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A “Fair and Expeditious” Trial: A Reappraisal of Slobodan Milosevic’s Right to Self-Representation before the International Criminal Tribunal for the Former Yugoslavia

Constantinos Hotis*

Slobodan Milosevic elected to conduct his own defense in his initial appearance before the International Criminal Tribunal for the Former Yugoslavia (“ICTY” or “Tribunal”).¹ The Trial Chamber granted the request² and later reaffirmed the right to self-representation,³ explaining that the rights of the accused could not be “infringed” even in the interests of a “fair and expeditious trial.”⁴ It was careful to emphasize, however, that there may be certain “circumstances” when the appointment of counsel would be necessary.⁵

Circumstances clearly changed at the ICTY. The Trial Chamber frequently postponed its proceedings because poor cardiovascular health prevented Milosevic from directing his own defense even with a reduced working schedule. It responded by assigning Steven Kay and Gillian Higgins to assume control over Milosevic’s defense⁶ “in the interests of justice.”⁷ In reaching this decision, the Tribunal weighed competing interests and concluded that the need to

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¹ Milosevic stated: “I consider this Tribunal a false Tribunal and the indictment a false indictment. It is illegal being not appointed by the UN General Assembly, so I have no need to appoint counsel to [sic] illegal organ.” Transcript of Record at 2, *Prosecutor v Milosevic*, Case No IT-99-37-I (July 3, 2001).

² Id.

³ Transcript of Record at 14574, *Prosecutor v Milosevic*, Case No IT-99-37-I (Dec 18, 2002).

⁴ *Prosecutor v Milosevic*, Case No IT-02-54, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, ¶ 41 (Apr 4, 2003).

⁵ Id at ¶ 40.

⁶ *Prosecutor v Milosevic*, Case No IT-02-54-T, Order on the Modalities to Be Followed by Court Assigned Counsel (Sept 3, 2004).

⁷ Transcript of Record at 32358, *Prosecutor v Milosevic*, Case No IT-02-54 (Sept 2, 2004).

conduct a “fair and expeditious” trial superseded Milosevic’s right to self-representation.⁸

The decision to impose counsel on Milosevic was affirmed on appeal.⁹ The Appeals Chamber reasoned that assigning counsel ensured that the trial would close within a reasonable amount of time,¹⁰ but sharply criticized and reversed the modalities¹¹ of the order because they relegated Milosevic to a “visibly second-tier role in the trial.”¹²

Following the Tribunal’s order, defense witnesses declined to testify¹³ and Milosevic refused to cooperate.¹⁴ In light of these difficulties, Milosevic’s counsel requested to be relieved of their duties to avoid violating the code of ethics governing defense counsel at the ICTY. The Trial Chamber rejected their motion, maintaining that the “presence of assigned counsel is essential to ensure the fair and expeditious conduct of the proceedings.”¹⁵

This Development analyzes and critiques recent cases on Milosevic’s *in propria persona* defense. Contrary to some arguments that the assignment of counsel will aid the trial process,¹⁶ it contends that the ICTY cannot impose counsel because all of the reasons that it used to justify its ruling are inadequate. This Development specifically argues that the “fair and expeditious” rationale, with its emphasis on judicial management, does not legitimize the Tribunal’s decision to retract Milosevic’s right to self-representation. In fact, it is a poor

⁸ *Prosecutor v Milosevic*, Case No IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, ¶¶ 64–65 (Sept 22, 2004).

⁹ *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, ¶¶ 14–15 (Nov 1, 2004).

¹⁰ *Id.*

¹¹ The “modalities” of an order in ICTY jurisprudence refer to the details of the order. In other words, the “modalities” set out how the order will be put into effect.

¹² *Milosevic*, IT-02-54-AR73.7, Decision on Interlocutory Appeal at ¶ 16.

¹³ Transcript of Record at 32832–33, *Prosecutor v Milosevic*, Case No IT-02-54 (Sept 15, 2004).

¹⁴ *Id.* at 32843. Many of these defense witnesses refused to testify because they disagreed with the Trial Chamber’s decision to impose counsel. *Id.*

¹⁵ *Prosecutor v Milosevic*, Case No IT-02-54-T, Decision on Assigned Counsel’s Motion for Withdrawal, ¶ 26 (Dec 7, 2004). A motion for an interlocutory appeal on the issue was denied. *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). The President of the ICTY has affirmed this decision in *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).

¹⁶ Judith Armatta, *Justice, Not a Political Platform, for Milosevic*, Intl Herald Trib 6 (Oct 8, 2004). See Nina H.B. Jørgensen, *The Right of the Accused to Self-Representation before International Criminal Tribunals*, 98 Am J Ind L 711, 726 (2004) (arguing that the right to self-representation must be checked under certain circumstances before the *Milosevic* developments unfolded).

proxy for justice and may countervail any type of fairness that the ICTY wishes to achieve in its proceedings. This Development concludes that the Tribunal should formally sustain Milosevic's right to self-representation so as to bolster its own legitimacy and positively influence the acceptance of present and future international tribunals.

