights by the European Court of Human Rights

In *Pakelli v. Germany*, the European Court of Human Rights held that Article 6, paragraph 3(c) of the European Convention of Human Rights entitles everyone charged with a criminal offense to be defended by counsel of his own choosing.⁶⁷ Furthermore, subject only to the restrictions based on the qualifications of the defense counsel under paragraphs 4 and 5 of Rule 36,⁶⁸ Rule 91 of the Court Rules allows free legal assistance for indigent defendants.⁶⁹ The contours of the right of the accused to choose his court appointed counsel under Article 6, paragraph 3(c) of the European Convention on Human Rights were further elucidated in the case of *Croissant v. Germany*.⁷⁰

⁶⁶ *Collins v. Jamaica*, *supra* note 58, at ¶ 8.3.

⁶⁷ *Pakelli v. Germany*, 6 Eur. H.R. Rep. 1 (1984), *available at* <http://www.echr.coe.int/echr> (Reproduced in accompanying notebook at Tab 36).

⁶⁸ Council of Europe, European Court of Human Rights: Rules of Court (Dec. 2005) (Rule 36, paragraph 4(a) provides “[t]he representative acting on behalf of the applicant...shall be an advocate authorised to practice in any of the Contracting Parties and resident in the territory of one of them, or any other person approved by the President of the Chamber”; Rule 36, paragraph 5 requires that “[t]he advocate or other approved representative, or the applicant in person who seeks leave to present his or her own case, must...have an adequate understanding of one of the Court’s official languages”), *available at* <http://www.echr.coe.int/echr> (Reproduced in accompanying notebook at Tab 6).

⁶⁹ *Id.* at Rule 91 (“The President of the Chamber may...grant free legal aid to the applicant...”).

⁷⁰ *Croissant v. Germany*, 237 Eur. Ct. H. R. (ser. A) 23 (1992), *available at* <http://www.echr.coe.int/echr> (Reproduced in accompanying notebook at Tab 31).

In *Croissant*, the defendant was convicted and subsequently disbarred for his activities as a lawyer for various members of the Red Army Faction (RAF), a criminal organization.⁷¹ During the proceedings at the Stuttgart Regional Court, the defendant was initially represented by two lawyers of his own choosing.⁷² However, the dispute in question arose when the President of the Stuttgart Regional Court assigned a third counsel over the defendant's objections as well as his preference for a different counsel.⁷³ The defendant challenged his conviction on the grounds that the Stuttgart Regional Court's appointment of a third defense counsel against his objections violated his rights under Article 6, paragraph 3(c) of the European Convention on Human Rights.⁷⁴

The European Court of Human Rights, in denying the defendant's claim, further illuminated its previous holding in *Pakelli v. Germany* and held:

It is true that Article 6 para. 3(c) (art. 6-3-c) entitles 'everyone charged with a criminal offence' to be defended by counsel of his own choosing...Nevertheless, and notwithstanding the importance of a relationship of confidence between lawyer and client, this right cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also where, as in the present case, it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. When appointing defense counsel the national courts must certainly have regard to the defendant's wishes; indeed, German law contemplates such as 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.⁷⁵

Although the European Court of Human Rights placed limitations on the defendant's right to choose court appointed counsel when the legal aid is free, the Court recognizes that the wishes of

⁷¹ *Id.* at ¶¶ 6, 12.

⁷² *Id.* at ¶ 7.

⁷³ *Id.* at ¶¶ 8-9.

⁷⁴ *Id.* at ¶ 1.

⁷⁵ *Id.* at ¶ 29.

the accused must be considered if the interests of justice are to be served. Accordingly, the “appointment [of counsel] that runs counter to [the defendant’s] wishes will be incompatible with the notion of fair trial under Article 6 para. 1 (art. 6-1) if, even taking into account a proper margin of appreciation, it lacks relevant and sufficient justification.”⁷⁶

C. PRECEDENT FROM INTERNATIONAL AD HOC TRIBUNALS

At the end of the Second World War, the accused Nazi and Japanese leaders were prosecuted for their war crimes at the International Military Tribunals established at Nuremberg and Tokyo, respectively. Fifty years later, the U.N. Security Council established ad hoc tribunals under its Chapter VII powers to try those accused of war crimes, crimes against humanity, and genocide in the former Yugoslavia and Rwanda. Likewise, the establishment of the hybrid Special Court for Sierra Leone as well as the International Criminal Court signified a further commitment by the international community to bring the perpetrators of atrocity crimes to justice.

Representing an amalgamation of both common law and civil law principles, the ad hoc tribunals use established international standards of justice and norms of fairness in their proceedings; in return, jurisprudence from these tribunals contribute to the development of international law. In order to guarantee fairness in the proceedings that are predominantly adversarial, the statutes of the tribunals, the rules of procedure and evidence, and case law further articulate the right to counsel. The baseline parameters of the right to counsel arising from the international ad hoc tribunals include: (1) the right to counsel and the right to be informed of this right attaches upon entering the jurisdiction of the court; (2) the defendants’ right to choose their

⁷⁶ *Id.* at ¶ 27.

counsel within limits; (3) adequate access to counsel but not equal resources; and (4) a qualified right to self-representation.⁷⁷

1. Assignment of Counsel in the Nuremberg and Tokyo Tribunals

A defendant's right to counsel is protected under Article 16 of the Nuremberg Charter, which provides: "[a] Defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of Counsel."⁷⁸ In order to protect the legitimacy of the tribunal from future challenges grounded in the denial of a fair trial, "[e]very defendant...had the right under the law to be represented by counsel of his own selection providing such counsel was qualified to conduct cases before the German courts or was specifically authorized by the Tribunal."⁷⁹ In practice, "no German lawyer [was] excluded if he was requested as counsel for a defendant...[and] most of the German counsel chosen are themselves subject to arrest or trial in German courts under German law for membership in the Nazi Party or the criminal SS."⁸⁰

This selection criteria and procedural practice from the Nuremberg Tribunal would form the foundation for the future procedural rules regarding the registrar's role in the assignment of legal assistance as well as the appointment and qualifications of defense counsel that are found in the ICC and ad hoc tribunals. Likewise, the defendants in the Tokyo Tribunal were afforded

⁷⁷ Kate Kerr, *Fair Trials at International Criminal Tribunals: Examining the Parameters of the International Right to Counsel*, 36 GEO. J. INT'L L. 1227, 1230 (2005) [hereinafter Kerr, Fair Trials] (Reproduced in accompanying notebook at Tab 54).

⁷⁸ See Nuremberg Charter, *supra* note 37, art. 16.

⁷⁹ Benjamin B. Ferencz, *Nurnberg Trial Procedure and the Rights of the Accused*, J. CRIM. L. & CRIMINOLOGY 144 (1948) (Reproduced in accompanying notebook at Tab 53).

⁸⁰ *Id.*

defense counsel, albeit with differences in the selection process of counsel where “[m]ost of the Japanese defendants were provided military officers with legal billets (JAGS).”⁸¹

2. Statutory and Procedural Rules Relating to Assignment of Counsel and Self-Representation under the ICC, ICTY, ICTR, and SCSL

While the defendant’s right to counsel is protected by the statutes of the ICC, ICTY, ICTR, and SCSL, the rules of evidence and procedure from the tribunals further define the scope of the tribunals’ authority as well as the process by which to assign defense counsel. Despite their similarities in process, differences exist between the tribunals with regard to the standards used to determine the qualification of defense counsel.

a. International Criminal Court (ICC)

The functions and powers of the ICC trial chamber are restrained by its Statute and the Rules of Procedure and Evidence. Article 64 of the Rome Statute of the ICC prescribing the ‘Functions and Powers of the Trial Chamber’ provides in paragraphs 1 and 2:

1. The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.
2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.⁸²

Likewise, the accused’s right to counsel, guaranteed in Article 67, paragraph 1(d) of the ICC Statute, entitles the accused to:

a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees in full equality:

⁸¹ Kastenberg, *supra* note 30, at 185 (citing George F. Guy, *The Defense of Yamashita*, 6 USAFA J. LEG. STUD. 215, 216-17 (1996)).

