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Slobodan Milosevic and the Guarantee of Self-Representation

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SLOBODAN MILOSEVIC AND THE GUARANTEE OF SELF-REPRESENTATION

*Joanne Williams**

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This Article examines the nature of the guarantee of self-representation as exercised in the *Milosevic* case at the International Criminal Tribunal for the former Yugoslavia (ICTY). The paper debates the manner in which the *Milosevic* Trial Chamber and the Appeals Chamber of the ICTY balanced the competing interests of the pro se rights of the Accused and the need for expedition in the trial. It is argued that the Trial Chamber disproportionately restricted the rights of the Accused in a dubiously reasoned decision, a mistake that was partially remedied by the Appeals Chamber, but which has left a legacy that potentially endangers the rights of the accused which subsist in an already precarious environment. The Article concludes with an examination of the merits of hybrid representation in high-level cases such as that of Slobodan Milosevic.

SECTION ONE: INTRODUCTION

The death of Slobodan Milosevic in his cell at the United Nations Detention Unit of the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague on March 11, 2006,¹ has raised the question of what can now be salvaged from a trial that ran for over four years and generated forests of testimony, exhibits, litigation, decisions, and appeals.² One question that must be asked in the wake of the former President's death is whether it is appropriate for high-profile criminal defendants to represent themselves. "Once left to a handful of political dissidents and lawyer-haters, self-representation no longer is rare."³ High-profile defendants often seek to utilize their statutory right to represent themselves in person before international and regional tribunals in a bid to secure control over a specific defense strategy, often politically motivated.⁴

1. Molly Moore & Daniel Williams, *Milosevic Found Dead in Prison; Genocide Trial Is Left Without a Final Judgment*, WASH. POST, Mar. 12, 2006, at A01.

2. Over forty-nine thousand pages of transcript were recorded by the last day of trial on March 1, 2006. Trial Tr. at 49,190 (Mar. 1, 2006), Prosecutor v. Milosevic, Case No. IT-02-54-T, available at <http://www.un.org/icty/transe54/060301IT.htm>. By November 22, 2006, there had been 2,256 filings, comprising 63,775 pages; 930 prosecution exhibits; 85,526 pages of prosecution evidence; 117 videos of prosecution evidence; and 1,245,084 pages of prosecution disclosure, 930,553 of which were under ICTY Rule 68..

3. Tom Sowa, *Rising to Their Own Defense; High Legal Bills Just One Reason for "Pro Se" Cases*, SPOKESMAN-REV. (Spokane, Wash.), Mar. 29, 1999, at A1.

4. Those who have featured prominently in the public eye include Theodore Kaczynski, John Allen Muhammad, Zacarias Moussaoui, Ted Bundy, Douglas Clark, Charles Manson, Colin Ferguson, Sheik Omar Abdel-Rahman, Vojislav Seselj, Hinga Norman, and Slobodan Milosevic.

An all-encompassing set of principles regarding the scope of the right of criminal defendants to self-representation has not yet been expressed.⁵ The relative significance of the right to self-representation⁶ “needs to be defined carefully, particularly in situations when it comes into apparent conflict with the due process guarantee of a fair trial.”⁷ There are “inherent tensions between these competing interests” which necessitate “close judicial scrutiny.”⁸ International criminal courts and tribunals must address this tension in a systematic fashion in order to obtain a satisfactory equilibrium between these competing interests.

This Article contends that the improvised approach adopted by the Trial Chamber of the ICTY in *Prosecutor v. Milosevic*⁹ to assess the importance of the pro se right weighed disproportionately on the side of expedition. This imbalance was somewhat remedied by the subsequent decision of the Appeals Chamber. As it stands, however, the jurisprudence generated by this case has markedly broadened the potential circumstances in which the right to self-representation may be curtailed, leaving open the possibility of further abrogation not only of the pro se right but also of the other minimum guarantees from which the right to a defense is cast.

1.1: The Right to Self-Representation

In *Milosevic*, the Trial Chamber of the ICTY (Trial Chamber) recognized that “the international and regional conventions (in similar language) plainly articulate a right to defend oneself in person.”¹⁰ The right to self-representation appears in identical terms in Articles 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR),¹¹ 21(4)(d) of the ICTY Statute,¹² 20(4)(d) of the Statute of the Interna-

5. Robert R. Homiak, Comment, *Faretta v. California and the Pro Se Defense: The Constitutional Right of Self-Representation*, 25 AM. U. L. REV. 897, 936 (1976).

6. The terms “pro se” and “self-representation” will be used interchangeably in this paper.

7. Homiak, *supra* note 5, at 936.

8. *Id.*

9. All references herein to *Prosecutor v. Milosevic* or *Milosevic* are to the case of Slobodan Milosevic.

10. *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, para. 36 (Apr. 4, 2003), available at <http://www.un.org/icty/milosevic/trialc/decision-e/040403.htm>.

11. International Covenant on Civil and Political Rights art. 14(3)(d), adopted Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

12. Statute of the International Criminal Tribunal for the Former Yugoslavia art. 21(4)(d), May 25, 1993, 32 I.L.M. 1192 [hereinafter ICTY Statute].

tional Criminal Tribunal for Rwanda (ICTR),¹³ and 17(4)(d) of the Statute of the Special Court for Sierra Leone (SCSL).¹⁴ Articles 67(1)(d) of the Rome Statute of the International Criminal Court (ICC),¹⁵ 6(3)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (ECHR),¹⁶ 8(2)(d) of the American Convention on Human Rights (ACHR),¹⁷ and 16(d) of the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (Nuremberg Charter)¹⁸ contain analogous provisions.

The right to self-representation is, under the ICTY Statute, one of a basic set of “minimum guarantees” to which the accused is entitled “in full equality.”¹⁹ Among the other guarantees listed in Article 21(4) of the ICTY Statute are defendants’ right to remain silent;²⁰ to confront the witnesses against them;²¹ “to be tried without undue delay;”²² and to court-appointed counsel “where the interests of justice so require, and without

13. Statute of the International Criminal Tribunal for Rwanda art. 20(4)(d), Nov. 8, 1994, 33 I.L.M. 1602 [hereinafter ICTR Statute].

14. Statute of the Special Court for Sierra Leone art. 17(4)(d), Jan. 16, 2002, 2178 U.N.T.S. 145 [hereinafter Statute of the SCSL].

15. Rome Statute of the International Criminal Court art. 67, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (granting the right “to conduct the defence in person or through legal assistance of the accused’s choosing, . . . and to have legal assistance assigned by the Court in any case where the interests of justice so require”).

16. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(3)(c), Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights (ECHR)] (granting an accused 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”).

17. Organization of American States, American Convention on Human Rights art. 8(2)(d), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR] (granting an accused “[t]he right to defend himself personally or to be assisted by legal counsel of his own choosing”).

18. Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal art. 16(d), Aug. 8, 1945, 82 U.N.T.S. 279 (granting an accused “the right to conduct his own defence before the Tribunal or to have the assistance of Counsel”).

19. ICTY Statute, *supra* note 12, art. 21(4).

20. *Id.* art. 21(4)(g).

21. *Id.* art. 21(4)(e).

22. *Id.* art. 21(4)(c).

payment by him” in the case of indigence.²³ The Appeals Chamber of the ICTY has acknowledged that by placing the right to self-representation “on a structural par” with these guarantees, the drafters of the ICTY Statute recognized the right to self-representation as “an indispensable cornerstone of justice.”²⁴

Article 21(4)(d) incorporates a “binary opposition between representation ‘through legal assistance’ and representation ‘in person.’”²⁵ The personal character of the individual’s procedural rights is recognized by acknowledging the defendant’s right to make his own choice.²⁶ The pro se right “embodies one of the most cherished ideals of civilization: the right of an individual to determine his own destiny.”²⁷ Furthermore, the pro se process “affirm[s] the dignity and autonomy of the accused.”²⁸ On the other hand, it has been recognized that “[t]he presence of counsel serves both to protect the accused from prosecutorial overreaching and to preserve society’s interest in the integrity of the judicial process.”²⁹ The benefits derived from the presence of counsel in certain circumstances have spurred contemporary criminal tribunals to make self-representation a qualified, and not an absolute, guarantee.³⁰

It is widely recognized that the right to self-representation “is not categorically inviolable.”³¹ For example, various common law jurisdictions recognize the capacity of courts to restrict the pro se right in sexual as-

23. *Id.* art. 21(4)(d).

24. *Milosevic v. Prosecutor*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel, para. 11 (Nov. 1, 2004), available at <http://www.un.org/icty/milosevic/appeal/decision-e/041101.htm>.

25. *Id.*

26. See Note, *The Accused as Co-Counsel: The Case for the Hybrid Defense*, 12 VAL. U. L. REV. 329, 350 (1978) [hereinafter *Hybrid Defense*].

27. *People v. Gordon*, 688 N.Y.S.2d 380, 382 (N.Y. Sup. Ct. 1999).

28. *McKaskle v. Wiggins*, 465 U.S. 168, 176–77 (1984).

29. Judith Welton, Note, *Assistance of Counsel: A Right to Hybrid Representation*, 57 B.U. L. REV. 570, 571 (1977).

30. See *Prosecutor v. Norman*, Case No. SCSL-04-14-T, Decision on the Application of Samuel Hinga Norman for Self Representation Under Article 17(4)(d) of the Statute of the Special Court, paras. 9, 15 (June 8, 2004), available at <http://www.sc-sl.org/CDF-decisions.html> (scroll down page to “Trial Chamber Decisions”); *Prosecutor v. Seselj*, Case No. IT-03-67-PT, Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defence, para. 20 (May 9, 2003), available at <http://www.un.org/icty/seselj/trialc/decision-e/030509.htm>.

31. *Milosevic v. Prosecutor*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, para. 12 (Nov. 1, 2004).

sault trials “to protect vulnerable witnesses from trauma.”³² Furthermore, in the United States, the right to self-representation does not extend to appellate proceedings.³³ Civil law jurisdictions further restrict the pro se right by often forcing representation by counsel upon defendants “in serious criminal cases.”³⁴ This practice has been upheld by the European Court of Human Rights (ECtHR).³⁵

The importance of the right to self-representation is not diminished by the fact that other interests may supersede it.³⁶ As eloquently put by Colquitt, “[j]ustice, it seems, begs for the striking of balances and the fashioning of procedural accommodations.”³⁷ It is, of course, essential to

32. *Milosevic v. Prosecutor*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, para. 12 (Nov. 1, 2004). These common law jurisdictions include England (Youth Justice and Criminal Evidence Act, 1999, part II, c. II, §§ 34–35 (Eng. & Wales)), Scotland (Criminal Procedure (Scotland) Act 1995, sec. 288C(1), as amended by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, asp. 9, § 1), Canada (Criminal Code, RS 1985, sec. 486 (2.3), New Zealand (Evidence Act 1908, 1908 S.N.Z. No. 56, § 23F), and Australia (Crimes Act, 1914, §§ 15YF–15YH (as amended); Evidence Act, 1906, § 106G (W.A.); Criminal Procedure Act, 1986, § 294A (N.S.W.); Sexual Offences (Evidence and Procedure) Act, 1983, § 5 (N. Terr.); Evidence Act, 1977, § 21(L)-(S) (Queensl.)). *Milosevic*, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, para. 12 & n. 33–37 (citing the foregoing national statutes).

33. *Martinez v. Court of Appeal of Cal.*, 528 U.S. 152 (2000).

34. *Milosevic v. Prosecutor*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, para. 12 n.38 (Nov. 1, 2004) (citing C. PR. PÉN. Arts. 274, 317 (Fr.); Strafprozeßordnung [StPO] [Code of Criminal Procedure] Apr. 7, 1987, Bundesgesetzblatt, Teil I [BGBl. I] 1074, §140 (F.R.G.); Code D’Instruction Criminelle [Criminal Instruction Code] of 9 December 1808 art. 294 (Belg.); Arts. 282–83, Code of Criminal Procedure of the Republic of Korea; Art. 71(1) of the Criminal Procedure Act of the Federal Republic of Yugoslavia); *Prosecutor v. Seselj*, Case No. IT-03-67-PT, Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defence, paras. 16–17 (citing Section 731 of the Danish Administration of Justice Act; Criminal Procedure Act of the Federal Republic of Yugoslavia arts. 13, 71). Beginning in 1992, the Federal Republic of Yugoslavia consisted of Serbia and Montenegro. Montenegro declared independence from the political entity of Serbia and Montenegro on June 3, 2006. U.S. Dep’t of State, Bureau of Eur. and Eurasian Affairs, Background Note: Montenegro (Aug. 2006), <http://www.state.gov/r/pa/ei/bgn/70949.htm>.

35. See, e.g., *Croissant v. F.R.G.*, 237 Eur. Ct. H.R. (ser. A) 20, 32 (1992). The United Nations Human Rights Committee (HRC) has also upheld a national court’s requirement that persons not possessing a law degree be represented by counsel. *Torregrosa Lafuente v. Spain*, Communication No. 866/1999, U.N. Doc. CCPR/C/72/D/866/1999 (2001).

36. Joseph A. Colquitt, *Hybrid Representation: Standing the Two-Sided Coin on Its Edge*, 38 WAKE FOREST L. REV. 55, 65 (2003).

37. *Id.* at 127.

“balance the rights and interests of defendants against other important rights and interests in a manner fair to all” parties, without excluding victims, witnesses, or defendants.³⁸

Recognizing that a defendant’s right to represent himself or herself is subject to some limitations does not, however, resolve the issue at hand. It must also be shown that the restriction applied was justified and proportionate to the interest pursued. Section Two explores the balancing of the interests of the accused with the interests of victims, witnesses, and the Tribunal itself. Section Three will analyze the balancing of these rights in the curtailment of the pro se right in *Milosevic*, and Section Four expands upon the need for proportionality in such balancing exercises.

1.2: *Milosevic at the ICTY*

Slobodan Milosevic was indicted at the Yugoslavia Tribunal on May 24, 1999, for alleged atrocities committed in Kosovo.³⁹ He remained in power as Yugoslav President until October 2000⁴⁰ and was re-elected leader of Serbia’s Socialist Party in November 2000.⁴¹ The former President was finally transferred to The Hague in June 2001,⁴² and, in November 2001, was charged with twenty-nine criminal counts, including genocide, with regard to his involvement in the Bosnian War from 1992–95.⁴³ Two further indictments were brought against him, with five counts

38. *Id.* at 65.

39. Prosecutor v. Milosevic, Case No. IT-99-37, Indictment (May 24, 1999), available at <http://www.un.org/icty/indictment/english/mil-ii990524e.htm>. The Kosovo Indictment was twice subsequently amended, Prosecutor v. Milosevic, Case No. IT-99-37-I, Amended Indictment (June 29, 2001), available at <http://www.un.org/icty/indictment/english/mil-ai010629e.htm>; Prosecutor v. Milosevic, Case No. IT-99-37-PT, Second Amended Indictment (Oct. 29, 2001), available at <http://www.un.org/icty/indictment/english/mil-2ai011029e.htm>, and later joined with the indictments concerning Bosnia and Croatia, see *infra* note 47 and accompanying text.

40. Alissa J. Rubin, *A Year Gone By, but Still a Pall Remains; Yugoslavia: Anniversary of Milosevic’s Toppling Comes Amid Continued Economic Despair as Well as Political Bickering and Stalled Reforms*, L.A. TIMES, Oct. 5, 2001, at A22.

41. Carlotta Gall, *Milosevic Wins Re-election as Leader of Socialist Party*, N.Y. TIMES, Nov. 26, 2000, at A10.

42. R. Jeffrey Smith, *Serb Leaders Hand Over Milosevic for Trial by War Crimes Tribunal; Extradition Sparks Crisis in Belgrade*, WASH. POST, June 29, 2001, at A1.

43. Prosecutor v. Milosevic, Case No. IT-01-51-I Indictment (Nov. 22, 2001), available at <http://www.un.org/icty/indictment/english/mil-ii011122e.htm>; see William Drozdiak, *Milosevic to Face Genocide Trial for Role in the War in Bosnia; Yugoslav Ex-Leader First Head of State to Be So Charged*, WASH. POST, Nov. 25, 2001, at A22. The Bosnia Indictment was joined with those concerning Croatia and Kosovo, see *infra* note 47 and accompanying text, and subsequently amended. Prosecutor v. Milosevic, Case No.

concerning his activities in Kosovo in 1999⁴⁴ and a further thirty-two relating to Croatia in 1991–92.⁴⁵ The three indictments were joined together by the Appeals Chamber,⁴⁶ and the trial commenced on February 12, 2002.⁴⁷ Until his death on March 11, 2006, Milosevic stood accused of sixty-six counts, comprising seventeen substantive crimes.⁴⁸

1.3: *Milosevic: Self-Representation*

From the outset, Slobodan Milosevic indicated that he wished to represent himself and, accordingly, did not wish to be represented by coun-

IT-02-54-T, Amended Indictment (Apr. 21, 2004), *available at* <http://www.un.org/icty/indictment/english/mil-ai040421-e.htm>.