To these ends, the Development is divided into three parts. In the First Section, the Development will piece together and analyze the various rationales that the ICTY used to justify the imposition of counsel. There will be a corresponding focus on cases outside of the ICTY, particularly from other war crimes tribunals such as the International Criminal Tribunal for Rwanda ("ICTR") and the Special Court for Sierra Leone ("SCSL"). These arguments will be critically assessed and ultimately rejected in the Second Section. The Third Section will question the adequacy and application of the "fair and expeditious" rationale to impose counsel on Milosevic. In a brief Conclusion, the reasons for rejecting the recent decisions from the ICTY will be reassessed.

I. "FAIR AND EXPEDITIOUS" AND OTHER REASONS FOR IMPOSING COUNSEL AT THE ICTY

The Appeals Chamber recognized that individuals before the ICTY have a presumptive right to self-representation.¹⁷ Article 21(4)(d) of the Statute for the International Criminal Tribunal for the Former Yugoslavia ("ICTY Statute") expressly provides that an individual has the right "to defend himself in person or through legal assistance of his own choosing."¹⁸ The Appeals Chamber concluded that the "binary opposition" in the statute between "in person" and "through legal assistance" indicates that the defendant has a right to lead a *pro se* defense if he chooses.¹⁹ To further substantiate its interpretation, the Tribunal inferred that the inclusion of the right of self-representation in Article 21 is significant because it is on a "structural par"²⁰ with other fundamental rights that Article 21 enumerates such as the rights to remain silent²¹ and to a speedy trial.²²

¹⁷ *Milosevic*, IT-02-54-AR73.7, Decision on Interlocutory Appeal at ¶ 11.

¹⁸ Statute for the International Criminal Tribunal for the Former Yugoslavia (2004) (hereinafter "ICTY Statute"), available online at <<http://www.un.org/icty/legaldoc-e/index.htm>> (visited Oct 27, 2005).

¹⁹ *Milosevic*, IT-02-54-AR73.7, Decision on Interlocutory Appeal at ¶ 11.

²⁰ *Id.*

²¹ ICTY Statute, art 21, § (4)(g) (cited in note 18).

²² *Id.* at art 21, § (4)(c).

The Appeals Chamber nevertheless asserted that the right to self-representation was not “categorically inviolable.”²³ It supported this conclusion by drawing from dicta in the United States Supreme Court case, *California v Faretta*, that propose that self-representation may be curtailed if a defendant deliberately obstructs judicial proceedings.²⁴ Citations to several civil law jurisdictions and common law countries in sexual offense cases prohibiting defendants from conducting their own defense further supported that proposition.²⁵ The Appeals Chamber also relied on a case from its own jurisdiction, *Prosecutor v Seselj*,²⁶ and a recent case from the SCSL, *Prosecutor v Norman*,²⁷ to demonstrate that there is precedent for limiting a defendant’s right to a *pro se* defense in war crimes tribunals.²⁸

Rule 80(B) of the ICTY’s Rules of Procedure and Evidence²⁹ also figured prominently in the opinion. The Appeals Chamber emphasized the significance of the location of the self-representation and “in his presence” rights within the same section of Article 21.³⁰ Since the “in his presence” requirement can be limited whenever circumstances threaten the management of the trial pursuant to Rule 80(B), the Tribunal deduced that a *pro se* defense may be retracted for similar reasons.³¹ It noted that any “substantial trial disruption” regardless of intent authorizes it to override a defendant’s right to a *pro se* defense.³² As

²³ *Milosevic*, IT-02-54-AR73.7, Decision on Interlocutory Appeal at ¶ 12.

²⁴ *Id.*, citing *Faretta v California*, 422 US 806, 834 n 46 (1975).

²⁵ *Id.* For a similar discussion, see *Milosevic*, IT-02-54-T, Reasons for Decision at ¶¶ 46–49.

²⁶ *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 (May 9, 2003). In imposing stand-by counsel on the accused, the Tribunal stated that the “right to self-representation . . . is not absolute.” *Id.* at ¶ 20.

²⁷ *Prosecutor v Norman*, Case No SCSL-04-14-T-125, Decision on the Application of Samuel Hinga Norman for Self-Representation under Article 17(4)(d) of the Statute of the Special Court (June 8, 2004). The Court held that one “has a right to self-representation, but that such a right, being qualified and not absolute, could, in the light of certain circumstances, be derogated should the interests of justice so dictate.” *Id.* at ¶ 30.

²⁸ *Milosevic*, IT-02-54-AR73.7, Decision on Interlocutory Appeal at ¶ 12.

²⁹ The ICTY’s Rules of Procedure and Evidence (2005) are available online at <<http://www.un.org/icty/legaldoc-e/index.htm>> (visited Oct 27, 2005). Rule 80(B) reads: “The Trial Chamber may 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 following a warning that such conduct may warrant the removal of the accused from the courtroom.”

³⁰ *Milosevic*, IT-02-54-AR73.7, Decision on Interlocutory Appeal at ¶ 13.

³¹ *Id.*

³² *Id.* at ¶ 14.