⁸² Rome Statute of the International Criminal Court, Jul. 17, 1998, art. 64, para. 1-2, U.N. Doc. A/CONF.183/9 (2002) (entered into force Jul. 1, 2002) [hereinafter ICC Statute], available at [http://www.un.org/law/icc/statute/english/rome_statute\(e\).pdf](http://www.un.org/law/icc/statute/english/rome_statute(e).pdf) (Reproduced in accompanying notebook at Tab 82).

...(d)...to conduct the defense in person or through legal assistance of the accused's choosing, to be informed, if the accused 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 accused lacks sufficient means to pay for it.⁸³

The scope of the Court's authority to assign defense counsel, the process of assigning counsel and the qualifications of the counsel are set out in ICC's Rules of Procedure and Evidence. Rule 22, paragraph 1, detailing the qualifications of the defense counsel, prescribes:

[a] counsel for the defense shall have established competence in international or criminal law and procedure, as well as the necessary relevant practice, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings. A counsel for the defense shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court. Counsel for the defense may be assisted by persons, including professors of law, with relevant expertise.⁸⁴

In addition to the Rule 20 responsibilities of the Registrar relating to the rights of the defense,⁸⁵ Rule 21, paragraph 1 requires the Registrar to establish a code of regulations detailing the criteria and procedures for assignment of legal assistance.⁸⁶ Lastly, under Rule 21, paragraph 2, the Registrar "shall create and maintain a list of counsel who meet the criteria...[and the accused] shall freely choose his or her counsel from this list or other counsel who meets the required criteria and is willing to be included in the list."⁸⁷

b. International Criminal Tribunal for the Former Yugoslavia (ICTY)

The International Criminal Tribunal for the former Yugoslavia (ICTY) was established on May 25, 1993 by the Security Council acting under its Chapter VII powers to "prosecute

⁸³ *Id.* art. 67, para. 1(d).

⁸⁴ International Criminal Court, *Rules of Procedure and Evidence*, rule 22(1), U.N. Doc. ICC-ASP/1/3 (2002) [hereinafter ICC Rules] (Reproduced in accompanying notebook at Tab 9).

⁸⁵ *Id.* R. 20.

⁸⁶ *Id.* R. 21(1).

⁸⁷ *Id.* R. 21(2).

persons responsible for serious violations of international humanitarian law committed in the territory of former Yugoslavia since 1991.”⁸⁸ Similar to the ICC, the tribunal “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 the victims and witnesses.”⁸⁹ Likewise, Article 21, paragraph 4(d) of the ICTY statute echoes the language of the ICCPR in guaranteeing the defendant’s right to counsel:

to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.⁹⁰

The Tribunal’s Rules of Procedure and Evidence as well as its regulatory Directive on Assignment of Defense Counsel further refine when and in what manner the Tribunal can assign defense counsel, the responsibilities of the Registrar, and the qualifications of the defense counsel. Rule 44, paragraph A of the ICTY’s Rules of Procedure and Evidence sets out the following requirements for the appointment and qualifications of counsel:

...a counsel shall be considered qualified to represent a suspect or accused if the counsel satisfies the Registrar that he or she:

(i) is admitted to practice of law in a State, or is a university professor of law;

⁸⁸ See Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art. 1, S.C.Res. 827, U.N.SCOR, 48th Sess., 3217th mtg. at 1, U.N.Doc. S/RES/827 (1993) (Reproduced in accompanying notebook at Tab 27); see also Statute of the International Criminal Tribunal for the Former Yugoslavia (2006) [hereinafter ICTY Statute], available at <http://www.un.org/icty/legaldoc-e/index.htm> (Reproduced in accompanying notebook at Tab 21).

⁸⁹ *Id.* art. 20, para. 1.

⁹⁰ *Id.* art. 21, para. 4(d).

(ii) has written and oral proficiency in one of the two working languages of the Tribunal....⁹¹

Moreover, sub-paragraphs iii-vii require a close scrutiny of the prospective counsel's past ethical conduct.⁹² Unlike the ICC, the Tribunal's regulatory Directive on Assignment of Defense Counsel further sets out the standards required for determining the qualification of counsel.⁹³

c. International Criminal Tribunal for Rwanda (ICTR)

The ICTR Statute and the Rules of Procedure and Evidence were modeled after those adopted by the ICTY. As in the ICTY and ICCPR, the right to counsel guaranteed in Article 20, paragraph 4(d) of the ICTR Statute provides every defendant the right:

[t]o be tried in his or her presence, to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.⁹⁴

Although there is a great similarity in the procedural rules between the ICTR and ICTY, the requirement of ten years of relevant experience is unique to the ICTR.⁹⁵ Additionally, Rule 44 of the ICTR Rules of Procedure and Evidence sets out the following requirements for the appointment and qualifications of counsel:

⁹¹ International Criminal Tribunal for the Former Yugoslavia, *Rules of Procedure and Evidence*, R. 44(a)(i-ii) (2005) [hereinafter ICTY, Rules], available at http://www.un.org/icty/legaldoc-e/basic/rpe/IT32_rev36.htm (Reproduced in accompanying notebook at Tab 11).

⁹² *Id.* R. 44(a)(iii-vii).

⁹³ International Criminal Tribunal for the Former Yugoslavia, *Directive on Assignment of Defense Counsel*, art. 14 (2004) [hereinafter ICTY, Directive], available at <http://www.un.org/icty/legaldoc-e/basic/IT073-rev10-e.htm> (Reproduced in accompanying notebook at Tab 10).

⁹⁴ Statute of the International Tribunal for Rwanda, art. 20, para. 4(d), S.C.Res. 955, U.N.SCOR, 49th Sess., U.N.Doc. S/RES/955 (1994) (Reproduced in accompanying notebook at Tab 28); Statute of the International Tribunal for Rwanda (2004) [hereinafter ICTR Statute], available at <http://69.94.11.53/ENGLISH/basicdocs/statute/2004.pdf> (Reproduced in accompanying notebook at Tab 22).

⁹⁵ International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence*, R. 45 (2005) [hereinafter ICTR Rules], available at <http://69.94.11.53/ENGLISH/rules/070605/070605.pdf> (Reproduced in accompanying notebook at Tab 13).

(A) Counsel engaged by a suspect or an accused shall file his power of attorney with the Registrar at the earliest opportunity. Subject to verification by the Registrar, a counsel shall be considered qualified to represent a suspect or accused, provided that he is admitted to the practice of law in a State, or is a University professor of law.

(B) In the performance of their duties counsel shall be subject to the relevant provisions of the Statute, the Rules, the Rules of Detention and any other rules or regulations adopted by the Tribunal, the Host County Agreement, the Code of Conduct and the codes of practice and ethics governing their profession and, if applicable, the Directive on the Assignment of Defense Counsel.⁹⁶

Rule 45 of the ICTR Rules of Procedure and Evidence prescribes the authority to assign counsel to the Registrar. Rule 45, paragraph (A) requires the Registrar to keep a list of counsel “who speak one or both of the working languages of the Tribunal, meet the requirements of Rule 44, [and] have at least 10 years’ relevant experience....”⁹⁷ Furthermore, Rule 45, paragraph (C) divides the procedure for assigning counsel to an indigent defendant into three parts. First, a request for court-appointed counsel must be made to the Registrar.⁹⁸ Second, the Registrar must make inquiries into the financial means of the accused to determine whether the criteria for indigence are met.⁹⁹ Lastly, if the Registrar “decides that the criteria are met, he shall assign counsel from the list; if he decides to the contrary, he shall inform the...accused that the request is refused.”¹⁰⁰

d. Special Court for Sierra Leone (SCSL)

Unlike the ICTY and ICTR, the Special Court for Sierra Leone is a hybrid court; the SCSL was established by an agreement reached between the government of Sierra Leone and the

⁹⁶ *Id.* at R. 44.