44. Prosecutor v. Milosevic, Case No. IT-99-37-PT, Second Amended Indictment (Oct. 29, 2001), *available at* <http://www.un.org/icty/indictment/english/mil-2ai011029e.htm>.

45. Prosecutor v. Milosevic, Case No. IT-02-54-T, Second Amended Indictment (July 28, 2004), *available at* <http://www.un.org/icty/indictment/english/mil-2ai020728e.htm>.

46. Prosecutor v. Milosevic, Case Nos. IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder (Feb. 1, 2002), *available at* <http://www.un.org/icty/milutinovic/appeal/decision-e/20201JD317089.htm>. *See Milosevic*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder (Apr. 18, 2002), *available at* <http://www.un.org/icty/milosevic/appeal/decision-e/020418.htm>. The Trial Chamber had joined two of the three indictments, those relating to Croatia and Bosnia, but ordered the Kosovo indictment to be tried separately. Prosecutor v. Milosevic, Case Nos. IT-99-37-PT, IT-01-50-PT, IT-01-51-PT, Decision on Prosecution's Motion for Joinder (Dec. 13, 2001), *available at* <http://www.un.org/icty/milutinovic/appeal/decision-e/11213JD516912.htm>. The Trial Chamber has, on more than one occasion, contemplated the possibility of severance. *See, e.g.*, Prosecutor v. Milosevic, Case No. IT-02-54-T, Further Order on Future Conduct of the Trial Relating to Severance of One or More Indictments (July 21, 2004), *available at* <http://www.un.org/icty/milosevic/trialc/order-e/051122.htm>; *id.*, IT-02-54-T, Decision in Relation to Severance, Extension of Time and Rest (Dec. 12, 2005).

47. Trial Tr. at 1 (Feb. 12, 2002), Prosecutor v. Milosevic, Case No. IT-02-54-T, *available at* <http://www.un.org/icty/transe54/020212IT.htm>.

48. Prosecutor v. Milosevic, Case No. IT-02-54-T, Second Amended Indictment, paras. 34–83 (July 28, 2004), *available at* <http://www.un.org/icty/indictment/english/mil-2ai020728e.htm> (charging Milosevic with thirty-two counts); Prosecutor v. Milosevic, Case No. IT-02-54-T, Amended Indictment, paras. 32–45 (Apr. 21, 2004), *available at* <http://www.un.org/icty/indictment/english/mil-ai040421-e.htm> (charging Milosevic with twenty-nine counts); Prosecutor v. Milosevic, Case No. IT-99-37-PT, Second Amended Indictment, paras. 62–68 (Oct. 29, 2001), *available at* <http://www.un.org/icty/indictment/english/mil-2ai011029e.htm> (charging Milosevic and others with five counts). As noted, the Appeals Chamber joined the three indictments together in February 2002. *Supra* note 46 and accompanying text.

sel.⁴⁹ This appears to have been motivated by his non-recognition of the Tribunal's legitimacy.⁵⁰ Judge May assured the Accused in July 2001 that "[y]ou do have the right, of course, to defend yourself."⁵¹ The following month, the Trial Chamber invited the Registrar to appoint amici curiae, not to represent Milosevic but rather to ensure a fair trial and "assist [the Chamber] in the proper determination of the case."⁵² In order to assist the Chamber to secure a fair trial, the amici were to bring "exculpatory or mitigating evidence" to the Trial Chamber's attention,⁵³ to inform the Chamber of any defenses the Accused could properly raise,⁵⁴ to "mak[e] submissions as to the relevance . . . of the NATO air campaign in Kosovo,"⁵⁵ and to identify witnesses whom the Chamber could call.⁵⁶ The Chamber further enhanced the rights of the Accused in April 2002 by recognizing his right to communicate with legal advisers⁵⁷ and by granting him privileged communication with named Legal Associates.⁵⁸

49. Written Note by the Accused, Prosecutor v. Milosevic, Case No. IT-99-37-I, Registry pgs. 3371–72 (July 3, 2001) (confidential document on file with author).

50. Trial Tr. at 2806:2–3 (Apr. 10, 2002), Prosecutor v. Milosevic, Case No. IT-02-54-T, available at <http://www.un.org/icty/transe54/020410IT.htm> (Milosevic: "I cannot appoint a lawyer, an attorney for myself, in front of an institution that I don't recognize.").

51. *Id.* at 1:19–20 (July 3, 2001), available at <http://www.un.org/icty/transe54/010703IA.htm>.

52. *Id.* at 7:5–15 (Aug. 30, 2001), available at <http://www.un.org/icty/transe54/010830SC.htm>; Prosecutor v. Milosevic, Case No. IT-99-37-PT, Order Inviting Designation of Amicus Curiae (Aug. 30, 2001), available at <http://www.un.org/icty/milosevic/trialc/order-e/10830AO516194.htm>. Steven Kay QC, Branislav Tapuskovic, and Mischa Wladimiroff were designated by the Registrar on September 6, 2001. *Milosevic*, Order Concerning the Provision of Documents to Amici Curiae (Sept. 19, 2001), available at <http://www.un.org/icty/milosevic/trialc/order-e/10919DE516313.htm>. The Accused was also permitted to discuss and supply them with copies of documents subject to Trial Chamber Orders imposing non-disclosure to third parties.

53. Prosecutor v. Milosevic, Case No. IT-02-54-T, Order Inviting Designation of Amicus Curiae (Aug. 30, 2001).

54. Prosecutor v. Milosevic, Case No. IT-02-54-T, Order Concerning Amici Curiae (Jan. 11, 2002), available at <http://www.un.org/icty/milosevic/trialc/order-e/20111AO517099.htm>.

55. *Id.*

56. *Id.*

57. Prosecutor v. Milosevic, Case No. IT-02-54-T, Order, para. 10 (Apr. 16, 2002).

58. Prosecutor v. Milosevic, Case No. IT-02-54-T, Order, para. 14 (Apr. 16, 2002) (permitting Milosevic to have privileged communication with lawyers Zdenko Tomanovic and Dragoslav Ognjanovic). Branko Rakic was later appointed as a third "Associate." *Milosevic*, Case No. IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, para. 5 (Sept. 22, 2004) (citing *Milosevic*, Order Appointing Branko Rakic as Legal

In response to a suggestion in 2001 from the Prosecution that defense counsel should be assigned to the Accused alongside the Amici, the Chamber reiterated that “the accused has a right to counsel, but he also has a right not to have counsel.”⁵⁹ The Trial Chamber consistently upheld this position on the basis that “it would be wrong for the Chamber to impose counsel on the accused, because that would be in breach of the position under customary international law.”⁶⁰

1.3.1: Prosecution Phase

The Trial Chamber first expressed concern about the completion of the trial in November 2002 in light of the state of the Accused’s ill health.⁶¹ The Prosecution again sought to have defense counsel imposed on the Accused on the basis that by proceeding pro se, the Accused had exacerbated his health problems.⁶² This, the Prosecution suggested, created “self-imposed” difficulties, dictated the scope of the trial, and obtained for the Accused a trial that was “significantly less complete than it would otherwise be.”⁶³

This submission was rejected in December 2002⁶⁴ and written reasons were issued in April 2003.⁶⁵ The Trial Chamber reasoned that the “present circumstances” were not such that the tribunal could assign counsel

Associate to the Accused (Oct. 23, 2003)), available at <http://www.un.org/icty/milosevic/trialc/decision-e/040922.htm>.

59. Trial Tr. at 18:3–4 (Aug. 30, 2001), Prosecutor v. Milosevic, Case No. IT-99-37-PT, available at <http://www.un.org/icty/transe54/010830SC.htm>.

60. *Id.* at 18:9–11.

61. *Id.* at 12727:10–12 (Nov. 1, 2002) (Case No. IT-02-54-T), available at <http://www.un.org/icty/transe54/021101IT.htm>.

62. Prosecutor v. Milosevic, Case No. IT-02-54-T, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, para. 7 (Apr. 4, 2003) (citing *Milosevic*, Submission from the Office of the Prosecutor on the Future Conduct of the Case in the Light of the State of the Accused’s Health and the Length and Complexity of the Case (Nov. 8, 2002); *Milosevic*, Observations by the Amici Curiae on the Imposition of Defence Counsel on Accused (Nov. 18, 2002); *Milosevic*, Addendum to the Prosecution’s Response to the Confidential Observations by the Amici Curiae on the Health of the Accused and the Future Conduct of the Trial (Nov. 20, 2002)).

63. *Id.* para. 10 (quoting *Milosevic*, Submission from the Office of the Prosecutor on the Future Conduct of the Case in the Light of the State of the Accused’s Health and the Length and Complexity of the Case, para. 4 (Nov. 8, 2002)).

64. Trial Tr. at 14574:14–17 (Dec. 18, 2002), Prosecutor v. Milosevic, Case No. IT-02-54-T (“[D]efence counsel will not be imposed upon the accused against his wishes in the present circumstances. It is not normally appropriate in adversarial proceedings such as these. The Trial Chamber will keep the position under review.”).

65. Prosecutor v. Milosevic, Case No. IT-02-54-T, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel (Apr. 4, 2003).

contrary to the wishes of the accused.⁶⁶ It noted that the duty imposed by Article 20(1) of the ICTY Statute to ensure a fair and expeditious trial must be implemented ““with full respect for the rights of the accused.””⁶⁷ Crucially, however, the Trial Chamber stressed that ““there may be circumstances . . . where it is in the interests of justice to appoint counsel,” and resolved to “keep the position under review.””⁶⁸

1.3.2: Defense Phase

The ill health of the Accused began to cause more frequent disruption as the Prosecution phase of the trial advanced. During the Prosecution’s case, the trial was adjourned on several occasions for two to three weeks or more to allow the Accused to recuperate.⁶⁹ Due to Milosevic’s high blood pressure and heart condition, his trial was reduced to a three-day week, and, further, to a four-hour day beginning September 2003.⁷⁰ In an attempt to speed up proceedings, the Trial Chamber reduced the time

66. *Id.* para. 18.

67. *Id.* para. 41.

68. *Id.* para. 40.

69. See, e.g., *Milosevic Trial Delayed Again Due to High Blood Pressure*, IRISH TIMES, July 17, 2004, available at <http://www.ireland.com/newspaper/world/2004/0717/1605102285FR17MILOSEVIC.html> (trial adjourned from mid-July 2004 to August 31, 2004 due to the Accused’s high blood pressure); *Milosevic Trial Put Off to Give Him Rest*, BIRMINGHAM POST (U.K.), Dec. 13, 2005, at 9 (trial adjourned “for six weeks to give [Milosevic] more rest”); see also Marlise Simons, *Milosevic Now Faces Genocide Charges*, N.Y. TIMES, Sept. 27, 2002, at A10 (noting the slowing of the trial’s pace due to concerns about Milosevic’s health).

70. Pursuant to the Medical Report of Dr. van Dijkman of August 26, 2002, the Trial Chamber mandated that four consecutive days of rest be given every two weeks of trial. Prosecutor v. Milosevic, Case No. IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, para. 53 (Sept. 22, 2004) (citing Medical Report of Dr. van Dijkman, Aug. 26, 2002). The trial continued as such until the end of September 2003 when, in accordance with further medical recommendations (*Id.*, citing Medical Report of Dr. van Dijkman, Sept. 26, 2003), “the Trial Chamber decided to sit three days each week, to allow the Accused sufficient time to rest.” *Id.* (citing Trial Tr. at 27063 (Sept. 30, 2003), Prosecutor v. Milosevic, Case No. IT-02-54-T). From then on, the trial ran from 9a.m. to 1:45p.m. (with two fifteen minute intervals) three days per week.

available to the Prosecution,⁷¹ causing prosecutors to argue that “their case [wa]s being ‘emasculated.’”⁷²

The Prosecution closed its case on February 25, 2004,⁷³ at which stage sixty-six trial days had been lost.⁷⁴ The Prosecution’s case was interrupted on thirteen occasions on account of the Accused’s illness, eight of which related exclusively to the Accused’s high blood pressure.⁷⁵ Between February and June 2004, doctors advised the Accused to rest for fifty-one weekdays.⁷⁶ Due to Milosevic’s poor health, the Tribunal delayed the original starting date for the defense case, originally June 8,

71. Trial Tr. at 2784 (Apr. 10, 2002), *Prosecutor v. Milosevic*, Case No. IT-02-54-T (“[W]e have decided that the Prosecution should have one year from today to conclude their case. That will give them a total of 14 months in which to finish the case, their case. In the view of the Trial Chamber, no Prosecution case should continue for a period longer than that.”); *see* *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Decision on Prosecution’s Request to Have Written Statements Admitted Under Rule 92bis, para. 27 (Mar. 21, 2002) (limiting the number of Prosecution witnesses).

72. Mirko Klarin, *War Crimes Manipulation; Slobodan Milosevic’s Refusal to Accept Help in His War Crimes Trial Is Making It Difficult to Provide Him a Fair Hearing*, LONDON FREE PRESS (Ontario, Can.), Aug. 24, 2002, at F4.

73. *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Order Rescheduling and Setting the Time Available to Present the Defence Case, para. 2 (Feb. 25, 2004), *available at* <http://www.un.org/icty/milosevic/trialc/order-e/040225.htm>.

74. *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Order on Future Conduct of the Trial, para. 6 (July 6, 2004), *available at* <http://www.un.org/icty/milosevic/trialc/order-e/040706.htm>.

75. *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, para. 56 n.120 (Sept. 22, 2004). Of the sixty-six trial days lost, twenty-eight were in 2002, thirty-one in 2003, and seven in the first two months of 2004. *Id.*

76. *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Scheduling Order for a Hearing, para. 11 (Nov. 22, 2005), *available at* <http://www.un.org/icty/milosevic/trialc/order-e/051122.htm> (citing “Report by the Registrar Pursuant to the Trial Chamber’s ‘Omnibus Order on Matters Dealt with at the Pre-Defence Conference’, filed on 18 June 2004,” para. 7 (June 25, 2004)). This total amount of days was based on a five-day working week. Under a “three-day-per-week analysis,” the amount of days lost was thirty-one. The Accused was found to have used the equivalent of eleven of these days in preparation of his case. *Prosecutor v. Milosevic*, Case No. IT-02-54-AR73.7, Appeal Against the Trial Chamber’s Decision on Assignment of Defence Counsel: Corrigendum, para. 5 (Sept. 29, 2004) (referring to *Prosecutor v. Slobodan Milosevic*, Case No. IT-02-54-T, “Report by the Registrar Pursuant to the Trial Chamber’s ‘Omnibus Order on Matters Dealt with at the Pre-Defence Conference’, filed on 18 June 2004,” para. 7 (June 25, 2004)).

2004,⁷⁷ on five occasions.⁷⁸ Milosevic's health was progressively becoming a major obstacle to the expeditious completion of the case.

In July 2004, the Trial Chamber noted that on the basis of the time lost due to the Accused's recurring ill health, it was "necessary to carry out a radical review of the future conduct of the trial."⁷⁹ At this stage of the trial, His Honor Judge May, who had been forced to resign due to ill health (and who subsequently died), had been replaced.⁸⁰ Preemptively, the Chamber suggested that "it may be necessary to assign counsel to the Accused, and/or adopt other measures to ensure a fair and expeditious conduct of the trial."⁸¹ It also noted "the resolve and determination of the Trial Chamber to conclude the presentation of the defense case by October 2005."⁸² This was perhaps the first indication of concern with the expeditious completion of the trial that, by the time of the Accused's death, had become unyielding.⁸³

77. Prosecutor v. Milosevic, Case No. IT-02-54-T, Order Rescheduling and Setting the Time Available to Present the Defence Case, para. 10(5) (Feb. 25, 2004), available at <http://www.un.org/icty/milosevic/trialc/order-e/040225.htm>.

78. Prosecutor v. Milosevic, Case No. IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, para. 59 (Sept. 22, 2004).

79. Prosecutor v. Milosevic, Case No. IT-02-54-T, Order on Future Conduct of the Trial, para. 15 (July 6, 2004).

80. Prosecutor v. Milosevic, Case No. IT-02-54-T, Order Pursuant to Rule 15 bis (D) (Mar. 29, 2004), available at <http://www.un.org/icty/milosevic/trialc/order-e/040329.htm> (deciding to continue the *Milosevic* proceedings with a substitute judge following Judge May's resignation caused by his illness).

81. Prosecutor v. Milosevic, Case No. IT-02-54-T, Order on Future Conduct of the Trial, para. 21 (July 6, 2004).

82. Prosecutor v. Milosevic, Case No. IT-02-54-T, Further Order on Future Conduct of the Trial, para. 5 (July 19, 2004), available at <http://www.un.org/icty/milosevic/trialc/order-e/040719.htm>. However, it later became apparent that the defense case would proceed significantly beyond this time. *Milosevic*, Decision in Relation to Severance, Extension of Time and Rest, para. 25 (Dec. 12, 2005), available at <http://www.un.org/icty/milosevic/trialc/decision-e/051212.htm> ("The conclusion of the Accused's allotted time will take the trial well into March 2006. Once rebuttal and rejoinder cases are heard and concluding arguments made, it is likely the trial hearings would still not conclude until the middle of 2006. Judgement drafting will occupy a further substantial period.").