Milosevic's poor health qualified as a disruption, the Appeals Chamber found adequate grounds to curtail Milosevic's *pro se* defense.³³

The Trial Chamber likewise evaluated the rights of the accused against the Tribunal's obligation to efficiently manage cases. While the Trial Chamber predicated its analysis on various cases,³⁴ Articles 20³⁵ and 21³⁶ of the ICTY Statute were the cornerstones of its decision.³⁷ In its interpretation, the purpose of Article 21 is to provide a "fair" trial to the accused.³⁸ The rights to defend "in person" and "through legal assistance" in Article 21(4)(d) are methods that guarantee fairness as they facilitate and develop the defendant's case.³⁹ Any interference with this process perpetrates a "miscarriage of justice" that requires a judicial remedy.⁴⁰ The Trial Chamber therefore considered that it had the authority to assign counsel because Milosevic's decision to lead a *pro se* defense

³³ Milosevic's health problems resulted in the loss of sixty-six days over the course of two years during the prosecution's case-in-chief. Even during periods of relatively good health, the court schedule was reduced to allow Milosevic to recuperate per doctors' orders. Following the close of the prosecution's case on February 25, 2004, the start of the defense's case was repeatedly postponed. Milosevic began delivering his opening statement on August 31, 2004—over six months after the close of the Prosecution's case. *Id.* at ¶¶ 4–5.

³⁴ Like the Appeals Chamber, it relied on *Prosecutor v Norman* and *Prosecutor v Seselj, Milosevic*, IT-02-54-T, Reasons for Decision at ¶¶ 39, 41. In addition, the Trial Chambers drew support from *Prosecutor v Barayagwiza*, Case No ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw, ¶ 27 (Nov 2, 2000) in which the Trial Chamber refused defense counsel's request to be withdrawn from the case, and *Croissant v Germany*, 237 Eur Ct HR (ser A) at ¶ 32 (1992), available online at <<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695613&portal=hbkm&source=externalbydocnumber&table=1132746FF1FE2A468ACCBCD1763D4D8149>> (visited Oct 27, 2005) in which the European Court for Human Rights validated the imposition of a third counsel over the accused's objection. *Milosevic*, IT-02-54-T, Reasons for Decision at ¶¶ 40, 43.

³⁵ "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."

³⁶ "4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality . . . (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."

³⁷ This reflexive approach to interpreting the ICTY Statute is a characteristic of ICTY jurisprudence. See, for example, *Prosecutor v Tadic*, Case No IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (Aug 10, 1995). The Tribunal stated that it would balance the right to a fair and public trial against the rights of witnesses to protection "within the context of its own unique legal framework." *Id.* at ¶ 27.

³⁸ *Milosevic*, IT-02-54-T, Reasons for Decision at ¶ 29.

³⁹ *Id.* at ¶ 32.

⁴⁰ *Id.* at ¶ 33.

had interfered with the procedural and substantive fairness of the proceeding and would have continued to do so if left unchecked.⁴¹

Both chambers differed on the modalities of their respective orders imposing counsel. The Appeals Chamber maintained that the Trial Chamber's order⁴² violated the "proportionality principle" because it ignored the relative stability of Milosevic's health.⁴³ Based on this evidence, the Appeals Chamber called for a "working regime that minimizes the practical impact of the formal assignment of counsel" that allows defense counsel to exercise greater control only when Milosevic cannot actively participate at trial.⁴⁴ The Trial Chamber subsequently upheld these modalities, insisting that counsel could serve the interests of their client without violating any ICTY procedures even though it knew that cooperation from Milosevic would not be forthcoming.⁴⁵

The ICTY struck a balance between two competing interests: self-representation and a "fair and expeditious" trial. In sum, the ICTY legitimized its decision because it believed its responsibility to conduct "fair and expeditious" trials was its "fundamental duty."⁴⁶ Milosevic's otherwise valid right to proceed *pro se* yielded to this "fundamental duty" because it adversely impacted judicial efficiency.⁴⁷

The emphasis on "fair and expeditious" trials appears to be a *leitmotiv* of ICTY jurisprudence. In its decision to appoint standby defense counsel, the *Seselj* tribunal argued that "the Tribunal has a legitimate interest in ensuring that the trial proceeds in a timely manner without interruptions, adjournments or disruptions."⁴⁸ The *Kunarac* tribunal decided that "the Chambers possess an inherent power to control the proceedings in such a way as to ensure that justice

⁴¹ Id at ¶¶ 32–34.

⁴² According to the Trial Chamber, Milosevic could "continue to participate actively in the conduct of his case" and even appoint counsel if he wished. *Milosevic*, IT-02-54-T, Order on the Modalities at ¶¶ 2–3. The Trial Chamber carefully enumerated the specific duties that the defense counsel must perform, which included the duty to "act throughout in the best interests of the Accused." Id at ¶ 1.

⁴³ *Milosevic*, IT-02-54-AR73.7, Decision on Interlocutory Appeal at ¶¶ 17–18.

⁴⁴ Id at ¶ 19.