⁹⁷ *Id.* at R. 45(A).

⁹⁸ *Id.* at R. 45(C)(i).

⁹⁹ *Id.* at R. 45(C)(ii).

¹⁰⁰ *Id.* at R. 45(C)(iii).

United Nations.¹⁰¹ In contrast to the ICTY and ICTR, “which try international crimes with international lawyers in cities distant from the scene of the crime, the SCSL combines international with national law, relies on local and international lawyers, and holds court in the country where the crimes occurred.”¹⁰²

Article 17, paragraph 4(d) of the SCSL Statute mirrors the ICCPR language and guarantees every defendant the right:

[t]o 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 interests 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.¹⁰³

The Court’s authority to assign defense counsel is further clarified in its Rules of Procedure and Evidence, promulgated pursuant to the requirements of Article 14 of the SCSL Statute.¹⁰⁴

Since the ICTR’s Rules of Procedure and Evidence are applicable *mutatis mutandis* to the conduct of the legal proceedings before the SCSL, Rule 44 sets out the appointment and qualifications for counsel while Rule 45 envisions the establishment of Defense Office headed by the Special Court Principle Defender for the purpose of ensuring the rights of suspects and accused. Rule 44, paragraph A, requires counsel engaged by a suspect or an accused to “file his

¹⁰¹ See Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, S.C. Res. 1315, U.N. SCOR, 55th Sess., 4186th mtg., U.N. Doc 5/2001/915 (2000) (Reproduced in accompanying notebook at Tab 26); see also Statute of the Special Court of Sierra Leone, Preamble (2000) [hereinafter SCSL Statute], available at <http://www.sc-sl.org/scsl-statute.html> (Reproduced in accompanying notebook at Tab 24).

¹⁰² Kerr, *supra* note 77, at 1240.

¹⁰³ SCSL Statute, *supra* note 101, art. 17, ¶ 4(d).

¹⁰⁴ *Id.* (Article 14, paragraph 1 provides: “[t]he Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable *mutatis mutandis* to the conduct of the legal proceedings before the Special Court”).

power of attorney with the Registrar at the earliest opportunity..., admitted to practice law in a State and practices criminal law for a minimum of five years.”¹⁰⁵

To facilitate assignment of counsel, Rule 45, paragraph C, requires the Principle Defender to “maintain a list of highly qualified criminal defense counsel...[who] speak fluent English, [are] admitted to practice law in any State; have at least 7 years’ relevant experience, and have indicated their willingness and full-time availability to be assigned by the [SCSL]....”¹⁰⁶ In addition, the Directive on the Assignment of Counsel further expands the procedure for the assignment of counsel, qualifications for the defense counsel, scope of legal representation, payment of counsel, and withdrawal and replacement of counsel.¹⁰⁷

3. Assignment of Counsel under the ICTY and ICTR

The jurisprudence of the ICTY, ICTR, and SCSL, interpreting the respective statutes and rules of procedure and evidence, has established that the accused has the right to choose counsel or be appointed counsel if he or she is indigent. Although the accused has the right to select counsel, this right is limited when the tribunal must compensate counsel. In assigning counsel, the Registrar has a duty to verify that the prospective counsel meets the standards of competence required by the tribunal. However, none of the case law from the tribunals dealt directly with the assignment of counsel for a non-indigent defendant who can otherwise retain his own counsel.

¹⁰⁵ Special Court for Sierra Leone, *Rules of Procedure and Evidence*, R. 44, ¶ A (2005) [hereinafter SCSL Rules], available at <http://www.sc-sl.org/rulesofprocedureandevidence.pdf> (Reproduced in accompanying notebook at Tab 20).

¹⁰⁶ *Id.* R. 45, ¶ C.

¹⁰⁷ Special Court for Sierra Leone, *Directive of the Assignment of Counsel* (2003) [hereinafter SCSL Directive], available at <http://www.sc-sl.org/assignmentofcounsel.html> (Reproduced in accompanying notebook at Tab 19).

a. ICTY

A number of ICTY decisions shed light on the right to assigned counsel: *Prosecutor v. Delalic et al.*,¹⁰⁸ *Prosecutor v. Mrksic et al.*,¹⁰⁹ and *Prosecutor v. Sljivancanin*.¹¹⁰ In recognizing that indigent defendants do not have an absolute right to choose their own counsel, the ICTY Trial Chamber held in *Delalic*:

The [ICTY] Statute does not specifically state that the right to assigned counsel is also a right to assigned counsel of the accused's own choosing. Indeed, the right to assigned counsel under the Directive is not totally without limit—counsel may only be assigned if they are on a list maintained by the Registrar of the International Tribunal...However, the practice of the Registry of the International Tribunal has been to permit the accused to select any available counsel from this list and to add counsel to the list if selected by an accused, provided that such counsel meets the necessary criteria. The Trial Chamber supports this practice, within practical limits.¹¹¹

In *Delalic*, an indigent co-defendant requested an assignment of another lawyer for reasons other than the competence or qualifications of a currently-assigned lawyer.¹¹² The Trial Chamber further held that “even though an accused has a right to counsel of his own choosing, the overriding interest of the administration of justice means that he should not be permitted to seek withdrawal of his assigned counsel without establishing good cause.”¹¹³

¹⁰⁸ *Prosecutor v. Delalic et al.*, Case No. , Trial Chamber, Decision on Request by Accused Mucic for Assignment of New Counsel (Jun. 24, 1996) [hereinafter *Prosecutor v. Delalic*] (Reproduced in accompanying notebook at Tab 40).

¹⁰⁹ *Prosecutor v. Mrksic et al.*, Case No. IT-95-13a, Trial Chamber, Decision on Defense Preliminary Motion on the Assignment of Counsel (Sept. 30, 1997) [hereinafter *Prosecutor v. Mrksic*] (Reproduced in accompanying notebook at Tab 109).

¹¹⁰ *Prosecutor v. Sljivancanin*, Case No. IT-95-13/1-PT, Trial Chamber, Decision on Assignment of Defense Counsel (Aug. 20, 2003) [hereinafter *Prosecutor v. Sljivancanin*] (Reproduced in accompanying notebook at Tab 46).

¹¹¹ *Prosecutor v. Delalic*, *supra* note 108, at ¶ 2.

¹¹² *Id.* at Introduction and Procedural Background.

¹¹³ *Id.* at ¶ 3.