83. See, e.g., Prosecutor v. Milosevic, Case No. IT-02-54-T, Second Order Recording Use of Time in the Defence Case (Mar. 23, 2005), available at <http://www.un.org/icty/milosevic/trialc/order-e/050323.htm>; *Milosevic*, Order Recording Use of Time Used in the Defence case (Mar. 1, 2005), available at <http://www.un.org/icty/milosevic/trialc/order-e/050301-2.htm>; *Milosevic*, Order Concerning the Time Available to Present the Defence Case (Feb. 10, 2005), available at <http://www.un.org/icty/milosevic/trialc/order-e/050210.htm> (all concerning the limitation of time available to the Defense by calculation).

In an oral ruling on September 2, 2004, the Trial Chamber ordered the assignment of defense counsel to the Accused.⁸⁴ Accordingly, Mr. Steven Kay QC and Ms. Gillian Higgins, who previously functioned as *Amici Curiae*, were appointed to this role. The modalities of the assignment were outlined in an order issued on September 3,⁸⁵ according to which it would be the role of the Assigned Counsel “to determine how to present the case for the Accused.”⁸⁶ In particular, the Assigned Counsel were to:

represent the Accused by preparing and examining those witnesses court Assigned Counsel deem it appropriate to call;

make all submissions on fact and law that they deem it appropriate to make;

seek from the Trial Chamber such orders as they consider necessary to enable them to present the Accused’s case properly . . . ; [and]

discuss with the Accused the conduct of the case, endeavour to obtain his instructions thereon and take account of views expressed by the Accused, while retaining the right to determine what course to follow.⁸⁷

Under this system, it was only with the leave of the Trial Chamber that the Accused could “continue to participate actively in the conduct of his case, including, where appropriate, examining witnesses, following examination by court Assigned Counsel.”⁸⁸ This order whipped the helm from the hands of the Accused and installed the newly Assigned Counsel in his place, giving them full control over the course of the defense strategy. As will be seen in Section Four, this disproportionate move stripped the Accused of his dignity and autonomy. The rationale behind the decision was expounded upon in a written ruling issued on September 22, 2004.⁸⁹ On this occasion, the Chamber extracted a different conclusion from an examination of much of the same jurisprudence upon which it

84. It should be noted that this Article will adopt the term “assignment” as used by the Tribunal. This will avoid the negative connotations of the term “imposition” which is often used in relation to this case.

85. Prosecutor v. Milosevic, Case No. IT-02-54-T, Order on the Modalities to be Followed by Court Assigned Counsel, (Sept. 3, 2004), *available at* <http://www.un.org/icty/milosevic/trialc/order-e/040903.htm>.

86. *Id.* para. 6(1).

87. *Id.* para. 6(1)(a)–(d). The Tribunal also instructed the Assigned Counsel to “act throughout in the best interests of the Accused.” *Id.* para. 6(1)(e).

88. *Id.* para. 6(2).

89. Prosecutor v. Milosevic, Case No. IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel (Sept. 22, 2004).

had based its April 2003 ruling. This conclusion is debated in Section Three.

Following the Accused's oral instigation, the Assigned Counsel lodged an appeal against the assignment that was rejected by the Appeals Chamber in November 2004.⁹⁰ The Appeals Chamber upheld the Trial Chamber's exercise of discretion.⁹¹ Crucially, however, the Appeals Chamber instructed the Trial Chamber to radically alter the modalities to be followed by the Assigned Counsel, according a far greater role to the Accused.⁹² This decision essentially reinstated Milosevic as "captain of the ship."⁹³ The significance of this judgment is expounded in Section Four. The Trial Chamber, in December 2004, refused the Assigned Counsel's motion to withdraw,⁹⁴ and refused leave to appeal this decision.⁹⁵ The Registrar's ensuing refusal to allow the Assigned Counsel to withdraw was reaffirmed by the ICTY President in February 2005.⁹⁶ The Assigned Counsel continued, therefore, to function alongside the accused until the trial was terminated in March 2006.

1.3.3: Why Such Haste?

There is, at present, an unconcealed push for a degree of finality to proceedings in The Hague. The Tribunal "was established as a temporary tribunal with a finite mission."⁹⁷ While this was not clearly articulated in the ICTY Statute, it is clear that this was the assumption implied by the Report of the Secretary General upon the establishment of the Tribunal, whereby "the life span of the international tribunal would be linked to the restoration and maintenance of international peace and security in the

90. *Milosevic v. Prosecutor*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel (Nov. 1, 2004), available at <http://www.un.org/icty/milosevic/appeal/decision-e/041101.htm>.

91. *Id.* paras. 15, 19.

92. *Id.* para. 19.

93. *Id.*

94. *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Decision on Assigned Counsel's Motion for Withdrawal (Dec. 7, 2004), available at <http://www.un.org/icty/milosevic/trialc/decision-e/041207.htm>.

95. *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Decision on Assigned Counsel Request for Certification of an Interlocutory Appeal Against the Decision on Assigned Counsel Motion for Withdrawal (Dec. 17, 2004), available at <http://www.un.org/icty/milosevic/trialc/decision-e/041217-3.htm>.

96. *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Decision Affirming the Registrar's Denial of Assigned Counsel's Application to Withdraw (Feb. 7, 2005), available at <http://www.un.org/icty/milosevic/trialc/decision-e/050207e.htm>.

97. Dominic Raab, *Evaluating the ICTY and Its Completion Strategy: Efforts to Achieve Accountability for War Crimes and Their Tribunals*, 3 J. INT'L CRIM. JUST. 82, 84 (2005).

territory of the former Yugoslavia, and Security Council decisions related thereto.”⁹⁸ Thus, “concerns have been voiced not only by United Nations officials, Member States and others, but also by all the organs of the Tribunals with regard to the slowness of the pace of proceedings, the associated length of detention of accused, [and] the length and cost of Tribunal operations”⁹⁹

With proceedings remaining “exceptionally lengthy, costly, and complicated,”¹⁰⁰ ambitious strategies had been adopted by the U.N. Security Council with a view to hastening the pace of progress.¹⁰¹ The ICTY envisaged the completion of “investigations by 2004 . . . first instance trials by 2008,”¹⁰² and all work in 2010.¹⁰³ These target deadlines have created a palpable concern with the Tribunal’s swift administration of justice, a concern which clearly manifested itself in the *Milosevic* case.

98. The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, para. 28, delivered to the Security Council, U.N. Doc. S/25704 (May 3, 1993).

99. U.N. Gen. Assembly, *Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*, para. 35, U.N. Doc. A/54/634 (Nov. 22, 1999); see also Mark A. Drumbl, *Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda’s Domestic Genocide Trials*, 29 COLUM. HUM. RTS. L. REV. 545, 623 (1998) (“Th[e] ICTR’s] slowness is perceived as foot-dragging by many Rwandans.”); Sanja Kutnjak Ivkovic, *Justice by the International Criminal Tribunal for the Former Yugoslavia*, 37 STAN. J. INT’L L. 255, 309 (2001) (noting that in a survey of war victims, the Tribunal’s slow pace emerged as one of the more frequent objections to the ICTY); Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT’L L. REV. 321, 368 (1999) (footnote omitted) (“Th[e] ICTY’s] pace is counterproductive to accountability goals, which often focus on the swiftness . . . of punishment.”); James Blount Griffin, Note, *A Predictive Framework for the Effectiveness of International Criminal Tribunals*, 34 VAND. J. TRANSNAT’L L. 405, 432 (2001) (describing the ICTR to be “too slow for the demands of justice”).

100. Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1, 90 (2002).

101. See S.C. Res. 1329, U.N. Doc. S/RES/1329 (Dec. 5, 2000); S.C. Res. 1503, U.N. Doc. S/RES/1503 (Aug. 28, 2003); see also President of the International Criminal Tribunal for the Former Yugoslavia, *Report on the Operation of the International Criminal Tribunal for the Former Yugoslavia, presented to the Secretary-General* (May 12, 2000), available at <http://www.un.org/icty/pressreal/RAP000620e.htm>.

102. President of the International Criminal Tribunal for the Former Yugoslavia, *Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts*, para. 1, delivered to the Secretary-General, U.N. Doc. S/2002/678 (June 19, 2002).

103. *Id.* para. 75.

SECTION TWO: BALANCING RIGHTS

What emerged in the *Milosevic* conflict between self-representation and the principle of a speedy trial was a balancing test between the personal rights of the Accused and the interest of the tribunal in achieving a fair and expeditious trial. The Tribunal ultimately found that the efficient administration of justice to prevail in light of the overarching need to secure a fair trial. This decision confirms that self-representation is not an institutional component of the adversary process, but rather a privilege that can be withdrawn in certain circumstances in the interests of fairness and expedition. This section examines the legitimacy of that claim.

2.1: Overarching Right to Fair Trial

In its decision to assign counsel, the *Milosevic* Trial Chamber found that “[t]he minimum guarantees set out in Article 21(4) of the Statute are elements of the overarching requirement of a fair trial.”¹⁰⁴ Essentially, the Trial Chamber subsumed the right to represent oneself in person into a single “right to a defense,” which in turn forms just one of several elements in the “overarching” right to a fair trial.

In accordance with the Vienna Convention on the Law of Treaties,¹⁰⁵ the Trial Chamber found that “when read in light of the object and purpose of securing [the] . . . right to a . . . fair trial,” the right to represent oneself under Article 21(4)(d) “may be lost if the effect of its exercise is to obstruct the achievement of that object and purpose.”¹⁰⁶ Thus, as articulated by Justice Frankfurter of the U.S. Supreme Court in *Adams v. United States ex rel. McCann*, “[w]hat were contrived as protections for the accused should not be turned into fetters.”¹⁰⁷

This reasoning was heavily inspired by the jurisprudence of the ECtHR, which considers all minimum rights included in Article 6(3) of the ECHR in the context of the overall purpose of bringing about a fair

104. Prosecutor v. Milosevic, Case No. IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, para. 32 (Sept. 22, 2004).

105. Vienna Convention on the Law of Treaties art. 31(1), *done* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. In the early days of the work of the ICTY, the Tribunal decided that it was permissible to interpret the ICTY Statute using treaty interpretation principles similar to that found in Article 31(1) of the Vienna Convention. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement, para. 282 (July 15, 1999), available at <http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf>.

106. Prosecutor v. Milosevic, Case No. IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, para. 34 (Sept. 22, 2004).

107. 317 U.S. 269, 279 (1942).

trial.¹⁰⁸ Under this premise, the list of minimum guarantees set out in Article 6(3) of the ECHR (substantially equivalent to Article 21(4) of the ICTY Statute) reflects aspects of the notion of a fair trial.¹⁰⁹ Article 21(4)(d) is not, therefore, simply a list of unconnected guarantees, but rather “a compact statement of the rights necessary to a full defense”¹¹⁰ which must be considered in the broader context of the right to a fair

108. See, e.g., *Meftah v. France*, 2002-VII Eur. Ct. H.R. 265, 282–83 para. 40, *available at* <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Meftah%20%7C%20v.%20%7C%20France&sessionid=11521945&skin=hudoc-en> (“[T]he guarantees contained in paragraph 3 of Article 6 are specific aspects of the general concept of a fair trial set forth in paragraph 1.”); *Correia de Mateos v. Portugal*, 2001-XII Eur. Ct. H.R. 161, para. 31, *available at* <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=1132746FF1FE2A468ACBCD1763D4D8149&key=24119&sessionId=8129673&skin=hudoc-en&attachment=true> (“The Court will examine the applicant’s complaint in accordance with the general rule set out in paragraph 1 of Article 6 of the Convention, while bearing in mind the requirements of paragraph 3(c) of that Article, which constitute particular aspects of the right to a fair trial, guaranteed by paragraph 1.” (citation omitted)); *X. v. Norway*, App. No. 5923/72, 3 Eur. Comm’n. H.R. Dec. & Rep. 43, 44 (1975).

109. See, e.g., *Foucher v. France* (No. 33), 1997-II Eur. Ct. H.R. 452, 464 para. 30, *available at* <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Foucher%20%7C%20v.%20%7C%20France&sessionid=11521945&skin=hudoc-en>; *Delta v. France*, 191 Eur. Ct. H.R. (ser. A) 1, 15 para. 34 (1990), *available at* <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Delta%20%7C%20v.%20%7C%20France&sessionid=11522061&skin=hudoc-en>; *Granger v. United Kingdom*, 174 Eur. Ct. H.R. (ser. A) at 17, para. 43 (1990), *available at* <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=205&sessionId=11522061&skin=hudoc-en&attachment=true>; *Unterpertinger v. Austria*, 110 Eur. Ct. H.R. (ser. A) at para. 29 (1986), *available at* <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=169&sessionId=11522046&skin=hudoc-en&attachment=true> (“[T]he guarantees contained in paragraph 3 (art. 6-3) are specific aspects of the general concept of a fair trial set forth in paragraph 1 (art. 6-1)”); see also *Vacher v. France* (No. 25), 1996-VI Eur. Ct. H.R. 2138, 2147 para. 22 (1996), *available at* <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Vacher%20%7C%20v.%20%7C%20France&sessionid=11522061&skin=hudoc-en> *Melin v. France*, 261 Eur. Ct. H.R. (ser. A) 1, 11 para. 21 (1993), *available at* <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=12914/87&sessionId=11520930&skin=hudoc-en> (both stating that “the requirements of paragraph 3 (b) and (c) of Article 6 of the Convention . . . constitute specific aspects of the right to a fair trial”).

110. *Faretta v. California*, 422 U.S. 806, 818 (1975). *Faretta* makes this statement with regard to the Sixth Amendment to the U.S. Constitution; the rights guaranteed by the Sixth Amendment and Article 21(4) of the ICTY Statute are substantially similar. Compare U.S. CONST. amend. VI with ICTY Statute art. 21(4), May 25, 1993, 32 I.L.M. 1192.

trial.¹¹¹ Self-representation is simply a means through which this right can be secured.¹¹² Recent jurisprudence of the HRC,¹¹³ ECtHR,¹¹⁴ and ICTY¹¹⁵ support this premise, as does the U.S. Supreme Court decision in *Faretta*.¹¹⁶

2.2: Fair and Expeditious Trial

Under Article 21(4)(c) of the ICTY Statute, the accused has the right to be tried “without undue delay.”¹¹⁷ Moreover, trial chambers have a duty, inter alia, to ensure a “fair and expeditious” trial under Article 20(1).¹¹⁸

111. Prosecutor v. Milosevic, Case No. IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, para. 32 (Sept. 22, 2004).

112. Prosecutor v. Milosevic, Case No. IT-02-54-AR73.7, Prosecution Response to “Assigned Counsel Appeal Against the Trial Chamber’s Decision on Assignment of Defence Counsel” and to “Defence Reply to ‘Prosecution Motion to Strike Ground of Appeal (3) from Assigned Counsel ‘Appeal Against the Trial Chamber’s Decision on Assignment of Defence Counsel,’” para. 25 (Oct. 11, 2004) available at <http://www.un.org/icty/milosevic/motion/041011response.htm>.

113. Torregrosa Lafuente v. Spain, Comm’n No. 866/1999, para. 6.3, U.N. Doc. CCPR/C/72/D/866/1999 (Aug. 31, 2001), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3e076e74aeabef56c1256ada002edafb?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3e076e74aeabef56c1256ada002edafb?Opendocument) (finding that a Spanish law requiring a litigant before the Constitutional Court to be represented by counsel did not violate Article 14(1) of the ICCPR).

114. See, e.g., Correia de Matos v. Portugal, 2001-XII Eur. Ct. H.R. 161.

115. Prosecutor v. Seselj, IT-03-67-PT, Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Seselj with His Defence, paras. 20–21 (May 9, 2003), available at <http://www.un.org/icty/seselj/trialc/decision-e/030509.htm>; Prosecutor v. Delalic, Case No. IT-96-21-T, Decision on the Alternative Request for Renewed Consideration of Delalic’s Motion for an Adjournment Until 22 June or Request for Issue of Subpoenas to Individuals and Requests for Assistance to the Government of Bosnia and Herzegovina, para. 44 (June 22, 1998), available at <http://www.un.org/icty/celebici/trialc2/decision-e/80622MS25747.htm> (stating that the exercise of the rights enjoyed by the accused “is not absolute” and “is subject to the control of the Trial Chamber to ensure a fair and expeditious trial in the interests of justice”).

116. *Hybrid Defense*, *supra* note 26, at 351.