⁴⁵ *Milosevic*, IT-02-54-T, Decision on Assigned Counsel's Motion at ¶¶ 17–26.

⁴⁶ *Milosevic*, IT-02-54-T, Reasons for Decision at ¶ 65.

⁴⁷ Commentators writing before the imposition of counsel on Milosevic seem to agree with the result. See, for example, Salvatore Zappalà, *Human Rights in International Criminal Proceedings* 64 (Oxford 2003) ("Notwithstanding the difficulties arising out of such a scenario, the cooperation of an accused should never be considered a condition for the trial to proceed. . . . Assigning a lawyer to the accused when the interests of justice so require may be the best way to reconcile the interests of justice with the right of the accused to a fair trial."); Jørgensen, 98 Am J Intl L at 726 (cited in note 16).

⁴⁸ *Seselj*, IT-03-67-PT at ¶ 21.

is done and to deal with conduct which interferes with the Tribunal's administration of justice."⁴⁹ The *Delalic* tribunal took notice of its obligation to "control its proceedings in such a way as to ensure that justice is done and, particularly in relation to matters of practice, that the trial proceeds fairly and expeditiously" when it held that the counsel could not be withdrawn just days before the case was to go to trial.⁵⁰

Like the ICTY, the ICTR and the SCSL have understood fairness in terms of judicial economy and management. The *Barayagwiza* tribunal denied a defense counsel motion to be withdrawn from a case by arguing that its decision ensured that the "Accused receives a fair trial."⁵¹ "The aim," the tribunal explained, "is to obtain efficient representation and adversarial proceedings."⁵² Judge Gunawardana forcefully argued in a concurring opinion that Article 20(4)'s focus on the "interest of justice" in the statute for the ICTR gives the tribunal an "inherent power to control its own proceedings."⁵³ The *Norman* tribunal from the SCSL refused the defendant's last-minute motion for self-representation, contending that the "duty" of the court is "to protect the integrity of the proceedings before [it] and to ensure that the administration of justice is not brought into disrepute."⁵⁴

The "fair and expeditious" rationale has become a popular judicial standard at international war crimes tribunals.⁵⁵ It allows them to retract certain well-established rights if they substantially interfere with overall fairness. The *Milosevic* case and issues surrounding self-representation are simply its most recent manifestation.

⁴⁹ *Prosecutor v Kunarac*, Case No IT-96-23/IT-96-23/1, Decision on the Request of the Accused Radomir Kovac to Allow Mr. Milan Vujin to Appear as Co-Counsel Acting Pro Bono, ¶ 9 (Mar 14, 2000).

⁵⁰ *Prosecutor v Delalic*, Case No IT-96-21, Order on the Motion to Withdraw as Counsel Due to Conflict [sic] of Interest, ¶ 8 (June 24, 1999).

⁵¹ *Barayagwiza*, ICTR-97-19-T at ¶ 21.

⁵² *Id.*

⁵³ *Id.* at ¶ 9 (Gunawardana concurring).

⁵⁴ *Norman*, SCSL-04-14-T-125 at ¶ 28.

⁵⁵ It remains to be seen how the Iraqi Special Tribunal will try defendants in its jurisdiction. Like its international war tribunal counterparts, it has a mandate to conduct "fair and expeditious" proceedings. The Statute for the Iraqi Special Tribunal (2005), art 21, § (b), available online at <<http://www.iraq-ist.org/en/about/sec8.htm>> (visited Oct 27, 2005). It may therefore approach the same issues in a similar manner.

II. SELF-REPRESENTATION AND MILOSEVIC UNDER THE ICTY AND INTERNATIONAL LAW

In Article 21, one of the “minimum guarantees” that the ICTY Statute offers to a defendant is the right to “defend himself in person or through legal assistance of his own choosing.” Under the Vienna Convention on the Law of Treaties,⁵⁶ a plain reading of this statute reveals that the defendant has a choice to either represent himself or seek the assistance of counsel at trial.⁵⁷

The ICTY failed to consider the large amount of international law codifying the right as fundamental.⁵⁸ The statutes for the SCSL,⁵⁹ the ICTR,⁶⁰ and the Rome Statute for the International Criminal Court⁶¹ all recognize the right. The International Covenant on Civil and Political Rights (“ICCPR”),⁶² the European Convention on Human Rights and Fundamental Freedoms (“ECHRFF”),⁶³ and the American Convention on Human Rights⁶⁴ contain similar provisions. In *Michael & Brian Hill v Spain*, the United Nations Human Rights Committee held that Spain had violated the plaintiff’s right to self-representation pursuant to Article 14(3)(d) of the ICCPR by appointing counsel

⁵⁶ (1969), art 31, § (1), 1155 UN Treaty Ser 331, 340 (1980). Article 31(1) reads: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” The ICTY has used the Vienna Convention before in its interpretation of the ICTY Statute and Rules of Procedure and Evidence. See *Milosevic*, IT-02-54-T, Reasons for Decision at ¶ 31; *Tadic*, IT-94-1 at ¶ 18.