In *Prosecutor v. Sljivancanin*, the Trial Chamber ruled that the right to select counsel is limited when the Registrar must compensate counsel. In *Sljivancanin*, the defendant appealed the Registrar's refusal to assign him his preferred lawyers.¹¹⁴ In limiting an indigent accused's right to choose his assigned lawyer, the Trial Chamber held:

[w]hatever may be the scope of the right to counsel of one's own choosing when a defendant hires his own counsel, the right to publicly paid counsel of one's own choice is limited...[W]hile the Registrar should normally take a defendant's preferences into account, a defendant must accept any duly qualified counsel appointed from the list maintained by the Registrar.¹¹⁵

The court further held that "[t]he party seeking assignment of counsel bears the burden of convincing the Registrar that his preferred attorney meets the relevant criteria. The Registrar [in turn] bears the responsibility to make clear the basis for his decisions."¹¹⁶

b. ICTR

The parameters of an indigent defendant's right to choose assigned counsel in the ICTR context were adjudicated in *Prosecutor v. Kambanda*¹¹⁷ and *Prosecutor v. Akayesu*.¹¹⁸ In *Kambanda*, the defendant was an ex-Rwandan Prime Minister, who was sentenced to life imprisonment after pleading guilty to genocide and crimes against humanity.¹¹⁹ In appealing his conviction, the defendant asserted a claim that the denial of his choice when a lawyer was

¹¹⁴ *Prosecutor v. Sljivancanin*, *supra* note 110, at ¶¶ 2-5.

¹¹⁵ *Id.* at ¶ 20.

¹¹⁶ *Id.* at ¶ 29.

¹¹⁷ *Prosecutor v. Jean Kambanda*, Case No. ICTR 97-23-A, Appeals Chamber, Judgment (Oct. 19, 2000) [hereinafter *Prosecutor v. Kambanda*] (Reproduced in accompanying notebook at Tab 38).

¹¹⁸ *Prosecutor v. Akayesu*, Case No. ICTR-96-4, Appeals Chamber, Judgment (Jun. 1, 2001) [hereinafter *Prosecutor v. Akayesu*] (Reproduced in accompanying notebook at Tab 38).

¹¹⁹ *Prosecutor v. Kambanda*, *supra* note 117, at ¶.

assigned to him amounted to a violation of his right to a fair trial.¹²⁰ The Appeals Chamber, after referencing various international authorities, held that “the right to free legal assistance by counsel does not confer the right to choose one’s counsel.”¹²¹

Likewise, in *Akayesu*, the defendant contended that the Registrar’s denial of his choice of a court-appointed counsel resulted in the denial of his right to effective counsel even though he had requested for a counsel who did not meet the standards of the Tribunal.¹²² In addition to finding that Akayesu had been offered counsel and affirmatively refused it,¹²³ the Appeals Chamber held that an indigent defendant’s right to choose his court-appointed counsel must be balanced against ensuring “proper use of the Tribunal’s resources.”¹²⁴ Furthermore, the Appeals Chamber, in reaffirming the *Kambanda* holding that the right to choose counsel is limited when the tribunal compensates the attorney, held that “the right to free legal assistance of counsel does not confer the right to counsel of ones own choosing.”¹²⁵

4. Right to Self-Representation in Relation to Assignment of Counsel under the ICTY, ICTR, and SCSL

Although the right to self-representation originated in common law, it is recognized as an international right under Article 14(d)(3) of the ICCPR, Article 8(2) of the American Convention on Human Rights, and Article 6(3)(c) of the European Convention on Human Rights.¹²⁶ Moreover, the statutes of the ICTY, ICTR, and the SCSL provide that the accused has a right to

¹²⁰ *Id.* at ¶

¹²¹ *Id.* at ¶

¹²² Prosecutor v. Akayesu, *supra* note 118, at ¶¶ 49-50.

¹²³ *Id.* at ¶ 46-48.

¹²⁴ *Id.* at ¶ 60.

¹²⁵ *Id.* at ¶ 61.

¹²⁶ See *supra* notes 3-5 and accompanying text.

“defend himself in person or through legal assistance of his own choosing.”¹²⁷ However, the ICTY, ICTR, and the SCSL vary in their treatment of the right to self-representation.

a. ICTY

The right to self-representation was hotly debated in the ICTY during the trial of Slobodan Milosevic. In a decision criticized by many observers, the ICTY allowed Milosevic to represent himself during his trial.¹²⁸ Milosevic refused to enter a plea and declined to accept court-appointed counsel during his initial appearance before the ICTY. In addition to appointing amicus curiae counsel for Milosevic, the Trial Chamber ruled that Milosevic “has a right not to have counsel [and that] it would not be practical to impose counsel on an accused who wishes to represent himself.”¹²⁹ Capitalizing on this, Milosevic turned the trial into his own political platform, criticized the legitimacy of the court and the fairness of the proceedings, and mistreated the prosecution, witnesses, and trial chamber judges in a way that would be never permitted by ordinary defense counsel.¹³⁰

Learning from this, the Trial Chamber reserved the limitations on the right to self-representation in its subsequent decision on April 4, 2003.¹³¹ In that decision, the Trial chamber rejected the Prosecution’s motion that defense counsel be imposed on Slobodan Milosevic to

¹²⁷ See *supra* notes 88, 94, 101 and accompanying text.

¹²⁸ For a full treatment of the right to self-representation in international criminal proceedings, see Michael P. Scharf and 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) [hereinafter Scharf & Rassi] (Reproduced in accompanying notebook at Tab 57).

¹²⁹ *Id.* at 18.

¹³⁰ See Scharf & Rassi, *supra* note , at ; see also Michael P. Scharf & Ahran Kang, *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) [hereinafter Scharf & Kang] (Reproduced in accompanying notebook at Tab 130).

¹³¹ Prosecutor v. Milosevic, Case No. IT-02-54-T, Trial Chamber, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel (Apr. 3, 2003) (Reproduced in accompanying notebook at Tab 41).

alleviate concerns that Milosevic would not be able to adequately represent himself. However, the Trial Chamber ruled that although the “international and regional conventions (in similar language) plainly articulates the right to [self representation]”,¹³² “the right to defend oneself in person is not absolute...[and that] there may be circumstances ...where it is in the interests of justice to appoint counsel.”¹³³

Likewise, finding that Milosevic’s health impeded the progress of the proceedings, the Trial Chamber on September 22, 2004, held that it is competent to assign counsel to Milosevic “in the interests of justice.”¹³⁴ In asserting that the right to self-representation is a qualified right, the Trial Chamber further ruled that “[t]he fundamental duty of the Trial Chamber is to ensure that the trial is fair and expeditious.”¹³⁵ On November 1, 2004, the Appeals Chamber affirmed the Trial Chamber’s imposition of defense counsel but required the Trial Chamber to “craft a working regime [assigning a standby counsel] that minimizes the practical impact of the formal assignment of counsel, except to the extent required by the interests of justice.”¹³⁶

b. ICTR

Unlike the ICTY, the ICTR in *Prosecutor v. Barayagwiza* imposed defense counsel on the accused in the interest of justice.¹³⁷ In *Barayagwiza*, the assigned defense counsel asked to

¹³² *Id.* at ¶ 36.

¹³³ *Id.* at ¶ 40.

¹³⁴ *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Trial Chamber, Reasons for Decision on Assignment of Defense Counsel, ¶¶ 29-51 (Sept. 22, 2004) (Reproduced in accompanying notebook at Tab 43).

¹³⁵ *Id.* at ¶ 65.

¹³⁶ *Prosecutor v. Milosevic*, Case No. IT-02-54-AR73.7, Appeals Chamber, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, ¶ 19 (Nov. 1, 2004) (Reproduced in accompanying notebook at Tab 42).