117. ICTY Statute, *supra* note 12, art. 21(4)(c) (emphasis added); see also ICTR Statute, *supra* note 13, art. 20(4)(c); Statute of the SCSL, *supra* note 14, art. 17(4)(c); Rome Statute, *supra* note 15, art. 67(1)(c); U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *The Administration of Justice and the Human Rights of Detainees: The Right to a Fair Trial: Current Recognition and Measures Necessary for its Strengthening, Annex II: Draft Body of Principles on the Right to a Fair Trial and a Remedy*, para. 54, U.N. Doc. E/CN.4/Sub.2/1994/24 (June 3, 1994) (prepared by Stanislav Chernichenko & William Treat).

118. ICTY Statute, *supra* note 12, art. 20(1) (emphasis added); see also ICTR Statute, *supra* note 13, art. 19(1) (“The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused . . .”); Rules of Procedure and

Article 20(1) does not simply concern the accused, but rather imposes a positive duty on the trial chamber in the public interest.¹¹⁹ The commonly cited principle of speedy trial refers to a combination of these three guarantees, and entails consideration of a diverse range of interests. The trial chambers must, therefore, in balancing various rights with the principle of a fair and expeditious trial, have due regard for interests other than those of the accused.

2.2.1: In Whose Interest Is a Speedy Trial?

It is primarily the accused who has an interest in a speedy trial. Prompt trials go some way to ensuring that the defendant can mount an effective defense. Speedy trials are primarily designed “(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.”¹²⁰ Prompt trials ensure that witnesses’ memories do not fade¹²¹ and evidence is not destroyed nor disappears.¹²² The limitation of pretrial detention is particularly important at the Yugoslavia Tribunal, where many defendants are held for lengthy periods before trial due to, *inter alia*, the Tribunal’s overwhelming caseload.¹²³

The interests of the Prosecution, victims, and witnesses must also be considered,¹²⁴ along with those of unrelated defendants awaiting trial¹²⁵

Evidence of the SCSL, Rule 26 *bis* (as amended Mar. 7, 2003) (similar language); Rome Statute, *supra* note 15, art. 64(2) (similar language).

119. ICTY Statute, *supra* note 12, art. 20(1) (“The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused *and* due regard for the protection of victims and witnesses.” (emphasis added)).

120. *Barker v. Wingo*, 407 U.S. 514, 532 (1972) (footnote omitted); *see also* Amnesty Int’l, *Fair Trials Manual*, ch. 19.1, AI Index: POL 30/002/98, Dec. 1, 1998.

121. *See* Barayagwiza v. Prosecutor, Case No. ICTR-97-19-AR72, Decision, para. 105, (Nov. 3, 1999) (quoting unidentified source).

122. Akhil Reed Amar, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 90 (1997) (“[I]f government holds the accused in extended pretrial detention, courts must ensure that the accuracy of the trial itself will not thereby be undermined—as might occur if an innocent defendant’s prolonged detention itself causes the loss of key exculpatory evidence.”).

123. Patrick L. Robinson, *Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia*, 11 EUR. J. INT’L L. 569, 585 (2000).

124. *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, para. 55 (Aug. 10, 1995), *available at* <http://www.un.org/icty/tadic/trialc2/decision-e/100895pm.htm> (“A fair trial means not only fair treatment to the defendant but also to the prosecution and to the witnesses.”); *see also* *Dietrich v. The Queen* (1992) 177 C.L.R. 292, 335 (Deane, J.) (Austl.) (stating that “the interests of the Crown acting on behalf of the community” must be

and the international community.¹²⁶ In an enlightening dissent in *Milosevic*, Judge Shahabuddeen posited that:

The fairness of a trial is the result of the fairness of the system of justice employed. The latter depends on the striking of a balance between two competing public interests. First, there is the justly publicized public interest in respecting the rights of the accused. Second, there is the less proclaimed but equal public interest in ensuring that crimes are properly investigated and duly prosecuted.¹²⁷

It was recognized in *Milosevic* that “the Tribunal has its own distinct set of interests at stake in this case, including *first and foremost* the interest in an outcome that is just, accurate, and reasonably expeditious.”¹²⁸ This premise has consistently been reiterated by the Trial Chamber¹²⁹

considered in “determining the practical content” of the right to a fair trial (quoting *Barton v. The Queen* (1980) 147 C.L.R. 75, 101 (Austl.) (Gibbs, A.C.J. & Mason, J.)).

125. Prosecutor v. Nyiramasuhuko, Case No. ICTR-98-42-T, Decision in the Matter of Proceedings Under Rule 15 *bis* (D), para. 33(g) (July 15, 2003).

126. Prosecutor v. Aleksovski, Case No. IT-95-14/1 (Appeals Chamber), Decision on Prosecutor’s Appeal on Admissibility of Evidence, para. 25 (Feb. 16, 1999), *available at* <http://www.un.org/icty/aleksovski/appeal/decision-e/90216EV36313.htm> (“[T]he Prosecution acts on behalf of and in the interests of the community, including the interests of the victims of the offence charged (in cases before the Tribunal the Prosecutor acts on behalf of the international community).”).

127. Prosecutor v. Milosevic, Case No. IT-02-54-AR73.2, Decision on Admissibility of Prosecution Investigator’s Evidence, Partial Dissenting Opinion of Judge Shahabuddeen, para. 36 (Sept. 30, 2002), *available at* <http://www.un.org/icty/milosevic/appeal/decision-e/020930par.htm.htm>.

128. Prosecutor v. Milosevic, Case No. IT-02-54-T, Decision Affirming the Registrar’s Denial of Assigned Counsel’s Application to Withdraw, para. 11 (Feb. 7, 2005) (footnote omitted) (emphasis added); *see also Milosevic*, Trial Tr. at 32358:12–19 (Sept. 2, 2004), *available at* <http://www.un.org/icty/transe54/040902IT.htm> (“The fundamental duty of the Trial Chamber is to ensure that the trial is fair and expeditious.”).

129. Prosecutor v. Delalic, Case No. IT-96-21-T, Decision on Request by Accused Mucic for Assignment of New Counsel, para. 3 (June 24, 1996), *available at* <http://www.un.org/icty/celebici/trialc2/decision-e/60624DS2.htm> (emphasizing the “overriding interest of the administration of justice” and that the Tribunal had to “be satisfied that the reasons [for the defendant’s dissatisfaction with assigned counsel] are genuine and that the request [for assignment of new counsel] is not being made for frivolous reasons or in a desire to pervert the course of justice, *e.g.*, by causing additional delay”); Prosecutor v. Seselj, IT-03-67-PT, Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Seselj with His Defence, para. 21 (May 9, 2003). The *Seselj* Tribunal also stated that “the right to a fair trial . . . is not only a fundamental right of the Accused, but also a fundamental interest of the Tribunal related to its own legitimacy.” *Id.*

and the Appeals Chamber,¹³⁰ by other tribunals,¹³¹ and in national jurisdictions.¹³² In sum, the Tribunal has a legitimate interest in ensuring that justice is being done and seen to be done.

2.2.2: The Fair Trial Rights of the Accused Remain Paramount

While the principle of a speedy trial necessarily encompasses diverse interests, it is particularly instructive that under Article 20(1) of the ICTY Statute a fair and expeditious trial must be achieved “with *full respect* for the rights of the accused and *due regard* for the protection of victims and witnesses.”¹³³ This formulation suggests that the interests of the accused must be given precedence. A further indication of the primacy of the interests of the accused is found in the assertion made in the ICTR case *Kanyabashi* that the “object and purpose” of the ICTR Statute is to secure *for the accused* “a fair and expeditious trial.”¹³⁴ According to Falvey, “[t]he protection of victims and witnesses, although a laudable goal, must yield to the right to a fair trial when the two conflict.”¹³⁵

130. *Milosevic v. Prosecutor*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel, para. 19 (Nov. 1, 2004) (noting “the Tribunal’s basic interest in a reasonably expeditious resolution of the cases before it”).

131. *See Prosecutor v. Norman*, Case No. SCSL-04-14-T, Decision on the Application of Samuel Hinga Norman for Self Representation under Article 17(4)(d) of the Statute of the Special Court, para. 26 (June 8, 2004) (considering “the public interest, national and international, in the expeditious completion of the trial” in determining whether to allow the accused to represent himself).

132. It has, for instance, consistently been reaffirmed by the High Court of Australia that when “determining the practical content” of the right to a fair trial, “regard must be had to the interests of the Crown acting on behalf of the community as well as to the interests of the accused.” *Dietrich v. The Queen* (1992) 177 C.L.R. 292, 335 (Deane, J.) (quoting *Barton v. The Queen* (1980) 147 C.L.R. 75, 101 (Austl.) (Gibbs, A.C.J. & Mason, J.)). Similarly, the U.S. Supreme Court felt that the right of a defendant to be present at trial must be held to be subordinate to the overriding need to maintain orderly and dignified proceedings, which is “essential to the proper administration of criminal justice.” *Illinois v. Allen*, 397 U.S. 337, 343 (1970).

133. ICTY Statute, *supra* note 12, art. 20(1) (emphasis added).

134. *Kanyabashi v. Prosecutor*, Case No. ICTR-96-15-A, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, para. 16 (June 3, 1999).

135. Joseph L. Falvey, Jr., *United Nations Justice or Military Justice: Which is the Oxymoron? An Analysis of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia*, 19 FORDHAM INT’LLJ. 475, 487 (1995). Mr. Falvey assisted in the drafting of the rules of evidence and procedure proposed by the United States for the ICTY. *Id.* at 475; *see also Prosecutor v. Nyiramasuhuko*, Case No. ICTR-97-21-I, Decision on the Prosecutor’s Motion for Joinder of Trials, para. 16 (Oct. 5,

The ECtHR has held that Article 6(1) of the ECHR, equivalent to Article 20(1) of the ICTY Statute, “is intended *above all* to secure the interests of the defence and those of the proper administration of justice.”¹³⁶ Furthermore, the ECtHR has held that “[t]he right to a fair administration of justice . . . cannot be sacrificed to expediency.”¹³⁷ Hence, the safeguards accorded to the accused should not be excessively curtailed in the interest of achieving a speedy conclusion at trial.

The ICTY Rules provide little guidance on which rights take precedence in the event of a conflict between them. This problem will become more pronounced, given the elevated status of victims and witnesses in the Rome Statute¹³⁸ and recent pronouncements of the ECtHR that appear to accord new rights to victims.¹³⁹ It is instructive that Article 68(1) of the Rome Statute dictates that measures taken to protect victims and witnesses “shall not be prejudicial to or inconsistent with the rights of the accused or a fair and impartial trial.”¹⁴⁰ This formulation again appears to give precedence to the rights of the accused. These authorities must be given due weight in the balancing of rights.

The Trial Chamber’s original approach of allowing Milosevic to proceed *pro se* indisputably exacerbated the already lengthy nature of that trial.¹⁴¹ In response, the Chamber had to balance the *pro se* right of the accused with its own statutory duty to secure a fair and expeditious trial. The following section will address the manner in which the Chamber balanced these rights. It is not denied that the Chamber indeed had a genuine and legitimate interest in curtailing the *pro se* right of the Accused. Rather, it is argued that the Chamber erred in the principles employed to achieve this goal.

1999) (“[T]he need to protect victims and witnesses . . . cannot be entirely subordinated to the rights of the accused.”).

136. *Acquaviva v. France*, 333 Eur. Ct. H.R. (ser. A) 17, para. 66 (1996) (emphasis added).

137. *Kostovski v. Netherlands*, 166 Eur. Ct. H.R. (ser. A) 21, para. 44 (1989).

138. *See, e.g.*, Rome Statute, *supra* note 15, art. 68 (containing provisions for the protection of victims and witnesses).

139. *See, e.g.*, *M.C. v. Bulgaria*, 2003-XII Eur. Ct. H.R. 1, 37–38, paras. 177–78. Here, the ECtHR appears to accord a right of a (rape) victim to compel investigators and prosecutors to confront witnesses in order to assess the credibility of conflicting evidence.

140. Rome Statute, *supra* note 15, art. 68(1); *see also id.* art. 68(3), 68(5) (containing same provision with respect to specific protective measures).

141. It is important to note that a trial’s length depends on many factors, “including the scope of the indictment, the breadth of the dispute between the parties and the complexity of the facts.” Richard May & Marieke Wierda, *INTERNATIONAL CRIMINAL EVIDENCE* 279 (2002).

SECTION THREE: MILOSEVIC AND THE ASSIGNMENT OF COUNSEL

As demonstrated by the foregoing, it has been clearly established that adjudicative bodies have the power to restrict the right to self-representation in the interest of the fair and expeditious administration of justice. Upon this foundation, it is widely accepted that a defendant's *pro se* right may be restricted in the case of *deliberate* trial disruption, to which the author will refer as "obstructionism." This principle is based on the rationale that self-representation may not be used as a tactic to delay the trial. By necessity, the employment of tactics implies the existence of resolve, volition, and intention. Thus, the concept of obstructionism may be said to relate solely to the willful conduct of the accused deliberately aimed at the disruption of trial proceedings. It follows that this concept does not encompass disruption caused by unintended or extraneous factors.

Controversially, the Trial Chamber ruled in *Milosevic* that "[t]here is no difference in principle between deliberate misconduct which disrupts the proceedings and any other circumstance which so disrupts the proceedings as to threaten the integrity of the trial."¹⁴² This reasoning effectively led to the conclusion that delays accruing due to the Accused's ill health had the same potential as a defendant's deliberately obstructionist actions to damage the integrity of proceedings. In other words, the damage that disruption causes to the integrity of a trial will be the same regardless of the cause or purpose of that disruption. This assertion will be challenged in this section.

It is contended that while the recurring ill health of Milosevic undeniably inhibited the expeditious completion of the trial, it cannot be said to have undermined the integrity of proceedings. Ill health must be differentiated from deliberate obstructionist behavior. The following section outlines why the decision to assign counsel could not defensibly have been based on the principle of obstructionism, thereby leading the Trial Chamber to avoid this rubric, and to create an entirely new and unfounded premise in law in order to fulfill the aims of the completion strategy.

3.1: *Intentional Disruption: "Obstructionism"*

The concept of obstructionism is derived from the fact that the "*pro se* right is circumscribed by the requirement that the defendant not disregard

142. Prosecutor v. Milosevic, Case No. IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, para. 33 (Sept. 22, 2004).

the dignity, order and decorum of judicial proceedings.”¹⁴³ In the seminal case of *Faretta v. California*, the U.S. Supreme Court acknowledged that the right to proceed pro se may be denied where the defendant *deliberately* undertakes to hinder the trial’s orderly conduct by engaging in obstreperous behavior.¹⁴⁴ This was based on the premise that the right to self-representation was not intended as a license either “to abuse the dignity of the courtroom”¹⁴⁵ or to ignore either the rules of procedure or substantive law.¹⁴⁶ This case clearly sought to regulate voluntary misconduct specifically designed to interrupt proceedings.¹⁴⁷ Nowhere does *Faretta* imply that a defendant may lose his pro se right if he unintentionally consumes too much time in exercising it.

It is imperative that international legal proceedings are seen to be conducted efficiently, and with dignity and decorum.¹⁴⁸ In other words, “justice must satisfy the appearance of justice.”¹⁴⁹ Disruptions, particularly where intentional, inevitably damage the public perception of the Tribunal. Accordingly, “the interest of a court in stopping disruption of its

143. Memorandum of Law Regarding Defendant’s Motion to Proceed Pro Se and Status of Counsel at 11 n.19, *United States v. Moussaoui*, 2002 U.S. Dist. LEXIS 11135 (E.D. Va. 2002) (No. 01-455-A) (citations omitted), *available at* <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/65824/0.pdf>

144. *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975) (“[T]he trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct.” (citation omitted)).

145. *Id.*

146. *Id.*; *see also* *Ramirez Ferrel v. Superior Court of Los Angeles County*, 576 P.2d 93, 95 (Cal. 1978) (noting that, as supported by *Faretta*, “an accused should only be deprived of th[e] right [of self-representation] when he engages in disruptive in-court conduct which is inconsistent with its proper exercise”).

147. *See Faretta*, 422 U.S. at 834 n.46 (“[T]he right [to self-representation] does not exist . . . to be used as a tactic for . . . disruption”); *see also* *United States v. Egwaoje*, 335 F.3d 579, 586 (7th Cir. 2003) (concluding that the fact that the accused “engaged in a pattern of obfuscation and obstructionism” supported the “knowing and intelligent” nature of his waiver of the right to counsel). The connotations of the word “obfuscation” in this context clearly indicate that the conduct to which the exception applies involves control and resolve. *See Illinois v. Allen*, 397 U.S. 337, 343 (1970); *Commonwealth v. Africa*, 353 A.2d 855, 864 (Pa. 1976).

148. *See* Memorandum of Law Regarding Defendant’s Motion to Proceed Pro Se and Status of Counsel at 11 n.19, *United States v. Moussaoui*, 2002 U.S. Dist. LEXIS 11135 (E.D. Va. 2002) (No. 01-455-A) (“[T]he defendant’s *pro se* right is circumscribed by the requirement that the defendant does not disregard the dignity, order and decorum of judicial proceedings.” (citations omitted)).