⁵⁷ But see *Seselj*, IT-03-67-PT at ¶ 29 (arguing that “[i]t would be a misunderstanding of the word ‘or’ in the phrase ‘to defend himself in person or through legal assistance of his own choosing’ to conclude that self-representation excludes the appointment of counsel to assist the Accused or vice versa”).

⁵⁸ Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke J Comp & Intl L 235, 283 (1993). Bassiouni later argues, however, that “in the best interest of justice and in the interest of adequate and effective representation of the accused, the court should disallow self-representation and appoint professional counsel.” *Id.*

⁵⁹ Art 17, § 4(d), available online at <<http://www.sc-sl.org/scsl-statute.html>> (visited Oct 27, 2005).

⁶⁰ Art 20, § 4(d), available online at <www.ictcr.org/ENGLISH/basicdocs/statute.html> (visited Oct 27, 2005).

⁶¹ (1998), art 67, § 1(d), 37 ILM 999, 1040 (recognizing this right subject to reservations of Article 63).

⁶² (1966), art 14, § 3(d), 999 UN Treaty Ser 171,177 (1976).

⁶³ (1950), art 6, § 3(d), 213 UN Treaty Ser 222, 228 (1955).

⁶⁴ (1969), art 8, § (2)(d), 1144 UN Treaty Ser 123, 147 (1979).

even though such a right does not exist under Spanish law.⁶⁵ The right to self-representation is also valued in common law jurisdictions.⁶⁶

While there are restrictions on self-representation in international law,⁶⁷ there is no evidence of its conditionality in the ICTY Statute. Without definitive statutory evidence that could legitimize its order, the Appeals Chamber rationalized its decision by emphasizing that self-representation is limited in sexual abuse cases even in common law countries where the right is more widely recognized.⁶⁸ The reason for this particular limitation is to prevent alleged abusers from cross-examining and possibly intimidating their victims. While Milosevic is charged with heinous crimes, the same intimidation risk would not be present as he is not charged with crimes against specific individuals. Additionally, it is unlikely that he would call victims of genocide when conducting his defense. Any threat of intimidation or psychological harm that would otherwise justify a restriction thus does not exist.

The Appeal Chamber's reliance on Rule 80(B) is similarly unconvincing. While the "in his presence" and "to defend himself in person" provisions are located in the same clause, Rule 80(B) only limits the former. There is no corresponding rule in the ICTY's Rules of Procedure and Evidence that allows the Tribunal to impose counsel on the defendant. Reasoning that the Tribunal has this power because Rule 80(B) restricts the "in his presence" right, which happens to be in the "to defend himself in person" clause, stretches the boundaries of responsible statutory interpretation. Had the drafters intended to restrict the *pro se* defense right in some way, they would have presumably included a provision that stipulates this check and the circumstances when it should be applied.

Furthermore, the text of Article 21 section (4)(d) only envisions instances when the defendant may be "assigned," not imposed, counsel "where the interests of justice so require."⁶⁹ To understand these interests, Rule 45 of the Rules of Procedure and Evidence is instructive. Instances "[w]hen the interests of justice so demand" are exclusively related to cases in which

⁶⁵ *Hill v Spain* in United Nations, *Report of the Human Rights Committee*, UN GAOR 52d Sess, UN Doc A/52/40 5,18 (1999).

⁶⁶ See, for example, *Faretta*, 422 US at 819; *R v Woodward*, (1944) KB 118, 118. But see *Martinez v California Court of Appeal*, 528 US 152, 163 (2000) (holding that the right to a *pro se* defense will not be granted on appeal). The right to self-representation is not as well respected in civil law jurisdictions. Jørgensen, 98 Am J Intl L at 714–15 (cited in note 16).

⁶⁷ Jørgensen, 98 Am J Intl L at 715–18 (cited in note 16).

⁶⁸ *Milosevic*, IT-02-54-AR73.7, Decision on Interlocutory Appeal at ¶ 12.

⁶⁹ The relevant provision is cited in note 36.

defendants “lack the means to remunerate such counsel.”⁷⁰ The Directive on Assignment of Defence Counsel (“Directive”)⁷¹ lends further support to this understanding of Rule 80(B). According to Article 6, defendants who cannot afford counsel “shall be entitled to assignment of counsel.” Articles 7 and 8 set out criteria for determining if the defendant financially qualifies. This right to counsel when financially eligible must be understood, however, “[w]ithout prejudice to the right of the Accused to conduct his own defense.”⁷² Nowhere in the Directive is there a provision that allows the Tribunal to impose counsel through its own fiat. The text of the Directive therefore forecloses any reading that the “interests of justice” give the Tribunal free reign to assign counsel to defendants who wish to retain exclusive control over their cases.⁷³