¹³⁷ *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-T, Trial Chamber, Decision on Defense Counsel Motion to Withdraw (Nov. 2, 2000) (Reproduced in accompanying notebook at Tab 39).

withdraw from the case on the basis that the accused had instructed the counsel not to represent him at the trial and refused to attend the trial.¹³⁸ In rejecting the defendant’s motion, the Trial Chamber held that “only in ‘most exceptional circumstances’ will Counsel assigned by the Tribunal to represent an accused be permitted to withdraw from the case.”¹³⁹ The Trial Chamber found that the defendant’s contentions that he will not receive a fair and just trial did not meet the ‘most exceptional circumstances’ test because the defendant was “actually boycotting the United Nations Tribunal [in] an attempt to obstruct judicial proceedings.”¹⁴⁰

The Trial Chamber also ruled that a court-assigned defense counsel is “under an obligation to continue to represent an accused to the best of his ability, unless the Chamber decides that they are permitted to withdraw.”¹⁴¹ Unlike defense counsel obtained by the accused, whose representation may be terminated, the fact that the counsel in this case is assigned by the court “does not only entail obligations towards the client, but also implies that he represents the interest of the Tribunal to ensure that the Accused receives a fair trial.”¹⁴² Furthermore, in his concurring opinion, Judge Gunawardana pointed out that Article 20(4) of the ICTR Statute enabled the assignment of counsel “in any case where the interests of justice so require.”¹⁴³

¹³⁸ *Id.* at ¶ 1.

¹³⁹ *Id.* at ¶ 10.

¹⁴⁰ *Id.* at ¶ 24.

¹⁴¹ *Id.* at ¶ 22.

¹⁴² *Id.* at ¶ 21.

¹⁴³ *Id.*, Concurring and Separate Opinion of Judge Gunawardana.

c. SCSL

The SCSL addressed the issue of a defendant's right to self-representation in *Prosecutor v. Norman*.¹⁴⁴ In *Norman*, the defendant, who was a former Minister of State Security, notified the Trial Chamber of his intention to represent himself.¹⁴⁵ After reviewing Article 17(4)(b)-(d) of the SCSL Statute, Article 14 of the ICCPR, and Rule 26 *bis* of the SCSL Rules of Procedure and Evidence, the Trial Chamber determined that the right to self-representation enshrined in its Statute "is not absolute but rather, a qualified right."¹⁴⁶ In granting the defendant's request with qualifications, the Court cautioned that the right of a particular accused to represent himself must be weighed against (1) the right to a fair and expeditious trial,¹⁴⁷ (2) possible infringement of the exercise of the right to self-representation on the institutional right of the court,¹⁴⁸ and (3) the timeliness of the application.¹⁴⁹ The Trial Chamber assigned a standby counsel to assist Norman in a later proceeding.¹⁵⁰

¹⁴⁴ *Prosecutor v. Norman*, Case No. SCSL-04-14-T-125, Trial Chamber, Decision on the Application of Samuel Hinga Norman for Self-Representation Under Art. 17(4)(d) of the Statute of the Special Court (Jun. 8, 2004) (Reproduced in accompanying notebook at Tab 45).

¹⁴⁵ *Id.* at ¶ 4.

¹⁴⁶ *Id.* at ¶ 8.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at ¶¶ 17-19.

¹⁴⁹ *Id.* at ¶¶ 23-25.

¹⁵⁰ *Prosecutor v. Norman*, Case No. SCSL-04-14-T-141, Trial Chamber, Decision on Request by Samuel Hinga Norman for Additional Resources to Prepare His Defense, ¶ 2 (Jun. 23, 2004) (Reproduced in accompanying notebook at Tab 45).

D. ASSIGNMENT OF COUNSEL IN THE UNITED STATES

1. Constitutional Rights to Retained and Appointed Counsel

In addition to the international precedence, domestic treatment of the right to counsel is relevant as persuasive authority. Since the concept of the right to counsel is grounded in the adversarial system, the United States' jurisprudence on this topic is chosen as a prism to trace the development of this right. In the United States, the Sixth Amendment to the U.S. Constitution guarantees that "in all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense."¹⁵¹ Although the right to representation by privately retained counsel was apparent from the outset, constitutional right to appointed counsel was not contemplated until 1932.

In *Powell v. Alabama*, the Supreme Court held that "in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense..., it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law."¹⁵² In *Powell*, eight black youths were sentenced to death for raping two white girls in the vicinity of Scottsboro, Alabama.¹⁵³ The defendants challenged on the ground that they were denied effective assistance of counsel because counsel was not appointed to them until moments before the trial began.¹⁵⁴ The *Powell* Court's rationale in finding a constitutional right to appointed counsel arose out of the state's obligation to provide a fair hearing. Under this rationale, a state has an affirmative duty to appoint counsel for an

¹⁵¹ U.S. Const. Amend. VI.

¹⁵² *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (Reproduced in accompanying notebook at Tab 37).

¹⁵³ *Id.* at 50-51.

¹⁵⁴ *Id.* at 56-57.

indigent defendant because a lawyer's assistance is needed to ensure a fair and accurate guilt-determining process.¹⁵⁵

Although the *Powell* ruling restricted the right to appointed counsel to the facts of that case, later Supreme Court decisions broadened the scope of the right to appointed counsel. In *Johnson v. Zerbst*, the Court per Justice Black held that the Sixth Amendment applies to all criminal prosecutions and “withholds from the federal courts, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.”¹⁵⁶ In *Gideon v. Wainwright*, the Supreme Court held that the Sixth Amendment right to the appointment of counsel for indigent defendants applies in state felony trials.¹⁵⁷ In addition, the *Gideon* Court maintained that in an “adversary[ial] system of criminal justice, any person hauled into court, who is poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him.”¹⁵⁸

2. Right to Effective Assistance of Counsel

A necessary corollary of a constitutional right to retained and appointed counsel is a requirement that counsel provides effective assistance. The U.S. Supreme Court provided a general framework for analysis of ineffective assistance of counsel claims through its decisions in *United States v. Chronic* and *Strickland v. Washington*.¹⁵⁹ In *Strickland*, the defendant challenged his death sentence on the grounds that the strategic advice received from his attorney during the guilt and penalty phases of his trial constituted ineffective assistance of counsel,

¹⁵⁵ WAYNE R. LAFAVE, JEROLD H. ISRAEL, AND NANCY J. KING, *CRIMINAL PROCEDURE* 561 (1985, 4th ed. 2004) [hereinafter LaFave et al.] (Reproduced in accompanying notebook at Tab 74).

¹⁵⁶ *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938) (Reproduced in accompanying notebook at Tab 34).

¹⁵⁷ *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (Reproduced in accompanying notebook at Tab 33).

¹⁵⁸ *Id.* at 344.

¹⁵⁹ *U.S. v. Chronic*, 466 U.S. 648 (1984) (Reproduced in accompanying notebook at Tab 48); *Strickland v. Washington*, 466 U.S. 668 (1984) (Reproduced in accompanying notebook at Tab 47).

thereby violating his Sixth Amendment right to counsel.¹⁶⁰ The Supreme Court, in denying the defendant’s challenge, held that “the right to counsel is the right to the effective assistance of counsel.”¹⁶¹

Realizing the importance of effective assistance of counsel in an adversarial process, the Court further held that “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”¹⁶² In linking the standard for effective assistance of counsel to proper functioning of the adversarial process, the Court placed emphasis on meaningful adversarial testing and required a determination of actual ineffectiveness under the facts of a particular case.¹⁶³ Lastly, the Court set a high threshold to establish ineffective assistance; in order to prevail on ineffective assistance claim, a defendant must show (1) “...that counsel’s performance was deficient..., [and (2)] that the deficient performance prejudiced the defense.”¹⁶⁴

E. RIGHT TO COUNSEL—ASSIGNMENT OF COUNSEL AND RIGHT TO SELF-REPRESENTATION—IN THE CONTEXT OF IHT

1. Statutory and Procedural Rules Relating to Assignment of Counsel and the Right to Self-Representation under IHT

On December 10, 2003, the Iraqi Governing Council adopted the Statute of the Iraqi Special Tribunal (the “2003 IST Statute”) and established the Iraqi Special Tribunal (“IST”) to prosecute Saddam Hussein and other former Iraqi leaders for war crimes, crimes against

¹⁶⁰ Strickland v. Washington, *supra* note 159, at 675.