149. *Offutt v. U.S.* 348 U.S. 11, 14 (1954).

proceedings, and the consequent threat to the integrity of the trial, is a component of the overarching right to a fair trial.”¹⁵⁰

In *Seselj*, the Tribunal advanced the “legitimate interest in ensuring that the trial proceeds in a timely manner without interruptions, adjournments or disruptions” to justify the assignment of standby counsel.¹⁵¹ This interest was reaffirmed in *Delalic*.¹⁵² In *Prlic*, the Tribunal stated that “it is the duty of the Trial Chamber to make sure that the proceedings would not be halted by foreseeable, and therefore avoidable, risks.”¹⁵³ Likewise, in the SCSL case of *Norman*, the great potential for further disruption to the court’s timetable and calendar was among the factors the court considered relevant to the curtailment of the right to self-representation.¹⁵⁴

Furthermore, in *Croissant v. Germany*, the ECtHR found that “avoiding interruptions or adjournments corresponds to an interest of justice which is relevant in the present context and may well justify an appointment against the accused’s wishes.”¹⁵⁵ This principle is also recognized by U.S. courts which have denied applications “to proceed pro se be-

150. *Milosevic v. Prosecutor*, Case No. IT-02-54-AR73.7, Prosecution Response to “Assigned Counsel Appeal Against Trial Chamber’s Decision on the Assignment of Defence Counsel” and “Defence Reply to “Prosecution Motion to Strike Ground of Appeal (3) from Assigned Counsel “Appeal Against Trial Chamber’s Decision on the Assignment of Defence Counsel,”” n.98 (Oct. 11, 2004).

151. *Prosecutor v. Seselj*, IT-03-67-PT, Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Seselj with His Defence, para. 21 (May 9, 2003).

152. *Prosecutor v. Delalic*, Case No. IT-96-21-T, Decision on the Alternative Request for Renewed Consideration of Delalic’s Motion for an Adjournment Until 22 June or Request for Issue of Subpoenas to Individuals and Requests for Assistance to the Government of Bosnia and Herzegovina, paras. 44–45 (June 22, 1998) (noting that the exercise of the rights contained in Article 21(4) “is subject to the control of the Trial Chamber to ensure a fair and expeditious trial in the interests of justice” and declaring that “the Trial Chamber is, in the interests of expeditious and fair trial, empowered to order the accused to close his case”).

153. *Prosecutor v. Prlic*, Case No. IT-04-74-PT, Decision on Requests for Appointment of Counsel, para. 31 (July 30, 2004) (citing *Prosecutor v. Hadzihasanovic*, Case No. IT-01-47-PT, Decision on the Prosecution’s Motion for Review of the Decision of the Registrar to Assign Mr. Rodney Dixon as Co-Counsel to the Accused Kubura, para. 44–45 (Mar. 26, 2002), (noting that “the Chamber cannot wait until foreseeable harm is done to the proceedings. It is for the Chamber to prevent such foreseeable harm.”)).

154. *Prosecutor v. Norman*, Case No. SCSL-04-14-T, Decision on the Application of Samuel Hinga Norman for Self Representation Under Article 17(4)(d) of the Statute of the Special Court, paras. 15–16 (June 8, 2004). The SCSL further considered that the Trial Chamber has a special interest in “protect[ing] the integrity of [its] proceedings” and “ensur[ing] that the administration of justice is not brought into disrepute.” *Id.* para. 28.

155. *Croissant v. F.R.G.*, 237 Eur. Ct. H.R. (ser. A) 20, para. 28 (1992).

cause of concern for orderly process.”¹⁵⁶ Further justifications for denying a pro se request have included “the need to ‘minimize disruptions, to avoid inconvenience and delay, [and] to maintain continuity.’”¹⁵⁷

3.1.1: The Willful Nature of Obstructionism

An ICTY Trial Chamber in *Delalic* confirmed the willful nature of obstructionism, noting that self-representation may be curtailed where an accused “unreasonably and unilaterally chooses his own dates in such a manner as to prejudicially affect the course of the proceedings and cause delay in respect of the defence of other accused persons.”¹⁵⁸ This conclusion was primarily inspired by the possibility that “an accused . . . may by devious reasons relying on Article 21(4)(e) prolong the trial unnecessarily.”¹⁵⁹ As in *Faretta*, the rationale underpinning this decision pertains solely to voluntary misconduct.

In a dissenting opinion in *Seselj*, Judge Antonetti stated that a mere intention to obstruct proceedings is insufficient to justify the curtailment of the right to self-representation.¹⁶⁰ In order to warrant the appointment of counsel, the Tribunal must demonstrate deliberately obstructionist behavior¹⁶¹ or indisputably extreme conduct by the defendant which, by its

156. Colquitt, *supra* note 36, at 64 (citing *Sapienza v. Vincent*, 534 F.2d 1007, 1010 (2d Cir. 1976); *People v. Anderson*, 247 N.W.2d 857, 860 (Mich. 1976)).

157. *Id.* at 65 (quoting *United States v. Dunlap*, 577 F.2d 867, 868 (4th Cir. 1978)); *see also* *Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 161–62 (2000) (“[T]he government’s interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant’s interest in acting as his own lawyer.”).

158. *Prosecutor v. Delalic*, Case No. IT-96-21-T, Decision on the Alternative Request for Renewed Consideration of *Delalic*’s Motion for an Adjournment Until 22 June or Request for Issue of Subpoenas to Individuals and Requests for Assistance to the Government of Bosnia and Herzegovina, para. 45 (June 22, 1998).

159. *Id.* Based on these reasons, the *Delalic* Tribunal ordered the pro se Accused to close his case. *Id.* para. 48.

160. *Prosecutor v. Seselj*, Case No. IT-03-67-PT, Decision on the Accused’s Motion to Re-Examine the Decision to Assign Standby Counsel, Opinion Dissidente du Judge Antonetti [Dissenting Opinion of Judge Antonetti], para. 10 (Mar. 1, 2005) (“La Chambre ne peut pas . . . limiter le droit de l’Accusé à assurer personnellement sa défense en se fondant sur des « intentions » obstructionnistes.” [“The Chamber may not limit . . . the right of the Defendant to personally ensure his defense because it is based on obstructionist intentions.”] (translation by *Brooklyn Journal of International Law*)).

161. *Id.* (noting that the Tribunal “a le devoir de démontrer que le comportement de l’accusé est constitutif d’une faute témoignant d’un comportement délibérément grave et obstructionniste” [“has the duty to show that the behavior of the defendant constitutes an offense demonstrating deliberately serious and obstructionist conduct”] (translation by *Brooklyn Journal of International Law*)).

very nature, encumbers the administration of justice.¹⁶² Clearly, therefore, in order to constitute obstructionism, disruption must be derived from voluntary misconduct.

The Appeals Chamber in *Milosevic* found it “particularly instructive”¹⁶³ to consider the right of an accused “to be tried in his [own] presence.”¹⁶⁴ Rule 80(B) of the ICTY Rules allows a Trial Chamber to “order the removal of an accused from the courtroom and continue the proceedings in the absence of the accused if the accused has persisted in disruptive conduct.”¹⁶⁵ Here, again, it is voluntary misconduct which triggers the curtailment of the minimum guarantees set out in Article 21(4)(d).

3.1.2: Was Milosevic an Obstructionist?

The *Milosevic* Trial Chamber explicitly acknowledged that the Accused’s conduct at trial did not constitute obstructionism.¹⁶⁶ The Prosecution also overtly accepted this fact.¹⁶⁷ In order to understand Milosevic’s conduct, it is first necessary to comprehend his defense strategy. Milosevic clearly viewed himself as a “political” defendant, attempting to convert his trial into a trial of NATO and the Clinton Administration, which, he claimed, cooperated with “terrorists” in Kosovo in 1999.¹⁶⁸

162. *Id.* (noting that the Tribunal must establish “un comportement manifestement excessif de nature à entraver la bonne administration de la justice” [“conduct so manifestly excessive the nature of which is likely to hinder the proper administration of justice”] (translation by *Brooklyn Journal of International Law*)).

163. *Milosevic v. Prosecutor*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, para. 13 (Nov. 1, 2004).

164. *Id.*; see ICTY Statute, *supra* note 12, art. 21(4)(d).

165. Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia rule 80(B), U.N. Doc. IT/32/Rev. 37 (1996), available at <http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev37e.pdf>.

166. *Prosecutor v. Milosevic*, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, para. 40 (Apr. 4, 2003).

167. *Prosecutor v. Seselj*, IT-03-67-PT, Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defence, at para. 11 (Feb. 28, 2003) (“As a former head of state, the accused Milosevic does not need to be disruptive, obstructionist or scandalous in order to remain in the public’s eye. Therefore, despite his rejection of the Tribunal and its authority as such, to date the accused Milosevic has, to a large extent, taken part in the proceedings in an orderly fashion.”) (on file with the author).

168. Sophia Piliouras, U.N. Report, *International Criminal Tribunal for the Former Yugoslavia and Milosevic’s Trial*, 18 N.Y.L. SCH. J. HUM. RTS. 515, 520–21 (2002) (alleging, *inter alia*, that the United States provided “close air support to the Kosovo Liberation Army and other Albanian ‘terrorists’ and their foreign Islamic allies,” that NATO

Among other allegations,¹⁶⁹ Milosevic accused the ICTY of “victor’s justice.”¹⁷⁰ Milosevic claimed that the Tribunal yields to the objectives of the U.S. and other NATO powers,¹⁷¹ countries without whose financial and military support the tribunal could not function.¹⁷² Essentially, he chose self-representation as the most effective means of defending the actions of the Serbian nation and his own political record.

Commentators have noted that Milosevic was derisive on certain occasions during the trial proceedings.¹⁷³ This, however, is inherent in the primarily adversarial nature of the trial proceedings. It also ignores the sensitive manner in which the Accused dealt with alleged victims of sexual assault. Accusations that the Accused refused to focus on material considered relevant to the indictment¹⁷⁴ fail to examine the role of the Trial Chamber in regulating the presentation of the evidence, and the efforts of the Accused to present indictment-relevant evidence, particularly relating to Kosovo, during the Defense stage.

Although the Accused did not personally file written submissions and at times failed to state his position on procedural points,¹⁷⁵ he effectively

acted “as an ‘unlawful aggressor,’” and that certain officials of NATO countries were involved in “a ‘joint criminal enterprise’ against Yugoslavia and Serbia”).

169. Among other factors challenged by Milosevic were the composition of the bench, the manner of his surrender to the Tribunal, the timing of his indictment, and the unfairness of procedures at the Tribunal. Michael P. Scharf, *The Legacy of the Milosevic Trial*, 37 NEW ENG. L. REV. 915, 923–30 (2003).

170. See Gary J. Bass, *Why Not Victor’s Justice?*, WASH. POST, Feb. 15, 2002, at A33.

171. See *id.*

172. See, e.g., Madeleine K. Albright, *We Won’t Let War Criminals Walk; With or Without a Balkan Peace Deal, the U.S. Won’t Relent*, WASH. POST, Nov. 19 1995, at C01 (noting that the U.S. had given “more than \$13 million in direct contributions and assessments” to the Tribunal).

173. See, e.g., Scharf, *supra* note 169, at 919 (“In addition to regularly making disparaging remarks about the court and repeatedly brow-beating witnesses, Milosevic pontificate[d] at length during cross examination of every prosecution witness.”).

174. See, e.g., Trial Tr. at 3264:15–17 (Apr. 17, 2002), *Prosecutor v. Milosevic*, Case No. IT-02-54-T, available at <http://www.un.org/icty/transe54/020417IT.htm> (May, J.) (“It is an abuse of the process for you to make speeches, Mr. Milosevic, at this stage. It’s also an abuse to go over the same ground.”); *id.* at 6208:8–10 (June 4, 2002), available at <http://www.un.org/icty/transe54/020604ED.htm> (May, J.) (“A great deal of time is taken up with repetition and argument and sometimes irrelevancies.”).

175. See, e.g., *id.* at 32078:3–4 (Mar. 25, 2004), available at <http://www.un.org/icty/transe54/040325MH.htm> (Milosevic: “Of course I have no intention of declaring my views on your administrative issues.”); *id.* at 32078:9–13 (Meron, J.) (“I am assuming that I should derive the conclusion from your comment that you do not wish to grant a consent to the continuation of the hearings as I cannot understand the comment you have made as amounting to a clear and unequivocal consent to continue the proceedings with a substitute Judge.”).

waived his right to file by implicitly accepting the work of Assigned Counsel. The Accused essentially prompted them to make such submissions on his behalf through oral submissions at trial.¹⁷⁶ He went so far as to explicitly acknowledge the dedication and commitment of Assigned Counsel.¹⁷⁷ However, it is evident from the litigation concerning provisional release that he gave explicit and direct instructions to Assigned Counsel from December 2005 to the time of his death.¹⁷⁸ Furthermore, Milosevic “fully engaged in the cross-examination of Prosecution witnesses”¹⁷⁹ and presented consecutive witnesses in his defense,¹⁸⁰ thereby actively partaking in trial proceedings.

3.1.3: Threshold of Obstructionist Conduct

The high threshold that a defendant’s conduct must breach in order to constitute obstructionism is manifest from the ICTR case of *Barayagwiza*.¹⁸¹ The Accused, Jean-Bosco Barayagwiza, declared the Rwanda Tribunal to be “so dependent on the dictatorial anti-Hutu regime of Kigali” that it could not render “independent and impartial justice.”¹⁸² He

176. *E.g.*, Prosecutor v. Milosevic, Case No. IT-02-54-T, Decision on Assigned Counsel Request for Provisional Release, para. 2 (Feb. 23, 2006); Prosecutor v. Milosevic, Case No. IT-02-54-AR73.7, Appeal Against the Trial Chamber’s Decision on Assignment of Defence Counsel: Corrigendum, para. 32 (Sept. 29, 2004), available at <http://www.un.org/icty/milosevic/motion/040929.htm>.

177. *See* Prosecutor v. Milosevic, Case No. IT-02-54-T, Transcript of Record at 46690:10–16 (Judge Robinson: “Mr. Milosevic, that, again, is a matter in relation to which you owe a great debt of gratitude to assigned counsel. Through their action, through their professionalism, we are considering now a motion to subpoena certain witnesses, and without their intervention, without their help, we would not have been considering this.” The Accused: “Yes, I know about that. I know about that, Mr. Robinson.”).

178. *E.g.*, Prosecutor v. Milosevic, Case No. IT-02-54-T, Decision on Assigned Counsel Request for Provisional Release, para. 2 (Feb. 23, 2006) (indicating that the Accused first requested provisional release orally, which was then followed by Assigned Counsel’s formal written Request for Provisional Release Pursuant to Rule 65).

179. Prosecutor v. Milosevic, Case No. IT-02-54-AR73.7, Prosecution Response to “Assigned Counsel Appeal Against the Trial Chamber’s Decision on Assignment of Defence Counsel” and to “Defence Reply to ‘Prosecution Motion to Strike Ground of Appeal (3) from Assigned Counsel ‘Appeal Against the Trial Chamber’s Decision on Assignment of Defence Counsel.’”” para. 90 n.144 (Oct. 11, 2004).

180. *E.g.*, Trial Tr. at 34851:9–10 (Jan. 11, 2005), Prosecutor v. Milosevic, Case No. IT-02-54-T, available at <http://www.un.org/icty/transe54/050111IT.htm>.

181. Prosecutor v. Barayagwiza, Case No. ICTR-97-19.

182. Prosecutor v. Barayagwiza, Case No. ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw, para. 5 (Nov. 2, 2000) (quoting Letter from Jean-Bosco Barayagwiza to the Trial Chamber (Oct. 24, 2000)), available at <http://69.94.11.53/ENGLISH/cases/Barayagwiza/decisions/021100.htm>.

stated that the Tribunal was committing “a mockery of justice”¹⁸³ and instructed his counsel not to represent him in any way.¹⁸⁴ Likewise, Milosevic contested the legitimacy of the ICTY, accusing the Tribunal of being “not [a] juridical institution” but rather “a political tool.”¹⁸⁵ However, parallels between the two cases end there; the voluntarily disruptive conduct of Barayagwiza breached a threshold which Milosevic did not aspire to reach. Barayagwiza refused to attend proceedings, thereby apparently “boycotting” the tribunal.¹⁸⁶ As a result of Barayagwiza’s instructing his lawyers not to represent him, his lawyers remained passive and did not mount an active defense.¹⁸⁷ Additionally, Barayagwiza did not assert his right to self-representation.¹⁸⁸

By contrast, to quote the prosecution, “despite his rejection of the tribunal and its authority as such . . . the accused Milosevic has, to a large extent, taken part in the proceedings in an orderly fashion.”¹⁸⁹ The Milosevic Trial Chamber explicitly distinguished the conduct of the former President from that of Barayagwiza, noting that “[n]o such circumstances have, as yet, arisen in this trial.”¹⁹⁰ Thus, although certain aspects of the behavior of Milosevic may parallel the conduct of the ICTR-accused, the primary source of the obstructionism in the *Barayagwiza* case, i.e., the refusal of the accused to attend court, was absent in the case of the former President.