Tribunal case law does not resolve the issue of self-representation in *Milosevic*. In *Seselj*, the Tribunal found that the right to self-representation “is not absolute.”⁷⁴ This decision rested partly on evidence that the accused had acted in an “obstructionist fashion” and had a “need for legal assistance.”⁷⁵ In *Milosevic*, the numerous delays have been health-related and the Tribunal never intimated that Milosevic required legal assistance. Furthermore, the *Seselj* tribunal held that “standby counsel” could be imposed on defendants.⁷⁶ Its holding should thus not be expanded to include the imposition of primary counsel on defendants in a war crimes tribunal. *Barayagwiza* is also inapplicable because in that case, defense counsel filed a motion to be withdrawn following the defendant’s request.⁷⁷ Viewing this motion “as an attempt to obstruct judicial proceedings,” the ICTR rejected it because there were no “most exceptional circumstances” that normally would have justified removal pursuant to the prevailing rules of procedure.⁷⁸ *Milosevic* involves the assignment of counsel on a defendant who exercised a procedural right that arises under the ICTY Statute. *Barayagwiza*’s holding is therefore irrelevant because both the facts and issue in *Milosevic* are different.

⁷⁰ Rules of Procedure and Evidence, rule 45 (cited in note 29).

⁷¹ The Directive on Assignment of Defence Counsel (2004) is available online at <<http://www.un.org/icty/legaldoc-e/index.htm>> (visited Oct 27, 2005).

⁷² *Id.* at art 5.

⁷³ But see *Seselj*, IT-03-67-PT at ¶ 21; *Barayagwiza*, ICTR-97-19-7-T at ¶ 9 (Gunawardana concurring) (both cases have a much broader interpretation of the “interests of justice”).

⁷⁴ *Seselj*, IT-03-67-PT at ¶ 20.

⁷⁵ *Id.* at ¶ 23.

⁷⁶ *Id.* at ¶ 30. See also *McKaskle v Wiggins*, 465 US 168, 177–78 (1984) (holding that standby counsel may be imposed on a defendant if the defendant “preserve[s] actual control over the case” and the jury is made aware that the defendant is in control).

⁷⁷ *Barayagwiza*, ICTR-97-19-7-T at ¶¶ 2–3.

⁷⁸ *Id.* at ¶¶ 20–25.

In a more recent case from the SCSL, the defendant moved to conduct his defense *pro se* on the first day of the trial. The Trial Chamber declined the request "in the interests of justice" and held it could not grant such a last-minute motion.⁷⁹ In addition to the delay of the request, a primary consideration in its decision was that the defendant was jointly tried with two other individuals.⁸⁰ If the request for a *pro se* defense were granted, it feared that inevitable delays would have jeopardized the other defendants and the presentation of their cases. The same danger of injustice or delay does not exist in Milosevic's case as he has consistently asserted his right to a *pro se* defense and is being tried alone. Finally in *Croissant*, the European Court of Human Rights held that counsel could be imposed on the defendant without violating Articles 3 and 6 of the ECHRFF.⁸¹ Unlike the defendant in *Croissant*, Milosevic has not sought legal assistance, has asserted his right to a *pro se* defense, and has objected to the assignment of any counsel. *Croissant* is thus only tangentially relevant to Milosevic's case at best.

American jurisprudence is also only of limited applicability. The Supreme Court held that a defendant has the right to defend himself *pro se* under the Sixth Amendment.⁸² Under certain circumstances, a court may qualify the right if the defendant "deliberately engages in serious and obstructionist misconduct."⁸³ While the Tribunal entertained arguments from the prosecution that Milosevic failed to take his medication to delay the trial,⁸⁴ it never found that Milosevic intentionally delayed the proceedings. Given *Faretta's* focus on purposeful obstruction, the Tribunal claimed that unintentional interference, including physical and mental ailments, may also justify the imposition of counsel.⁸⁵ Milosevic's condition, however, is not "permanent" and has improved.⁸⁶ Unlike

⁷⁹ *Norman*, SCSL-04-14-T-125 at ¶ 30.

⁸⁰ *Id* at ¶ 19.

⁸¹ *Croissant*, 237 Eur Ct HR (ser A) at ¶ 32.

⁸² *Faretta*, 422 US at 819.

⁸³ *Id* at 834 n 46, citing *Illinois v Allen*, 397 US 337 (1970) (Brennan concurring).

⁸⁴ *Milosevic*, IT-02-54-T, Reasons for Decision at ¶ 67. The Appeals Chamber has declined to review this issue because it is reluctant to make fact-finding conclusions on interlocutory appeal. *Milosevic*, IT-02-54-AR73.7, Decision on Interlocutory Appeal at n 55.

⁸⁵ *Milosevic*, IT-02-54-AR73.7, Decision on Interlocutory Appeal at ¶ 14, citing *Savage v Estelle*, 924 F2d 1459, 1464 (9th Cir 1990) (holding that a defendant with a speech impediment could not represent himself because he was not "able and willing to abide by rules of procedure and courtroom protocol" under *McKaskle*); *Johnson v State*, 17 P3d 1008, 1017 (Nev 2001) (holding that a mentally unstable defendant could not defend himself because the trial would have further deteriorated his condition).