¹⁶¹ *Id.* at 686 (quoting McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970)).

¹⁶² *Id.* at 686.

¹⁶³ LaFave et al., *supra* note 74, at 611.

¹⁶⁴ Strickland v. Washington, *supra* note 159, at 687.

humanity, genocide, and the crime of aggression.¹⁶⁵ On March 8, 2004, the Iraqi Governing Council promulgated the Law of Administration for the State of Iraq for the Transitional Period (“TAL”) to serve as Iraq’s Interim Constitution.¹⁶⁶ Article 48 of the TAL, in addition to continuing and preserving the 2003 IST Statute in force and effect, declares that the 2003 IST Statute “exclusively defines the [IST’s] jurisdiction and procedures, notwithstanding the provisions of [the TAL].”¹⁶⁷

On August 11, 2005, the Transitional National Assembly approved a revised Statute for the IST, which abrogated in full the 2003 IST Statute while at the same time legitimizing the IHT.¹⁶⁸ Lastly, on October 9, 2005, the Iraqi Presidency Council, pursuant to approval by the Transitional National Assembly, adopted the Statute of the Iraqi High Tribunal (“IHT Statute”) and established the Iraqi High Tribunal.¹⁶⁹ Although the IHT is established as a parallel court within the structure of the national courts, it must uphold international law and use international standards of justice and norms of fairness in its proceedings.

While Article 19 of the IHT Statute sets out the Guarantees of the Accused, Article 20 imposes statutory obligations on the IHT to ensure a fair and expeditious trial in accordance with

¹⁶⁵ The Statute of the Iraqi Special Tribunal, Dec. 10, 2003, *available at* <http://www.iraqspecialtribunal.org/en/about/statute.htm> [hereinafter 2003 IST Statute] (Reproduced in accompanying notebook at Tab 23); *see also* Christopher M. Rassi, *Issue #3: Is the Iraqi Special Tribunal, which was Established on December 10, 2003 by the Occupying Power and the Unelected Iraqi Governing Council, a Legitimate Judicial Institution?*, posted on Grotian Moment Blog, *available at* <http://www.law.case.edu/saddamtrial> [hereinafter Rassi, Commentary] (Reproduced in accompanying notebook at Tab 71). For a detailed analysis of the IHT, *see* M. Cherif Bassiouni, *Post Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal*, 38 CORNELL INT’L L. J. 327 (2005) (Reproduced in accompanying notebook at Tab 52).

¹⁶⁶ IHT Statute, *supra* note 1.

¹⁶⁷ *Id.* art. 48.

¹⁶⁸ Rassi, Commentary, *supra* note 165.

¹⁶⁹ *See* IHT Statute, *supra* note 1, art. 1.

the rights of the accused. Article 20, second paragraph of the IHT Statute structuring the Trial Proceedings provides:

[t]he Criminal Court shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with this Statute and the Rules of Procedure and Evidence annexed to this Law, with full respect for the rights of the accused and due regard for the protection of victims, their relatives and the witnesses.¹⁷⁰

Likewise, the accused's right to counsel is guaranteed by Article 19, paragraph 4(D), which provides:

[i]n directing any charge against the accused pursuant to the present Law, the accused shall be entitled to a just fair trial in accordance with the following minimum guarantees:

...D. To be tried in his presence, and to use a lawyer of his own choosing, and to be informed of his right [to] assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance and to have the right to request such aid to appoint a lawyer without paying the fees, case if he does not have sufficient means to pay for it; if he does not have the financial ability to do so.¹⁷¹

Unlike similar provisions safeguarding the right to counsel in the statutes of international criminal tribunals,¹⁷² as well as international and regional conventions on human rights,¹⁷³ the right to counsel under the IHT Statute, as amended, does not contain the right to self-representation.¹⁷⁴

¹⁷⁰ *Id.* art. 20, ¶ Second.

¹⁷¹ *Id.* art. 19, ¶ Fourth (D).

¹⁷² *See* Section III(C)(2).

¹⁷³ *See* Section III(A)(2).

¹⁷⁴ *See* 2003 IST Statute, *supra* note 165, art. 20(d)(4) [hereinafter 2003 IST Statute] (the right to counsel protected in Article 20(d)(4) of the 2003 IST Statute echoes the language of Article 14(d) of the ICCPR:

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

The Tribunal's authority to assign defense counsel is further clarified in the IHT's Rules of Procedure and Evidence, promulgated pursuant to the provisions of Article 16 of the IHT Statute.¹⁷⁵ Appointment of defense counsel is governed by Rule 29 of the IHT's Rules of Procedure and Evidence.¹⁷⁶ Rule 29, first paragraph requires the "Counsel engaged by an accused [to] file his power of attorney with the concerned judge at the earliest opportunity. The judge must verify qualification of the counsel in accordance with the Iraqi law of lawyers."¹⁷⁷ Furthermore, a defense counsel must adhere to the relevant provisions of the IHT Statute, IHT's Rules of Procedure and Evidence, any other rules or regulations adopted by the IHT, and lastly, any codes of practice and ethics governing his profession.¹⁷⁸

Likewise, Rule 30, first paragraph requires the Director of the Administration Department to "establish a Defense Office for the purpose of ensuring the rights of the accused."¹⁷⁹ The Defense Office functions to (1) provide "[l]egal assistance to any accused who does not have sufficient means to pay for it, or as ordered by the [IHT]";¹⁸⁰ (2) make available "[a]dequate facilities to enable the counsel to use in preparation of the Defense";¹⁸¹ and (3) "[a]ssign or appoint a counsel...to provide a legal assistance to a suspect or accused."¹⁸²

¹⁷⁵ IHT Statute, *supra* note 1, art. 16.

¹⁷⁶ Iraqi High Tribunal, *Rules of Procedure and Evidence*, R. 29, available at <http://www.law.case.edu/saddamtrial> (Reproduced in accompanying notebook at Tab 14).

¹⁷⁷ *Id.* R. 29, ¶ First.

¹⁷⁸ *Id.* R. 29, ¶ Third.

¹⁷⁹ *Id.* R. 30, ¶ First.

¹⁸⁰ *Id.* R. 30, ¶ Third (A).

¹⁸¹ *Id.* R. 30, ¶ Third (C).

¹⁸² *Id.* R. 30, ¶ Third (B).

Although the Director of the Defense Office is obligated to “select a *highly qualified* criminal Defense counsel” to provide effective defense,¹⁸³ the IHT’s Rules did not clearly specify what ‘highly qualified’ entails. However, the selection criteria for Non-Iraqi Advisors/Experts, whose role is restricted in the IHT,¹⁸⁴ is “based upon their criminal law experience in their respective countries,...extensive knowledge or experience in international war crimes trials, [and exhibiting] high moral character and integrity.”¹⁸⁵ Regardless, unlike the comparable ICC, ICTY, ICTR, and SCSL procedural rules specifying the qualifications of a defense counsel, the IHT’s Rules did not clearly spell out the qualifications needed for a defense counsel.

2. Assignment of Defense Counsel under the IHT Statute and Rules

Article 19 of the IHT Statute provides the accused with the right to counsel as a minimum guarantee to safeguard a just and fair trial.¹⁸⁶ Furthermore, Article 20 of the IHT Statute imposes an obligation on the Tribunal to “ensure that a trial is *fair and expeditious*....”¹⁸⁷ A defendant’s right to counsel itself is further defined by a bundle of rights: (1) the right to defend himself through a counsel of his own choosing; (2) the right to be informed of this right; and (3) the right to have counsel assigned to him whenever the interests of justice require it.¹⁸⁸ However, these subsidiary rights are not absolute; they must yield when it is necessary to ensure the overall

¹⁸³ *Id.* R. 30, ¶ Fourth (emphasis added).