The conduct of ICTY-accused Seselj provides a further example of the high threshold an accused must breach in order to constitute obstructionism. Vojislav Seselj, representing himself, has consistently derogated from the issues at hand¹⁹¹ and refused to follow the procedural rules of

183. *Id.* para. 12.

184. *Id.* para. 11 (citing Letter from Jean-Bosco Barayagwiza to the Trial Chamber (Oct. 23, 2000)).

185. See Trial Tr. at 25:1–2 (Aug. 30, 2001), Prosecutor v. Milosevic, Case No. IT-02-54-T, available at <http://www.un.org/icty/transe54/010830SC.htm>.

186. Prosecutor v. Barayagwiza, Case No. ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw, para. 16 (Nov. 2, 2000).

187. *Id.* para. 17.

188. *Id.*, Concurring and Separate Opinion of Judge Gunawardana, para. 3.

189. Prosecutor v. Seselj, Case No. IT-03-67-PT, Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defence, para. 11 (Feb. 28, 2003) (on file with the author).

190. *Id.* para. 40.

191. *E.g.*, Prosecutor v. Seselj, Case No. IT-03-67-PT, Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defence, para. 7 (May 9, 2003) (“The Accused devoted only thirteen pages of his ninety-three page ‘Reply to the Prosecutor’s Motion to impose defence counsel on me against my will’ . . . to the concrete legal question actually at issue.”). The Tribunal classified the remainder as “frivolous abuse of the Tribunal’s Translation Unit.” *Id.* para. 7 n.7.

the ICTY.¹⁹² Seselj consistently filed handwritten, “excessively long,” and “largely irrelevant” motions.¹⁹³ He publicly expressed his intent to cause harm to, or indeed to “attack”¹⁹⁴ and “destroy” the Tribunal,¹⁹⁵ and to use the proceedings to promote Serb national interests rather than as a means to defend himself against the charges alleged against him.¹⁹⁶ Furthermore, he refused to use a laptop or typewriter as “he was ‘afraid of receiving an electric shock,’”¹⁹⁷ and repeatedly insisted that he only understands the Serbian language despite the fact that Croatian is simply a variant of that language and evidence showed that he understands Eng-

192. *Id.* para. 23 (noting that, *inter alia*, the Accused “submitted a hand written petition directly to the Appeals Chamber” knowing that this violated the Rules, that a self-described “legal adviser” to the accused submitted a letter to the Registrar “[un]accompanied by the necessary power of attorney” and who apparently did not meet the requirement that counsel speak one of the working languages of the Tribunal, and that the accused, in a petition, made “frivolous demands framed in language inappropriate for a legal document”).

193. *Id.*

194. In a 1994 interview for the French film “Crimes et Criminels,” when he was asked what would be his defense in the event of a case being taken against him at the ICTY, the Accused responded: “I am not planning to defend myself, I can only attack.” Prosecutor v. Seselj, Case No. IT-03-67-PT, Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defence (Feb. 28, 2003) (on file with the author). He also said: “Personally, I do not recognise this Hague Tribunal. I think it has no legal foundation, but if I am ever invited to The Hague I’ll gladly go there immediately. I would never miss such a show.” Prosecutor v. Seselj, Case No. IT-03-67-PT, Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defence, para. 4 n. 5 (May 9, 2003). Furthermore, at a public rally on the evening before he left Belgrade for The Hague, the accused Seselj said “that he would put ‘the Americans, the Hague tribunal and NATO’ on trial.” Sofia Hilden, *Serb Hardliner Seselj Arrives in Hague*, REUTERS, Feb. 24, 2003. The Accused also made the following comments: “With their stupid charges against me they have come up against the greatest living legal Serb mind . . . I shall blast them to pieces.” *Seselj Dismisses Hague Indictment*, ONASA NEWS AGENCY, Feb. 17, 2003.

195. On February 3, 2003, the news agency Deutsche Presse Agentur reported that the Accused was “reported to have said that ‘he would gladly travel to The Hague to ‘destroy’ the . . . tribunal in case it open[ed] a trial against him.’” Prosecutor v. Seselj, Case No. IT-03-67-PT, Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defence, para. 4 n. 5 (May 9, 2003) (quoting DEUTSCHE PRESSE-AGENTUR, Feb. 3, 2003).

196. See Prosecutor v. Seselj, Case No. IT-03-67-PT, Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defence, para. 1 (Feb. 28, 2003) (on file with the author).

197. Prosecutor v. Seselj, Case No. IT-03-67-PT, Trial Tr. at 66, available at <http://www.un.org/icty/transe67/030325SC.htm>; *Seselj*, Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defence, para. 23 (May 9, 2003).

lish.¹⁹⁸ The trial chamber found the foregoing “attitude and actions . . . indicative of obstructionism on [Seselj’s] part.”¹⁹⁹ As recognized by the Prosecution, the similarities between Seselj and Milosevic are remote.²⁰⁰

Although Milosevic used the Serbian form of address rather than that customarily used at the Tribunal, Milosevic remained moderately respectful to Tribunal judges.²⁰¹ In the highly publicized case of *United States v. Zacarias Moussaoui*, the right to proceed pro se was revoked where the accused filed frivolous motions which repeatedly insulted the judge, among others.²⁰² This misconduct indicates a lower threshold than

198. Prosecutor v. Seselj, Case No. IT-03-67-PT, Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defence, paras. 24–25 (May 9, 2003).

199. *Id.* para. 26.

200. Prosecutor v. Seselj, Case No. IT-03-67-PT, Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defence, para. 11 (Feb. 28, 2003) (on file with the author). The Prosecution stated that:

As a former head of state, the accused Milosevic does not need to be disruptive, obstructionist or scandalous in order to remain in the public’s eye. Therefore, despite his rejection of the Tribunal and its authority as such, to date the accused Milosevic has, to a large extent, taken part in the proceedings in an orderly fashion. The opposite is to be expected from the accused Seselj. The accused Seselj thrives on the creation of the scandal, conspiracies and publicity.

Id.; *Seselj*, Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defence, para. 4 (May 9, 2003). The ICTY stated that:

The Prosecution argues that the circumstances of the Accused’s request to represent himself are distinguishable from those of Slobodan Milosevic who is currently the only other accused before this Tribunal conducting his own defence. The Prosecution also requested the imposition of defence counsel in the Milosevic case, but in that case the main reason was concern about the toll that self-representation was taking on Milosevic’s health. In contrast to Milosevic, the Prosecution believes the Accused Seselj has intimated to and may behave in a ‘disruptive, obstructionist or scandalous’ manner.

Id.

201. Molly Moore, *Trial of Milosevic Holds Lessons for Iraqi Prosecutors*, WASH. POST, Oct. 18, 2005, at A19. Theodor Meron, the president of the ICTY, remarked, “[Milosevic] complies with the rules of the game for the most part. If he insists on calling the judges ‘Mister’ instead of ‘Your Honor,’ I regret that. But it doesn’t mean he’s not otherwise respectful to the judges.” *Id.*

202. *United States v. Moussaoui*, No. 01-455-A (E.D. Va. Nov. 14, 2003) (order appointing counsel of record), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/69412/0.pdf>; Jerry Seper, *Moussaoui Right to Represent Self Revoked*, WASH. TIMES, Nov. 15, 2003, at A02, available at <http://www.washingtontimes.com/functions/print.php?StoryID=20031114-113846-2466r>.

the *Barayagwiza* or *Seselj* standards, but remains inapplicable to *Milosevic*.

There appears to be a lack of consensus with regard to the minimum threshold to be met to constitute obstructionism in domestic jurisdictions. In the U.S. case of *United States v. Davis*,²⁰³ counsel was assigned as the accused delved into obscure and irrelevant discussion whenever he was afforded the opportunity to speak.²⁰⁴ The trial in *Duke v. United States*²⁰⁵ was infused with accusations that the prosecution was the result of a conspiracy to frame the accused.²⁰⁶ The court indicated that the accused could not be allowed to turn the proceeding into a “Roman holiday” or use his pro se status “as a launching ground for missiles, even if . . . he believed his best defense was . . . trying the prosecutors and witnesses for the prosecution.”²⁰⁷ Although this displays certain comparisons to the *Milosevic* case, it is arguable that the level of deliberate misconduct in these cases exceeds that of the former President.

Dissenting Justice Blackmun in *Faretta v. California* suggested that the presentation of a politically inspired defense may defeat the right to self-representation, proposing that the right does not accommodate “the whimsical—albeit voluntary—caprice of every accused who wishes to use his trial as a vehicle for personal or political self-gratification.”²⁰⁸ Similarly, in *United States v. Frazier-El*, the defendant’s insistence on representing himself so that he could present “frivolous” arguments in his defense was sufficient to deny him his right to proceed pro se.²⁰⁹

This premise stretches the theory of obstructionism to the extent that it excessively restricts the accused’s defense rights. According to Judge Antonetti’s dissenting opinion in *Seselj, Faretta* established that a judge may discontinue an accused’s self-representation if he or she “deliberately adopts behavior that is serious and obstructionist.”²¹⁰ According to

203. 260 F. Supp. 1009, 1021 (E.D. Tenn. 1966).

204. *Id.* at 1021. The obstructionism in *Davis* was due to the defendant’s mental incapacities. The court found that *Davis* lacked sufficient mental capacity to represent himself. *Id.*

205. 255 F.2d 721 (9th Cir. 1958).

206. *Id.* at 726–27. The accused alleged that a federal judge and members of the U.S. Attorney’s staff were among those involved in framing him. *Id.* at 727.

207. *Id.*

208. *Faretta v. California*, 422 U.S. 806, 849 (1975) (Blackmun, J., dissenting).

209. *United States v. Frazier-El*, 204 F.3d 553, 560 (4th Cir. 2000).

210. Prosecutor v. *Seselj*, Case No. IT-03-67-PT, Decision on the Accused’s Motion to Re-examine the Decision to Assign Standby Counsel, Opinion Dissidente du Juge Antonetti, para. 8 (Mar. 1, 2005) (“[S]i l’accusé adopte délibérément un comportement grave et obstructionniste.” “[I]f the Accused deliberately adopts behavior that is serious and obstructionist.”) (citing *Faretta*, 422 U.S. at 834 n.46) (author’s translation)).

Judge Antonetti, the accused must *seriously* interfere with proceedings,²¹¹ *repeatedly* breach the orders and decisions of the Trial Chamber, interrupt proceedings through bad behavior, or use profanities.²¹² Milosevic did not come close to breaching this threshold of deliberate obstructionism.

3.2: Unintentional Disruption

While it is clear that while a deliberately disruptive defendant reaching a certain level of misconduct may be denied the pro se right, “a more complex problem arises when the pro se defendant unintentionally disrupts the proceedings but not to an extent that would justify his permanent removal from the courtroom.”²¹³ At the outset, it is important to note that although a pro se defendant will inevitably take longer to present his defense than experienced counsel will,²¹⁴ “a simple lack of legal knowledge may not be the . . . sole reason for denying a *pro se* request.”²¹⁵ This principle is self-evident, because if a court required a de-

211. *Id.* para. 8 (“[L]e droit de l’accusé à se défendre lui-même peut être restreint au motif que l’accusé perturbe *gravement* le procès.” “[T]he right of the accused to defend himself may be limited on grounds that the accused *seriously* disrupts the proceeding.”) (emphasis added) (translation by *Brooklyn Journal of International Law*)).

212. *Id.* para. 10. Judge Antonetti stated that

La notion d’obstruction à la justice et au bon déroulement du procès doit en effet s’entendre de la violation répétée des ordres et décisions de la Chambre, de la perturbation du déroulement du procès par des écarts de conduite, de l’utilisation d’un langage outrageant ou de toute autre faute témoignant d’un comportement délibérément grave et obstructionniste. La Chambre ne peut pas à ce stade limiter le droit de l’Accusé à assurer personnellement sa défense en se fondant sur des « intentions » obstructionnistes.”

[The notion of the obstruction of justice and the proper conduct of proceedings must involve repeated violations of order and decisions of the Chamber, disturbances of the proceedings through bad conduct, the use of insulting language or other conduct exhibiting deliberate, serious and obstructionist behaviour. The Chamber cannot, at this stage, restrict the right of the accused to present his own defence on the basis of obstructionist “intentions.”]

Id. (author’s translation).

213. Homiak, *supra* note 5, at 920.

214. *See* *United States v. Dougherty*, 473 F.2d 1113, 1124 (D.C. Cir. 1972) (“Given the general likelihood that *pro se* defendants have only rudimentary acquaintanceship with the rules of evidence and courtroom protocol, a measure of unorthodoxy, confusion and delay is likely, perhaps inevitable, in *pro se* cases.” (footnote omitted)).

215. Homiak, *supra* note 5, at 910; *see also* *Faretta v. California*, 422 U.S. 806, 835 (1975) (“[A] defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation . . .”).

defendant to possess legal knowledge as a pre-requisite to granting the right to represent himself, the right to self-representation “would become essentially meaningless.”²¹⁶ In other words, an accused may elect to represent himself even if his lack of experience causes significant inefficiency in the proceedings.²¹⁷

What is contentious in the context of the *Milosevic* case is the decision of the Trial Chamber to base its decision to assign counsel on the consequences of the recurring ill health of the Accused. It is the contention of this paper that this innovative expansion of the circumstances in which the pro se right may be restricted, without the circumscription necessary to confine the decision to the specific circumstances of the *Milosevic* case, leaves open the possibility that the right to self-representation and other minimum guarantees which are composite elements of the right to a fair trial will in the future be abrogated.

3.2.1: Trial Chamber Decision

As seen in Section 1.3.1, the recurrent ill health of Milosevic inhibited the expeditious completion of the case.²¹⁸ The Trial Chamber indicated that medical reports filed in July and August 2004 made it “plain . . . that the Accused is not fit enough to defend himself and that should he continue to represent himself, there will be further delays in the progress of the trial.”²¹⁹ Doctors advised that Milosevic could suffer “a hypertensive emergency, a potentially life-threatening condition.”²²⁰ On this basis, the Tribunal felt obliged to assign counsel in the interest of the orderly administration of justice.²²¹

The Trial Chamber conceded that no precedent existed for this reasoning.²²² Nevertheless, it promulgated the theory that “[d]isruption of a trial, whatever the circumstances, may give rise to the risk of a miscarriage of justice because the whole proceedings have not been conducted

216. Homiak, *supra* note 5, at 910.

217. Note, *Hybrid Defense*, *supra* note 26, at 346.

218. Trial Tr. at 32357:9–10 (Sept. 2, 2004), Prosecutor v. Milosevic, Case No. IT-02-54-T, available at <http://www.un.org/icty/transe54/040902IT.htm> (“The health of the accused has been a major problem in the progress of the trial.”).

219. *Id.* at 32358:4–6.

220. *Id.* at 32357:24–25.

221. Prosecutor v. Milosevic, Case No. IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, para. 65 (Sept. 22, 2004) (citing the concern that the trial could “last for an unreasonably long time” and noting the Tribunal’s “duty to ensure a fair and expeditious trial and its responsibility to preserve the integrity of its proceedings”).

222. *Id.* para. 37 (“[E]xtensive research has not led to the identification of any case in any jurisdiction where counsel has been assigned to an accused person because he was unfit to conduct his case as the result of impaired physical health . . .”).

and concluded fairly.”²²³ This decision was based on an examination of the jurisprudence of the ECtHR and U.N. Human Rights Committee (HRC) as well the jurisprudence of the ICTY, ICTR, and SCSL.²²⁴ In contrast to its 2003 ruling, the Trial Chamber sought to demonstrate that the various adjudicative bodies recognized a potentially broad range of possible exceptions to the right to self-representation.²²⁵

Furthermore, in its 2004 ruling, the Trial Chamber relied heavily on the ECtHR decision in *Croissant*,²²⁶ despite having found in 2003 that case to be “distinguishable from the instant case” to the extent that it involved objection to appointment of additional counsel.²²⁷ It also distinguished from the case at hand the views of the HRC in *Brian & Michael Hill v. Spain*,²²⁸ despite having found this decision to be “highly relevant to the correct interpretation of Article 21(4) (d)” in its 2003 ruling.²²⁹ However, in its 2003 ruling, ignoring jurisprudence to the contrary,²³⁰ the Trial Chamber appeared to interpret the HRC’s views as prohibiting exceptions to the pro se right.²³¹

223. *Id.* para. 33.

224. *Id.* paras. 38–44.

225. *Id.*

226. *Id.* para. 43.

227. Prosecutor v. Milosevic, Case No. IT-02-54-T, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, para. 32 (Apr. 4, 2003).