⁸⁶ *Milosevic*, IT-02-54-AR73.7, Decision on Interlocutory Appeal at ¶ 18. During the summer of 2004, the Tribunal assigned doctors to monitor Milosevic's health. Their prognosis was that there was a "risk" that the trial would exacerbate Milosevic's health which would lead to further delays. *Id* at ¶ 6. However, his condition has since improved. *Id* at ¶18. No new evidence was presented

the stutter in *Savage* and the serious mental condition in *Johnson*, Milosevic's health does not threaten to interfere with the trial indefinitely. Accordingly there is no need or justification to assign counsel in the present case.⁸⁷

III. THE UNSUITABILITY OF "FAIR AND EXPEDITIOUS" IN ICTY JURISPRUDENCE

With statutory interpretation and case law incapable of supporting an imposition of counsel, the "fair and expeditious" standard is the only remaining argument that could validate the restriction of the *pro se* defense. According to ICTY jurisprudence, delays are the very antithesis of fairness because they encumber adjudication. The United States Supreme Court presented a similar argument, writing that "[e]ven at the trial level . . . the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer."⁸⁸

Such a concern cannot be easily dismissed.⁸⁹ Milosevic's health has already delayed the prosecution's case and has resulted in a six month gap between the prosecutor's and the accused's cases-in-chief. If such delays continue, the defense will possibly lose the requisite focus and momentum to serve as a meaningful rebuttal to the prosecution's charges. Milosevic's illness may also render him an ineffective advocate on his own behalf at trial. Both scenarios would be unfair because Milosevic could neither present nor receive the best possible defense to which he is entitled.

The order also serves a greater range of interests. As the *Norman* tribunal noted: the "role of Defence Counsel . . . is meant to serve, not only the interests of his client, but also those of the Court and overall interests of justice."⁹⁰ The imposition of counsel could logically serve two distinct interests. First, it can vindicate the rights and memories of the victims and assuage the pain of the survivors by ensuring that Milosevic and other alleged participants in the

that the trial would have the same adverse effect on Milosevic's health. Therefore, Milosevic's condition does not pose the serious risk of delaying the trial both in terms of its potential and magnitude.

⁸⁷ *Martinez* also offers no support because Milosevic has not attempted to assert the right to a *pro se* defense on appeal. 528 US at 163 (holding that *Faretta* does not guarantee the right to self-representation on appeal).

⁸⁸ *Id.* at 162.

⁸⁹ One of the major criticisms of the ICTY and the ICTR is that the pace of the proceedings is slow. See Daryl A. Mundis, *Improving the Operation and Functioning of the International Criminal Tribunals*, 94 *Am J Int'l L* 759 (2000).

⁹⁰ *Norman*, SCSL-04-14-T-125 at ¶ 23.

genocide are found guilty.⁹¹ Second, the ICTY's decision guarantees that the progress of the trial remains steady regardless of the defendant's ignorance, illness, or, for that matter, recalcitrance. In this way, the ICTY makes it clear that it is fully capable of asserting its judicial authority.⁹²

The evidence and practical considerations nevertheless militate against the ICTY's decision. For one, Milosevic's health has stabilized. The modalities of the order reflect this change and tacitly acknowledge his ability to conduct his own defense. In addition, the events following the order contradict the "fair and expeditious" rationale because they have only protracted the trial.⁹³ Last, further delays undermining the Tribunal's attempt to achieve the incantation of "fair and expeditious" justice may occur. While the modalities of the order could be interpreted as a means of baiting Milosevic into some form of cooperation, the assignment of counsel may only encourage his obstinacy and may continue to postpone proceedings. This is the opposite, albeit foreseeable,⁹⁴ consequence of the ICTY's decision. These observations should force the ICTY to reconsider the order and ultimately reverse it.

On a more theoretical level, judicial management should not justify the circumscription of the *pro se* defense right. Such a consideration is of immense importance to any court or tribunal, but an exclusive adherence to it interferes with the ICTY's adversarial system.⁹⁵ In this framework, both sides are

⁹¹ For an excellent discussion of the psychological effect of the prosecution of war criminals and human rights violators on victims and their families, see Jamie O'Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console their Victims?*, 46 Harv Intl L J 295 (2005).

⁹² For the importance and dangers of relying on the Tribunal's "inherent powers," see generally, Gabriël Oosthuizen, *Of Misconduct, Contempt, False Testimony, Rule Mutations and Other Interesting Powers: A Popporri of Questions and Notes*, in Richard May, et al, eds, *Essays on ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald* 387 (Kluwer Law International 2001). See also, generally, Michèle Buteau and Gabriël Oosthuizen, *When the Statute and Rules Are Silent: The Inherent Powers of the Tribunal*, in May, et al, eds, *Essays on ICTY Procedure and Evidence* 65.

⁹³ See notes 13–15. In rejecting defense counsel's motion to be withdrawn, the Trial Chamber facilely resolved the conflict by maintaining that the counsel could still meet their professional obligations without their client's cooperation. See *Milosevic*, IT-02-54-T, Decision on Assigned Counsel's Motion at ¶¶ 8–10; 22–24. Their reasoning is questionable and the details of the client and counsel relationship remain unresolved. The limits of this Development do not allow for further discussion.