¹⁸⁴ *Id.* R. 21, ¶ Third (Non-Iraqi Advisors/Experts appointed to the Defense Office “*may not take any action that would involve them in any form of attorney-client relationship with a suspect or accused in any proceedings before the Tribunal*) (emphasis added).

¹⁸⁵ *Id.* R. 30, ¶ Sixth (B).

¹⁸⁶ IHT Statute, *supra* note 1, art. 19.

¹⁸⁷ *Id.* art. 20, ¶ Second.

¹⁸⁸ *Id.* art. 19, ¶ Fourth (D).

integrity and fairness of the process as well as the achievement of the object and purpose of the proceedings.

Thus, when assigning defense counsel in accordance with international law, the IHT must balance the defendant's right to counsel on the one hand and the need to safeguard the overall integrity and fairness of the proceedings on the other. When privately retained defense attorneys walk out in contempt of the Court or threaten to boycott the proceedings without sufficient cause, the IHT may assign public defenders in place of privately retained counsel in the interests of justice. However, the IHT must take a number of steps before wielding this power. First, the IHT must establish a transparent procedure on the assignment of counsel, which provides adequate notice to the defendant. Second, the IHT must make clear the level of proficiency required for a defense counsel, and if possible, constitute a high standard of qualification. Lastly, the IHT should consider instituting a standby counsel to avoid any unnecessary delay and potential prejudice against the defendant during trial.

a. Competency of the IHT to Assign Counsel

Under Article 19 of the IHT Statute, a defendant has the right to be assigned counsel if he or she is indigent.¹⁸⁹ However, an indigent defendant's right to assigned counsel is limited when the Tribunal must compensate counsel; so long as the assigned counsel meets the standards of competence required by the tribunal, the international precedence from the ICTY, ICTR, and SCSL has consistently held that an indigent defendant's right to assigned counsel does not include the right to be represented by a counsel of defendant's own choosing.¹⁹⁰ In situations where the court-assigned counsel for an indigent defendant threatens to boycott the proceedings, walks out of the Court, or withdraws for safety reasons or any other exceptional circumstances,

¹⁸⁹ *Id.*

¹⁹⁰ *See supra* Section III(C)(3).

the IHT may take the defendant's preferences into account in assigning counsel, but is not obligated to assign the defendant's choice of counsel.

The competency of the IHT to assign public defenders in place of privately retained defense counsel for contempt of the court, on the other hand, calls for a more subtle approach. The IHT, by assigning public defenders over the objections of defendants who can otherwise retain defense counsel of their own choosing, leaves itself open to a possible challenge based on the premise that its assignment of counsel violates a defendant's right to retain a lawyer of his own choosing. Furthermore, it can be argued that the IHT is required to allow the defendant to retain another lawyer of his choice even when the previously retained counsel is removed for misconduct. Two related arguments, however, lend support for the IHT's authority to assign public defenders in place of privately retained defense counsel.

First, the accused's right to defend himself through legal assistance of his own choosing is not an absolute right, but a qualified one. A defendant's right to be represented by counsel of his own choice is limited by the necessity to protect the overarching fairness, integrity, object, and purpose of the Tribunal. In addition to delaying the trial proceedings, a defense-team-instigated boycott of the proceedings and defense counsel misconduct in Court can have a real and lasting impact in disrupting and undermining the integrity of the Tribunal. A disingenuous defense tactic of this sort gives rise to a miscarriage of justice because the delay and disruption of trial proceedings has its own ramifications on other 'minimum guarantees' safeguarding the overall fairness of the trial proceedings. Moreover, jurisprudence from the national courts¹⁹¹ as well as a line of cases from international tribunals restricting a defendant's right to self

¹⁹¹ *See supra* Section III(D).

representation¹⁹² suggest that the right to legal assistance of one's own choosing must yield to the overarching requirement of a fair trial.

Second, a privately retained defense counsel's professional misconduct and contempt of the Court give rise to an implied waiver of the defendant's right to retain another lawyer of his own choosing. Not only is the defense counsel bound by both IHT and international codes of professional conduct, the defense counsel misconduct impairs the integrity of trial proceedings and undermines the tribunal's legitimacy. Moreover, the defense counsel's misconduct ultimately results in added delay because the replacement counsel will need adequate time to prepare for defense. Even if the defense counsel is subjected to disciplinary proceedings, there is no guarantee that the process will not repeat itself.

However, it is possible to argue that attributing an implied waiver on the defendant for defense counsel's misconduct is unfair, and that first transgression warrants only a warning and not an assignment of a public defender. This line of argument, however, ignores the tendencies of the defense team to delay the proceedings and discredit the tribunal. Furthermore, it disregards the defendant's role in developing the defense strategy. First, the Milosevic trial taught us that (1) granting unbridled license to conduct defense could be detrimental to the tribunal's image and credibility;¹⁹³ and (2) added delays could rob the tribunal of its historical and educational components. Second, when a defendant participates in strategy development and subsequently sanctions the defense counsel's misconduct to delay the proceedings or discredit the tribunal, it is as if the defendant himself has acted, thereby waiving his right to

¹⁹² See *supra* Section III(C)(4).

¹⁹³ See Scharf & Rassi, *supra* note 128; see also Scharf & Kang, *supra* note 130.

retain counsel of his own choosing. To do so otherwise would reward the defendant for using his rights as a sword—in a deplorable manner no less—rather than their intended use as a shield.

Thus, assignment of counsel by the IHT for defense counsel misconduct becomes the only mechanism to properly protect the defendant’s right to counsel while safeguarding the integrity of the Tribunal. However, the IHT must implement a number of safeguards before assigning public defenders in general. First, unlike other international criminal tribunals, the IHT lacks a transparent procedure of assigning defense counsel. Second, the IHT must further clarify minimum qualifications required for defense counsel. Lastly, the IHT must implement mechanisms to ensure that a defendant is not only represented by qualified counsel but is in fact receiving effective assistance of counsel.

b. Need for a Transparent Procedure in Assigning Defense Counsel

Rule 30 of the IHT’s Rules of Procedure and Evidence envisions the establishment of a Defense Office where one of its many functions is to “[a]ssign or appoint a counsel...to provide legal assistance to a suspect or accused.”¹⁹⁴ Similarly, Rule 31, paragraph First allows “[a] judge or a Criminal Court [to] impose legal proceedings against [the] counsel if...the counsel’s conduct becomes offensive or abusive or demeans the dignity and decorum of the [IHT] or obstructs the proceedings.”¹⁹⁵ However, despite authorizing the assignment of counsel and the ability to punish counsel for misconduct, the IHT is silent as to the exact procedure by which to assign counsel. In order to further guarantee the rights of the accused and provide adequate notice, the IHT must establish a transparent procedure in assigning defense counsel.

¹⁹⁴ IHT Rules, *supra* note 176, R. 30, ¶ Third (B).

¹⁹⁵ *Id.* R. 31, ¶ First.