228. Hill v. Spain, Commc’n No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993, para. 14.2 (June 23, 1997). This case concerned a Spanish law which specified that although an accused had the right to defend himself, “such defence should take place by competent counsel, paid by the State when necessary.” *Id.* The HRC found, without further discussion, that the right to defend oneself under Article 14(3)(d) of the ICCPR had not been respected. *Id.*

229. Prosecutor v. Milosevic, Case No. IT-02-54-T, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, para. 37 (Apr. 4, 2003). The Tribunal further looked to the U.N. Secretary-General’s report on the Statute of the ICTY, which indicated that the “internationally recognized standards” relevant to the rights of the accused “are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights.” *Id.* (quoting The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, para. 106, delivered to the Security Council, U.N. Doc. S/25704 (May 3, 1993)).

230. Gonzalez v. Spain, Commc’n No. 1005/2001, U.N. Doc. CCPR/C/74/D/1005/2001, para. 4.3 (Mar. 22, 2002); Marín Gómez v. Spain, Commc’n No. 865/1999, U.N. Doc. CCPR/C/73/D/895/1999, para. 8.4 (Nov. 5, 2001); Torregrosa Lafuente v. Spain, Commc’n No. 866/1999, U.N. Doc. CCPR/C/72/D/866/1999, para. 6.3 (Aug. 31, 2001) (finding that domestic legislation implementing mandatory representation by counsel did not violate Article 14(1) of the ICCPR).

231. Prosecutor v. Milosevic, Case No. IT-02-54-T, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, para. 36 (Apr. 4, 2003) (“[T]he only case on the issue decided under these conventions which the Trial Chamber has been

Side-stepping the inaccuracy of its earlier assertions, the Trial Chamber in its 2004 ruling disregarded the HRC's views on the basis that the Committee had given no reason for its determination and that it was not faced with circumstances which could be compared to the *Milosevic* case.²³² Further, although it had distinguished *Barayagwiza* (ICTR) in its 2003 ruling, the Trial Chamber regarded this case²³³ as well as *Norman* (SCSL)²³⁴ and the interim case of *Seselj* (ICTY)²³⁵ to be authority for the fact that "such factors as the ability of the accused to conduct his own defence, as well as his attitude and actions" should be taken into account when determining what course might be appropriate in the circumstances.²³⁶ This assertion markedly broadens the principles elucidated in these judgments.

3.2.2: Appeals Chamber Decision

Despite these inconsistencies in the Trial Chamber's reasoning, the Appeals Chamber upheld its exercise of discretion in assigning counsel, reaffirming that "it cannot be that the only kind of disruption legitimately cognizable by a Trial Chamber is the intentional variety."²³⁷ The reasoning upon which the Appeals Chamber based this premise was no more consistent than that of the Trial Chamber. In the form of a rather puzzling rhetorical question, the Appeals Chamber, in its decision, asked:

How should the Tribunal treat a defendant whose health, while good enough to engage in the ordinary and non-strenuous activities of everyday life, is not sufficiently robust to withstand all the rigors of trial

able to find, did not allow for such an exception: the above mentioned *Michael and Brian Hill v. Spain*.").

232. Prosecutor v. Milosevic, Case No. IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, para. 44 (Sept. 22, 2004).

233. Prosecutor v. Barayagwiza, Case No. ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw, para. 2; Concurring and Separate Opinion of Judge Gunawardana (Nov. 2, 2000).

234. Prosecutor v. Norman, Case No. SCSL-04-14-T, Decision on the Application of Samuel Hinga Norman for Self Representation Under Article 17(4)(d) of the Statute of the Special Court, paras. 8, 27 (June 8, 2004).

235. Prosecutor v. Seselj, IT-03-67-PT, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj with His Defence, paras. 20, 27, 30; Disposition at 13 (May 9, 2003).

236. Prosecutor v. Milosevic, Case No. IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, para. 38 (Sept. 22, 2004); *Id.* paras. 39-41 (discussing the aforementioned cases).

237. Prosecutor v. Milosevic, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, para. 14 (Nov. 1, 2004).

work—the late nights, the stressful cross-examinations, the courtroom confrontations—unless the hearing schedule is reduced to one day a week, or even one day a month?²³⁸

Without giving a substantive answer to this monologue, the Appeals Chamber went on to question whether the Tribunal ought to “be forced to choose between setting [such a] . . . defendant free and allowing the case to grind to an effective halt?”²³⁹ Giving the impression that the solution was self-evident, the Appeals Chamber responded ambiguously that “*to ask that question is to answer it.*”²⁴⁰ No further scrutiny was accorded to the question of non-intentional disruption.

The manner in which the concept of non-intentional disruption was promulgated is wholly unsatisfactory. Neither the Appeals Chamber nor the Trial Chamber attempted to provide any guidance as to the degree of ill health necessary in order for the tribunal to acquire the discretion to limit the right to self-representation. The Tribunal thereby failed to specify to what extent and for how long the ill health of the accused must delay proceedings in order for the tribunal to be able to exercise this discretion. The necessary cause, nature, and potential duration of such ill health remain undetermined.

It also remains unclear how “healthy” participants must be in order to qualify for pro se status before the Tribunal, or how “unhealthy” they must become in order for this minimum guarantee to be denied. Under the precedent established by the Appeals Chamber, it is to be expected that counsel might be assigned to every defendant, like Milosevic, with high blood pressure or potential heart problems. How much further this precedent stretches, however, remains a question of speculation. It is not implausible to surmise that *any* defendant with *any* potential health problems, no matter how trivial, could be denied the right to represent themselves in person. This possibility creates obvious anomalies, particularly given that the defense rights of the accused set out in Article 21(4) are guaranteed “in fully equality.”²⁴¹

Arguably, the Tribunal deliberately phrased its reasoning in ambiguous terms to avoid drawing attention to the novelty of its contention, the inconsistency in the reasoning of the chambers, and the lack of precedent to support it. As it stands, given the lack of definitive guidelines provided by the Appeals Chamber, case-by-case analysis will be required to determine which circumstances will merit curtailing the right to self-

238. *Id.*

239. *Id.*

240. *Id.* (emphasis added).

241. ICTY Statute, *supra* note 12, art. 21(4).

representation where non-intentional delay occurs. This leaves the future of self-representation, as well as the other minimum guarantees in Article 21(4) of the Statute, in unclear territory. Such lack of clarity critically undermines the significance of the right to self-representation and compromises the possibility of achieving a fair trial.

In order to estimate the potential parameters of non-intentional disruption, it may be useful to examine the cases cited by the Appeals Chamber.²⁴² The U.S. case of *Johnson v. State*²⁴³ provides authority for the withdrawal of the right to self-representation where, as in *Johnson*, expert testimony indicates that defendant's fragile mental state "might well succumb to the added stress of self-representation and deteriorate to the point where it would become necessary to continuously disrupt the proceedings to monitor his 'present' mental abilities and competence."²⁴⁴ This suggests that the potential ill health to which the concept of non-intentional disruption applies appears to encompass both physical and mental health. The *Johnson* concept cannot, however, be equated to *Milosevic*, as the capacity of the accused to stand trial was one of the matters at issue in *Johnson*.²⁴⁵ This position implied a level of trial disruption that far exceeds the *Milosevic* situation.²⁴⁶ It may, perhaps, be surmised that where mental health is at issue, a rather insidious level of disruption is necessary.

The *Milosevic* Appeals Chamber also cited the U.S. case of *Savage v. Estelle*,²⁴⁷ where the trial court did not allow the pro se defendant to con-

242. *Milosevic v. Prosecutor*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, para. 14 n.43 (Nov. 1, 2004).

243. *Johnson v. State*, 17 P.3d 1008, 2001 Nev. LEXIS 8 (Nev. 2001).

244. *Id.*, 2001 Nev. LEXIS at **28.

245. *Id.* (generally).

246. See *Prosecutor v. Milosevic*, Case No. IT-02-54-AR73.7, Prosecution Response to "Assigned Counsel Appeal Against the Trial Chamber's Decision on Assignment of Defence Counsel" and to "Defence Reply to "Prosecution Motion to Strike Ground of Appeal (3) from Assigned Counsel "Appeal Against the Trial Chamber's Decision on Assignment of Defence Counsel,"" para. 54 (Oct. 11, 2004) (citing *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision Re the Defence Motion to Terminate Proceedings (May 26, 2004) ("[T]here is no question that the Accused is unfit to stand trial: he clearly meets all the tests for fitness listed in the test recently formulated in the *Strugar* case."); see also *Milosevic v. Prosecutor*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, para. 14 n.42 (Nov. 1, 2004) ("We reject Assigned Counsel's contention that Milosevic's inability to represent himself necessarily rendered him unfit to stand trial at all. Trial litigation is an extraordinarily demanding profession. It cannot be that only those defendants capable of meeting its demands are formally fit to stand trial.").

247. 924 F.2d 1459 (9th Cir. 1990).

duct voir dire, cross-examine witnesses, make objections, or argue before the jury without leave of court because of his incapacitating stutter.²⁴⁸ This case immeasurably broadens the range of situations to which the *Milosevic* precedent may apply. A stutter is simply a speech impediment which relates in no way to the health of the accused, or his capacity to attend proceedings or stand trial. It certainly cannot be classified as “behavior.” Accordingly, given that the parameters of the exception recognized in *Milosevic* remain undefined, the potential breadth of conditions to which the decision could apply is unsettling.

Curiously, neither the Appeals Chamber nor the Trial Chamber referred to the proposition in *Strugar* that “[i]n some cases legal assistance to an accused may be a sufficient measure to compensate for any limitations of capacity of the accused to stand trial.”²⁴⁹ While this proposition initially appears to substantiate *Milosevic*, *Strugar* in fact concerned a situation in which the defense claimed that the accused was unable to stand trial,²⁵⁰ a stage to which it was not foreseen that the *Milosevic* proceedings would degenerate.²⁵¹ Hence, the *Strugar* proposition, rather than substantiating the *Milosevic* decision, highlights that the assignment of counsel is appropriate only where an extremely prohibitive level of disruption has occurred, i.e., to the extent that proceedings are in danger of completely shutting down.

Furthermore, in *Strugar*, the provision of legal assistance appears to have been considered suitable where the individual’s incapacity to stand trial was “of such a nature and effect that measures can be taken to sufficiently alleviate the impairment, or its effect, so that the trial can con-

248. *Id.* at 1461.

249. Prosecutor v. Strugar, Case No. IT-01-42-T, Decision Re The Defence Motion to Terminate Proceedings, para. 39 (May 26, 2004), available at <http://www.un.org/icty/strugar/trial1/decision-e/040526.pdf>. The Prosecution proposed that this decision “at a minimum leaves open the possibility, and at a maximum supports the contention, that ill-health can justify the assignment of legal assistance in order to enable a trial to continue.” Prosecutor v. Milosevic, Case No. IT-02-54-T, Prosecution Reply to “Amici Curiae Submissions in Response to the Trial Chamber’s “Further Order on Future Conduct of the Trial Concerning Assignment of Defence Counsel” Dated 6 August 2004,” para. 18 (Aug. 19, 2004) (on file with the ICTY).

250. Prosecutor v. Strugar, Case No. IT-01-42-T, Decision Re the Defence Motion to Terminate Proceedings, para. 5 (May 26, 2004).

251. See *Milosevic*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, at para. 14 n. 42 (Nov. 1, 2004). (“We reject Assigned Counsel’s contention that Milosevic’s inability to represent himself necessarily rendered him unfit to stand trial at all. Trial litigation is an extraordinarily demanding profession. It cannot be that only those defendants capable of meeting its demands are formally fit to stand trial.”).

tinue.”²⁵² The Tribunal suggested that if a defendant’s unfitness is temporary, then an appropriate remedy may be to adjourn until “the accused has sufficiently recovered.”²⁵³ It further stated, however, that “[o]ther cases may require that a trial be abandoned,”²⁵⁴ meaning presumably that permanent unfitness may lead to termination of the proceedings.

Thus, the measures suggested in *Strugar* were structured in a hierarchy whereby the measure adopted must be suitable to meet the needs of the circumstances of the case, or, in other words, proportionate to the interest pursued. Section Four will examine the disproportionality of the Appeals Chamber decision in *Milosevic* and its effect on the dignity and autonomy of the Accused.

SECTION FOUR: PROPORTIONALITY

4.1: Mode of Representation Assigned: Proportionate to Aim Pursued?

As seen in Section 1.3.2, instead of merely appointing counsel to assist Milosevic with the presentation of his defense, counsel was initially assigned to fully represent him. This decision purported to allow the Accused to continue to “actively participate along with counsel in the preparation and presentation of his case.”²⁵⁵ His participation was, however, “secondary to that of Assigned Counsel and strictly contingent on the discretionary permission of the Trial Chamber in any given instance.”²⁵⁶ Thus, the burden of the defense was placed on the Assigned Counsel. This situation may have been based on the supposition expressed in *Parren v. State* that “[t]here can be but one captain of the ship.”²⁵⁷

Subsequent to the assignment of counsel, Milosevic categorically refused to question witnesses²⁵⁸ or cooperate with Assigned Counsel. This

252. Prosecutor v. Strugar, Case No. IT-01-42-T, Decision Re the Defence Motion to Terminate Proceedings, para. 39 (May 26, 2004).

253. *Id.*

254. *Id.*

255. Prosecutor v. Milosevic, Case No. IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, para. 68 (Sept. 22, 2004) (noting that the decision “does not deprive him of his right to speak either by giving evidence, examining and re-examining witnesses as permitted by the Chamber, selecting and submitting documentary evidence, and making final submissions on the evidence”).

256. Milosevic v. Prosecutor, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, para. 7 (Nov. 1, 2004).

257. *Parren v. State*, 523 A.2d 597, 599 (Md. 1987).

258. See Trial Tr. at 32348:2–3 (Sept. 1, 2004), Prosecutor v. Milosevic, Case No. IT-02-54-T, (Milosevic: “I do not accept any decrease of that right or any renouncing of that

mutinous situation appears to substantiate the theory propounded by the U.S. Supreme Court in *Faretta v. California* that as “unwanted counsel ‘represents’ the defendant only through a tenuous and unacceptable legal fiction,” in this situation “counsel is not an assistant, but a master.”²⁵⁹ Ironically, this theory was concurrently recognized by the Trial Chamber as “the classic statement of the right to self-representation.”²⁶⁰

4.1.1: Proportionality

While the *Milosevic* Appeals Chamber upheld the Trial Chamber’s decision to assign counsel, it acknowledged that the Trial Chamber had, by relegating Milosevic to a “visibly second-tier role in the trial,” sharply restricted the Accused’s “ability to participate in the conduct of his case in any way.”²⁶¹ The Appeals Chamber reprimanded the Trial Chamber for not recognizing that restrictions on the pro se right “must be limited to the minimum extent necessary to protect the Tribunal’s interest in assuring a reasonably expeditious trial.”²⁶² This failure, it felt, was “a fundamental error of law.”²⁶³

Various jurisdictions utilize a “basic proportionality principle” in considering limitations on fundamental rights, which is that “any restriction of a fundamental right must be in service of ‘a sufficiently important objective,’ and must ‘impair the right . . . no more than is necessary to accomplish the objective.’”²⁶⁴ The ICTY has noted that “[a] measure in public international law is proportional only when it is (1) suitable, (2) necessary and when (3) its degree and scope remain in a reasonable rela-

right altogether.”); *Id.* at 32441:8–12 (Sept. 7, 2004) (Milosevic: “I actually have no intention of exercising any rights as Mr. Kay’s assistant. I’m not going to accept that, exercising my right to defence in that way, that is to say depending on your mercy, that you are just giving me crumbs of that right and in that way I am going to exercise my right to defence. So I ask you that you return my right of defence to me . . .”).

259. *Faretta v. California*, 422 U.S. 806, 820–21 (1975).

260. *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Reasons for Decision on Assignment of Counsel, para. 45 (Sept. 22, 2004).

261. *Milosevic v. Prosecutor*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, para. 16 (Nov. 1, 2004).

262. *Milosevic v. Prosecutor*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, para. 17 (Nov. 1, 2004).

263. *Id.*

264. *Id.* (quoting *de Freitas v. Permanent Sec’y of Ministry of Agric., Fisheries, Lands and Housing*, [1998] 1 A.C. 69 (P.C.) (U.K.) (citing Zimbabwean, South African, and Canadian cases)).

tionship to the envisaged target.”²⁶⁵ The U.N. HRC has similarly observed that restrictions on the right to freedom of movement, for example, “must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.”²⁶⁶ The ECtHR has also held that “there must be a reasonable relationship of proportionality between the means employed and the aim pursued.”²⁶⁷

According to this principle, Assigned Counsel may “do as little as needed to ensure judicial economy and an orderly courtroom” should the defendant object to counsel’s assistance.²⁶⁸ This was acknowledged by Judge Antonetti in a dissenting opinion in *Seselj*,²⁶⁹ which was handed down between the decisions of the Trial Chamber and the Appeals Chamber in *Milosevic*. In *Seselj*, it was felt that standby counsel should only take over the defense from the Accused at trial “in exceptional circumstances . . . should the Trial Chamber find, following a warning, that the Accused is engaging in disruptive conduct or conduct requiring his removal from the courtroom under Rule 80(B).”²⁷⁰

The Appeals Chamber found the significant curtailment of Milosevic’s role in his own defense to be disproportionate in light of the Accused’s

265. Prosecutor v. Limaj, Case No. IT-03-66-AR65, Decision on Fatmir Limaj’s Request for Provisional Release, para. 13 (Oct. 31, 2003), available at <http://www.un.org/icty/limaj/appeal/decision-e/031031-3.htm>.