⁹⁴ See Jørgensen, 98 Am J Intl L at 724 (cited in note 16) (foreseeing the practical limitations of imposing counsel over the defendant's objections).

⁹⁵ The Trial Chamber regarded its proceedings as "essentially adversarial." *Milosevic*, IT-02-54, Reasons for Decision on Prosecution Motion at ¶ 26. The Trial Chamber in *Tadic* conceded that the ICTY Statute "adopts a largely common law approach to its proceedings" with a few exceptions. *Tadic*, IT-94-1 at ¶ 22. Safferling notes that the ICTY "is mainly patterned on the [sic] adversarial structures." Christoph J.M. Safferling, *Towards an International Criminal Procedure* 218 (Oxford 2001). The SCSL has remarked that it operates within an "adversarial context" where it is "to remain the arbiter and not a pro-active participant in the proceedings." *Norman*, SCSL-04-14-

responsible for presenting their own cases without extensive interference from the presiding judge. There is thus a resultant freedom, indeed responsibility, to present arguments and facts however they wish to further their respective interests. Imposing counsel on a defendant who wishes to conduct his proceedings as he chooses substantially interferes with this defining characteristic of the adversarial system.⁹⁶

Expeditious and fair proceedings are a poor proxy for “justice” and “fairness.” While judicial economy is a legitimate interest, adjudication cannot be subjected exclusively to this goal. The obligation of the ICTY is to try defendants to approximate the truth of the allegations against them. Such a pursuit demands time and a faithful adherence to the rules to certify that all of the relevant facts and arguments, as presented by the parties, are understood and considered. The gravity of the offenses in question and the possibly severe penalties imposed further confirm the importance and need for just proceedings.

By focusing on accuracy and upholding substantive and procedural rights, the ICTY would increase its legitimacy in the court of public opinion. Present and future generations will not exclusively judge the ICTY on the relative speed with which it administers justice and the number of convictions that it secures. The focus will also be on how justice is rendered.⁹⁷ Given the skepticism that has characterized the international community’s reception of the ICTY, a reaffirmation of the Tribunal’s respect for the dictates of its statutes, rules of procedure, and international law will send a symbolic message that it is serious about responsibly administering justice. Trampling on its law by curtailing the right to self-representation would certainly convey the opposite image. This is not to suggest that the ICTY should adjudicate to win the most points in a public approval poll. However, some sensitivity to how it is perceived and judged in its most publicized case will benefit the ICTY as it continues to try war criminals from the former Yugoslavia.

Such a self-conscious administration of justice will have benefits outside of the ICTY. War crimes tribunals such as ICTR, SCSL, and the Iraqi Special Tribunal will also be better received as they fulfill their respective mandates. The nascent International Criminal Court would similarly benefit from a well-

T-125 at ¶ 26. At the ICTR, the purpose of the trial is likewise “to obtain efficient representation and adversarial proceedings.” *Barayagwiza*, ICTR-97-19-7-T at ¶ 21.

⁹⁶ *Milosevic*, IT-02-54, Reasons for Decision on Prosecution Motion at ¶ 24.

⁹⁷ Mark S. Ellis, *The Evolution of Defense Counsel Appearing before the International Criminal Tribunal for the Former Yugoslavia*, 37 *New Eng L Rev* 949, 949 (2003); Mark S. Ellis, *Achieving Justice before the International War Crimes Tribunal: Challenges for the Defense Counsel*, 7 *Duke J Comp & Int L* 519, 536 (1997); John E. Ackerman, *Assignment of Defence Counsel at the ICTY*, in May, et al, eds, *Essays on ICTY Procedure and Evidence* 167, 175–76 (cited in note 92); Sanja Kutnjak Ivkovic, *Justice by the International Criminal Tribunal for the Former Yugoslavia*, 37 *Stan J Int L* 255, 327 (2001).

established and well-respected ICTY and its precedents. Through its practices and holdings, the ICTY could effectively serve as a model for these institutions and influence the creation of an "international criminal procedure."⁹⁸ Before assuming such an influential role, the Tribunal must be certain to respect its laws by first recognizing that it has no authority to impose counsel on Milosevic.

IV. CONCLUSION

The Tribunal recognized the impact of its decision, stating that the "assignment of counsel against the wishes of the accused is a developing area of the law both in national and international jurisdictions."⁹⁹ This Development argues that the ICTY has weighed in on the wrong side of the issue. There is no statutory or precedential support that validates the decision. Moreover, the "fair and expeditious" rationale cannot justify its holding because it reduces justice to a judicial afterthought. The ICTY should therefore reconsider and ultimately reject its decision to appoint counsel for Milosevic. In addition to reinforcing the ICTY's own authority, a reversal would show that present and future international tribunals will faithfully execute their missions to try defendants regardless of delays caused by illness or posturing from ousted political leaders.

⁹⁸ Safferling, *Towards an International Criminal Procedure* at 366 (cited in note 95).

⁹⁹ *Milosevic*, IT-02-54-T, Decision on Assigned Counsel's Motion at ¶ 22.



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