The respective Registrar Offices of the ICTY, ICTR, and SCSL has prepared regulatory directives for assigning defense counsel to indigent defendants.¹⁹⁶ Although the context for assigning defense counsel is different in this case, the IHT can nevertheless learn from these existing models. First, the IHT's directive on assignment of defense counsel must include a procedure for assigning counsel.¹⁹⁷ This procedure may include (1) the defendant's responsibilities; (2) if the defendant is indigent, the defendant's financial situation and the procedure to determine the defendant's financial status; (3) the decision by the Director of the Defense Office and notification of that decision to the defendant; and (4) assignment of counsel in the interests of justice.¹⁹⁸

Second, the IHT's directive must adequately provide notice to the defendants when and under what circumstances their privately retained defense attorneys may be removed and replaced with public defenders for misconduct or disruption of trial proceedings. Likewise, it must contemplate circumstances under which defense counsel may withdraw. Third, the IHT's directive must also contemplate specific parameters governing the replacement of counsel when confronted with the case of the withdrawal or removal of defense counsel.¹⁹⁹ For example, the tribunal may wish to place limitations on the counsel's ability to withdraw at least until the replacement is counsel is assigned to the defendant.

¹⁹⁶ See *supra* notes 93, 107, 197 and accompanying text.

¹⁹⁷ See, e.g., International Criminal Tribunal for Rwanda, *Directive on the Assignment of Defense Counsel*, art. 5-12 (2004), available at <http://69.94.11.53/ENGLISH/basicdocs/defence/240404.pdf> (Reproduced in accompanying notebook at Tab).

¹⁹⁸ *Id.*; see also ICTY, Directive, *supra* note 93, art. 7-12, and SCSL, Directive, *supra* note 107, art. 5-12.

¹⁹⁹ ICTR, Directive, *supra* note 197, art. 18-20.

Fourth, the IHT's directive must properly allocate responsibility for costs and expenses.²⁰⁰ The costs and expenses are met by the Tribunal in the ICTY, ICTR, and SCSL since these directives dealt mainly with establishing a procedure for assigning defense counsel to indigent defendants. In the IHT context, however, assigning defense counsel to a defendant who could otherwise retain a counsel of his choice might call for a different allocation of costs. Nevertheless, the IHT should keep in mind that any allocation of costs and expenses to a defendant must accompany some form of the right to choose counsel. Lastly, the IHT's directive must reiterate the level of competence expected of defense attorneys as well as the scope of their legal representation.²⁰¹

c. Need for a High Standard of Qualifications

Rule 30, fourth paragraph of the IHT's Rules obligates the Director of the Defense Office to "select a *highly qualified* criminal Defense counsel" to provide effective defense.²⁰² Yet, the IHT's Rules are silent on what 'highly qualified' entails. Likewise, the selection criteria for Non-Iraqi Advisors/Experts, whose role is restricted in the IHT,²⁰³ does not provide adequate guidelines. The standard of competence for Non-Iraqi Advisors/Experts is "based upon their criminal law experience in their respective countries,...extensive knowledge or experience in international war crimes trials, [and exhibiting] high moral character and integrity."²⁰⁴ The IHT must set a high standard of qualifications for its defense attorneys.

²⁰⁰ *Id.* art. 17.

²⁰¹ *Id.* art. 13-15.

²⁰² IHT Rules, *supra* note 176, R. 30, ¶ Fourth (emphasis added).

²⁰³ *Id.* R. 21, ¶ Third (Non-Iraqi Advisors/Experts appointed to the Defense Office "*may not take any action that would involve them in any form of attorney-client relationship with a suspect or accused in any proceedings before the Tribunal*) (emphasis added).

²⁰⁴ *Id.* R. 30, ¶ Sixth (B).

Rule 22, paragraph 1 of the ICC's Rules of Procedure and Evidence details the qualifications of the defense counsel:

[a] counsel for the defense shall have established competence in international or criminal law and procedure, as well as the necessary relevant practice, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings. A counsel for the defense shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court. Counsel for the defense may be assisted by persons, including professors of law, with relevant expertise.²⁰⁵

Likewise, the ICTY, ICTR, and SCSL rules and regulatory directives require (1) fluency in at least one of the working languages of Court; (2) 7-10 years of relevant practice experience in criminal law, international law, international humanitarian law, or international human rights law; and (3) admission to practice law in a State.²⁰⁶ In addition, the international criminal tribunals closely scrutinize the prospective counsel's past record of professional or other misconduct, which may include criminal convictions.²⁰⁷

d. Standby Counsel to Safeguard Effective Assistance of Counsel

A high standard for attorney qualifications ensure that defendants are represented by competent counsel who satisfy minimum international human rights standards. However, a qualified counsel does not necessarily mean an effective counsel. For example, a newly assigned counsel during an ongoing trial may not be able to effectively assist his client if he has not been present in the courtroom or does not know the defense strategy. In the IHT context, this scenario came into fruition when Judge Rahman promptly replaced the Saddam Hussein's defense team

²⁰⁵ ICC Rules, *supra* note 84, R. 22, ¶ 1.

²⁰⁶ *See, e.g.*, ICTY, Directive, *supra* note 93, art. 14; ICTR, Directive, *supra* note 197, art. 13; and SCSL, Directive, *supra* note 107, art. 13(B).

²⁰⁷ *Id.*

on January 29, 2006 with a new team of six court-appointed lawyers, who sat silently as the trial proceeded.²⁰⁸

The IHT must institute a regime to properly safeguard effective assistance of counsel when assigning public defenders. One option is to grant additional time to newly assigned lawyers so that they may adequately prepare for trial. There are, however, a number of drawbacks to this option. First, this solution automatically builds in delay to the trial proceedings. Second, it is hard to determine the exact time needed for adequate preparation because of the factors involved. For example, a defendant's unwillingness to cooperate might impede the counsel's ability to prepare adequately. More alarmingly, this option presents a potential for abuse since unscrupulous defendants are able to use it to their advantage.

Another option, though more costly, is to employ standby counsel to better promote effective assistance of counsel when assigning new defense counsel. Although standby counsel has been employed most famously in the Milosevic trial, standby judges have historically been employed since the Nuremberg trials. In addition to not introducing unnecessary delay, the employment of standby counsel has a number of benefits. First, if the newly appointed counsel is present in the courtroom throughout the trial, the nature of his preparedness might be significantly different from someone who reads the transcripts only. Second, a standby counsel who is present in the courtroom during the trial may be able to better elicit meaningful cooperation from the defendant. Moreover, the IHT, and not the defendant, has control of the process. Lastly, establishment of standby counsel reinforces IHT's conviction to do everything in their power to ensure a fair trial.

²⁰⁸ See Worth, *supra* note 22.

IV. CONCLUSION

The right to a fair trial is a basic human right. Furthermore, in an adversarial process, the right to counsel preserves the legitimacy of the tribunal by protecting the defendant's right to a fair trial. In addition, the right to counsel guaranteed in various international treaties and national constitutions, means more than the right to have a lawyer present in the courtroom. Thus, when the international community prosecutes those responsible for atrocity crimes, it is critical to ensure that retribution occurs within the constraints of a fair trial. Interrelated procedural protections further safeguard the substantive right to counsel. This memorandum focuses on the scope of the IHT's authority to assign defense counsel when privately retained counsel misbehaves so that it does not violate international law.

When assigning defense counsel in accordance with international law, the IHT must balance the defendant's right to counsel on the one hand and the need to safeguard the overall integrity and fairness of the proceedings on the other. When privately retained defense attorneys walk out in contempt of the Court or threaten to boycott the proceedings without sufficient cause, the IHT may assign public defenders in place of privately retained counsel in the interests of justice. However, the IHT must take a number of steps before wielding this power. First, the IHT must establish a transparent procedure on the assignment of counsel, which provides adequate notice to the defendant. Second, the IHT must make clear the level of proficiency required for a defense counsel, and if possible, constitute a high standard of qualification. Lastly, the IHT should consider instituting a standby counsel to avoid any unnecessary delay and potential prejudice against the defendant during trial.