266. U.N. Int’l Human Rights Instruments, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 176, para. 14, U.N. Doc. HRI/GEN/1/Rev.6 (May 12, 2003). The HRC also stated that “[t]he application of restrictions in any individual case must . . . meet the test of necessity and the requirements of proportionality.” *Id.* para. 16.

267. *Chassagnou v. France*, 1999-III Eur. Ct. H.R. 21, 53. The *Chassagnou* court also held that only “indisputable imperatives” can justify restrictions on a right protected by the ECHR, and even then only if the restrictions are a “necessary” and “proportionate” means of advancing the state objective. *Id.* paras. 112–13; see also *Croissant v. F.R.G.*, 237 Eur. Ct. H.R. (ser. A) 20, 43 (1992) (Messrs. Frowein, Weitzel, Schermers & Mrs. Liddy, dissenting) (noting that while the appointment of a third defence counsel was appropriate in the light of “the public interest to ensure the proper running of the trial,” his active intervention in the trial was “neither necessary nor required”).

268. Joshua L. Howard, *Hybrid Representation and Standby Counsel: Let’s Clear the Air for the Attorneys of South Carolina*, 52 S.C. L. REV. 851, 873 (2001).

269. Prosecutor v. Seselj, Case No. IT-03-67-PT, Decision on the Accused’s Motion to Re-Examine the Decision to Assign Standby Counsel, Opinion Dissidente du Judge Antonetti, para. 9 (Mar. 1, 2005) (noting “[I]l convient de garder en mémoire que la mesure d’ingérence doit être nécessaire et proportionnée au but légitime”) [“[I]t is advisable to remember that the measurement of interference must be necessary and proportionate to the legitimate goal”] (translation by *Brooklyn Journal of International Law*)).

270. Prosecutor v. Seselj, IT-03-67-PT, Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Seselj with His Defence, para. 30 (May 9, 2003).

vigorous two-day opening statement without interruption or apparent difficulty and a lack of evidence that Milosevic's condition was permanent or that he had suffered from any health problems since late July.²⁷¹ On these bases, the Appeals Chamber ordered that the practical impact of the assignment of counsel should be minimized "except to the extent required by the interests of justice."²⁷² The regime put in place thereafter was to be rooted, therefore, "in the default presumption that, when he [wa]s physically capable of doing so, Milosevic [would] take the lead in presenting his case."²⁷³ The captancy of the ship had reverted to the Accused.

Nevertheless, the Trial Chamber was entrusted with the discretion to "steer a careful course" between allowing the Accused to take the lead and safeguarding "the Tribunal's basic interest in a reasonably expeditious resolution of the cases before it."²⁷⁴ Crucially, the trial could continue in the event Milosevic was temporarily incapable of participating.²⁷⁵ If Milosevic elected not to continue to act as counsel, became belligerent or uncooperative, or proved incapable of conducting even part of the defense, the Trial Chamber could direct Assigned Counsel to proceed with the representation.²⁷⁶

Indeed, this very situation occurred when, during the presentation of the evidence of defense witness Kosta Bulatovic in April 2005, the Accused was unable to attend court through illness.²⁷⁷ The Trial Chamber decided nevertheless to hear the remainder of the evidence, noting, "[i]f the decision of the Appeals Chamber is authoritative for anything, it seems to us that it authorises the completion of a witness's testimony in the temporary absence of the accused."²⁷⁸ Thus, while Milosevic stood at

271. *Milosevic v. Prosecutor*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, para. 18 (Nov. 1, 2004) (footnote omitted).

272. *Id.* para. 19.

273. *Id.*

274. *Id.*

275. *Id.* para. 20.

276. *See Commonwealth v. Africa*, 353 A.2d 855, 864 (Pa. 1976).

277. The witness initially gave evidence on April 14, 2005. Trial Tr. at 38503, *Prosecutor v. Milosevic*, Case No. IT-02-54-T, available at <http://www.un.org/icty/transe54/050414IT.htm>. He was examined in chief and partially cross-examined before the case was adjourned over the weekend. When the trial resumed on April 19, the Accused was absent through illness. *Id.* at 38577:5-6, available at <http://www.un.org/icty/transe54/050419IT.htm>.

278. Trial Tr. at 38591:1-3 (Apr. 19, 2005), *Prosecutor v. Milosevic*, Case No. IT-02-54-T; *see also Milosevic*, Case No. IT-02-54-R77.4, Contempt Proceedings Against Kosta Bulatovic, Decision on Contempt of the Tribunal (May 13, 2005), available at <http://www.un.org/icty/milosevic/trialc/judgement/bulatovic.htm>; *Milosevic*, Case No.

the helm, the compass remained in the hands of the Trial Chamber. Significantly, the Trial Chamber was careful in this instance to ensure that a video recording and transcript of the proceedings should be delivered to the Accused to enable him to review the remainder of the evidence, and declared that, should it be necessary, Bulatovic could be recalled.²⁷⁹ This ensured that the Accused remained in control of the presentation of the evidence and of his defense strategy. The Trial Chamber thereafter consistently concerned itself with these interests of the Accused, adjourning the proceedings when Milosevic could not attend due to ill health.²⁸⁰ Thus, the dignity and autonomy of the Accused were essentially preserved.

4.1.2: Dignity and Autonomy

Dignity and autonomy were first recognized in *Faretta* to be essential factors of the pro se right: "The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage."²⁸¹ Supplying a defense to the accused does not sufficiently protect the individual's autonomy; rather, the defense must be the individual's own. In order to preserve the *Faretta* right to proceed pro se, it is crucial that the accused retains final authority over significant decisions.²⁸² In *McKaskle v. Wiggins*, the U.S. Supreme Court held that counsel must not unduly interfere with the perception that the accused is acting as lead counsel.²⁸³ Thus, counsel "must generally respect" the defendant's preference to proceed "solo,"²⁸⁴ and a defendant may not be "forced to sub-

IT-02-54-A-R77.4, Decision on Interlocutory Appeal on Kosta Bulatovic Contempt Proceedings (Aug. 29, 2005), available at <http://www.un.org/icty/milosevic/appeal/judgement/bul-cj050829e.htm>.

279. Trial Tr. at 38591:5-8 (Apr. 19, 2005), Prosecutor v. Milosevic, Case No. IT-02-54-T.

280. See, e.g., *id.* at 46635 (Nov. 16, 2005), available at <http://www.un.org/icty/transe54/051116IT.htm>. Milosevic indicated, "I cannot call the next witness. I don't feel well, and I can't go on sitting here, and I want to say that I am opposed to any hearing in my absence." *Id.* at lines 9-11. The evidence of Lieutenant Colonel Zlatko Odak had just been completed. *Id.* The trial was adjourned until the Accused was once again fit to attend trial. Arguably this caution was strengthened by the contempt proceedings that resulted from Kosta Bulatovic's refusal to give evidence in the absence of the Accused.

281. *Faretta v. California*, 422 U.S. 806, 834 (1975).

282. *McKaskle v. Wiggins*, 465 U.S. 168, 178.

283. *Id.*

284. *Id.* at 188; see also *Parren v. State*, 523 A.2d 597, 599 (Md. 1987).

mit to counsel's unwanted control."²⁸⁵ This "may mitigate his distrust both of the criminal justice system and of his counsel" while safeguarding his dignity and enlarging his freedom of choice.²⁸⁶

It must not be forgotten, of course, that the assistance of counsel is considered vital to due process,²⁸⁷ and particularly so in adversarial systems.²⁸⁸ The recognition of these two interests of the accused—"full representation" and self-representation—as autonomous entities leads to a conflict "between preservation of the reliability of the judicial process and protection of the dignity of the defendant,"²⁸⁹ as it appears that "each right can only be exercised at the expense of the other."²⁹⁰

The possibility of assigning advisory,²⁹¹ standby,²⁹² or hybrid counsel²⁹³ mitigates this apparent mutual exclusivity and ensures that both the

285. Welcom, *supra* note 29, at 582.

286. *Id.* at 585.

287. Colquitt, *supra* note 36, at 98–99.

288. See Daniel D. Ntanda Nsereko, *Ethical Obligations of Counsel in Criminal Proceedings: Representing an Unwilling Client*, 12 CRIM. L.F. 487, 488 (2001) ("Vital as representation is to the litigant's assertion for his rights before the courts and other adjudicative bodies, it is particularly indispensable in an adversarial as opposed to an inquisitorial system of justice.").

289. Welcom, *supra* note 29, at 581.

290. Mark D. Ridley, Note, *The Right to Defend Pro Se: Faretta v. California and Beyond*, 40 ALB. L. REV. 423, 432 (1976) (footnote omitted).

291. Some courts use the terms "advisory counsel," "standby counsel," and "hybrid representation" interchangeably. *United States v. Singleton*, 107 F.3d 1091, 1097 n.2 (4th Cir. 1997). *But see, e.g., Locks v. Sumner*, 703 F.2d 403, 407 & n.3 (9th Cir. 1983) (discussing use of and distinctions between the terms "standby counsel," "advisory counsel," and "co-counsel"). "Advisory counsel" do not participate in trial proceedings while "standby counsel" may be expected to assume the defense if the defendant is not able to continue. *Id.*

292. Some courts have indicated that standby counsel serves the dual purposes of providing a "safety net" in ensuring a fair trial and of eliminating delays. Anne Bowen Poulin, *The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System*, 75 N.Y.U. L. REV. 676, 707 (2000) (citing *United States v. Bertoli*, 994 F.2d 1002, 1018–19 (3d Cir. 1993); *State v. Ortisi*, 706 A.2d 300, 308–09 (N.J. Super. Ct. App. Div. 1998)). Standby Counsel can participate in the trial only to the extent that they do not usurp actual control or interfere with the perception of control. *Id.*

293. Standby counsel are not normally permitted to actively represent the defendant. See *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984). The *McKaskle* Court stated that:

[T]he *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury. . . . If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak *instead* of the defendant on any matter of importance, the *Faretta* right is eroded.

interests of justice and those of the defendant are duly protected.²⁹⁴ Assigned Counsel in *Milosevic* essentially functioned as “hybrid” counsel, as they shared the role of defense counsel with the Accused. This constituted a “co-counsel” model²⁹⁵ which involved actual assistance in the trial proceedings. Thus, the Accused simultaneously exercised his rights to counsel and to represent himself, consistent with the nature of hybrid representation.²⁹⁶

4.2: Hybrid Representation and *Milosevic*

The hybrid model was the most suitable for the *Milosevic* case. Familiarity with the vast and countless facts, figures, locations, and witnesses made the Accused more suited to conducting certain aspects of his defense.²⁹⁷ This was particularly important as political and moral beliefs were central to the Accused’s defense.²⁹⁸ Hybrid representation allowed Milosevic to publicly conduct cross-examination and examination-in-chief while relinquishing to counsel those procedural and substantive tasks which required the legal skills at which they excel.²⁹⁹

Hybrid representation “is more likely to encourage efficiency and order than to promote chaos.”³⁰⁰ It also serves to preserve judicial neutrality.³⁰¹ This is because inexperienced pro se defendants often rely on judges for assistance in legal and procedural matters,³⁰² and hybrid representation

Id. (emphasis added). When standby counsel assume the role of lead counsel, the relationship has evolved into an inadvertent form of hybrid representation. This consists of “concurrent representation by both defendant and counsel.” *State v. Cornell*, 878 P.2d 1352, 1363 (Ariz. 1994) (en banc). Hybrid counsel participate in or assist in the preparation of such activities as opening statements, examination of witnesses and closing arguments. *See, e.g., Metcalf v. State*, 629 So.2d 558, 565 (Miss. 1993).

294. On the various benefits and inconveniences of these models, see Richard H. Chused, *Faretta and the Personal Defense: The Role of a Represented Defendant in Trial Tactics*, 65 CAL. L. REV. 636 (1977); Colquitt, *supra* note 36; Poulin, *supra* note 292; Marie Higgins Williams, *The Pro Se Criminal Defendant, Standby Counsel, and the Judge: A Proposal for Better-Defined Roles*, 71 U. COLO. L. REV. 789 (2000); Michael P. Erhard, Note, *The Pro Se Defendant’s Right to Counsel*, 41 U. CIN. L. REV. 927, 940 (1972); Welcom, *supra* note 29.

295. *Locks v. Sumner*, 703 F.2d 403, 407 (9th Cir. 1983).

296. Welcom, *supra* note 29, at 570.

297. *See U.S ex rel. Davis v. McMann*, 386 F.2d 611, 620 (2d Cir. 1967) (“[A] defendant who knows the facts of his case may indeed be better off defending himself without an attorney than with an inadequately prepared one.”).

298. *See Scharf, supra* note 169; *see also Erhard, supra* note 294, at 932.

299. *See Welcom, supra* note 29, at 573.

300. Colquitt, *supra* note 36, at 107.

301. *Id.* at 108.

302. Chused, *supra* note 294, at 653 n.73 (citation omitted).

can “protect[] the trial judge from the moral, if not legal, obligation to help the defendant,” thus allowing “the judge to remain a neutral arbitrator rather than . . . becom[ing] an active participant in the trial.”³⁰³ Furthermore, this also allows the victim, the prosecutor, and the witnesses to see the judge as impartial.³⁰⁴

Problems arise, however, from the ambiguity of the relationship between the hybrid counsel and the accused.³⁰⁵ Without a defined role, hybrid counsel are cast into “an uncomfortable twilight zone.”³⁰⁶ Normally holding a position of complete autonomy and control, counsel must allow the accused to feel in control.³⁰⁷ Thus, hybrid representation “poses a risk of clashing wills.”³⁰⁸ Moreover, while hybrid counsel are only supposed to assist when the accused so requests, well-intentioned co-counsel often cannot remain idle while the defendant makes mistakes.³⁰⁹ This ultimately could lead to the accused feeling “short-changed” or to believe that counsel is forcibly interfering with his case. This “undermines the appearance of fairness and places counsel in the untenable position of supporting a hostile pro se defendant.”³¹⁰

The Assigned Counsel in *Milosevic* overcame these obstacles, curbing their public role in trial proceedings to the disputation of procedural matters beyond the expertise of the pro se Accused. The Assigned Counsel comprehensively fulfilled their dual obligation to the Chamber and to the Accused through the filing of innumerable public and confidential written submissions on behalf of the Accused, and responding on his behalf and in his interests to those of the Office of the Prosecution, the Chambers and the Registry.³¹¹ It is a credit to the professionalism, patience, and sound judgment of Mr. Kay and Ms. Higgins that they fulfilled their

303. Welcom, *supra* note 29, at 584.

304. See Prosecutor v. Norman, Case No. SCSL-04-14-T, Decision on the Application of Samuel Hinga Norman for Self Representation Under Article 17(4)(d) of the Statute of the Special Court, para. 26 (June 8, 2004).

305. See Howard, *supra* note 268, at 859.

306. Poulin, *supra* note 292, at 676.

307. McKaskle v. Wiggins, 465 U.S. 168, 178 (1984).

308. Howard, *supra* note 268, at 861.

309. Williams, *supra* note 294, at 807.

310. Poulin, *supra* note 292, at 687.

311. The assignment of counsel “not only entail[s] obligations towards the client, but also implies that [counsel] represents the interest of the Tribunal to ensure that the Accused receives a fair trial.” Prosecutor v. Barayagwiza, Case No. ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw, para. 21 (Nov. 2, 2000); see also United States v. Swinney, 970 F.2d 494, 498–500 (8th Cir. 1992) (noting that the “contentious relationship” of the accused with counsel was not grounds for the withdrawal of the latter, given that the relationship of the accused with substitute counsel could be expected to be equally fractious).

duties without compromising the wishes of the Accused. Ultimately, Milosevic maintained full control over the witnesses called in his defense, and over his defense strategy.

In conclusion, regardless of the substantive deficiencies of the Trial Chamber decision, the Appeals Chamber must be commended for its application of the principle of proportionality to the manner in which the Assigned Counsel would function in trial proceedings. It is hoped that the application of the principle of non-intentional disruption to the right of self-representation, particularly in the domain of ill health, will be strictly circumscribed, and conducted in such a manner as to truly accord "full equality" to the minimum defense guarantees of the accused, as required by Article 21(4) of the ICTY Statute.