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Criminal Tribunals - Whose Case is it
Anyway? The Right of an Accused to
Defend Himself in Person before
International Criminal Courts

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Fair Trials and the International Criminal Tribunals - Whose Case is it Anyway? The Right of an Accused to Defend Himself in Person before International Criminal Courts*

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Abstract

This article argues that the right to self-representation should be upheld in international criminal trials.

KEYWORDS: fair trials, international criminal tribunals, the right to defend oneself in person

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Introduction

There has been much discussion in legal journals and the media in recent times over whether Defendants and in particular Heads of State should have the right to defend themselves in international criminal trials.¹ The issue arises in part because of the complexity and scale of these trials which involve detailed analysis of matters of fact and law that inevitably result in lengthy proceedings.² The time spent on a trial causes great frustration to many observers as they desire a quick resolution of the matters that have involved conflict, war and terror and in respect of which there will have been widespread condemnation. These observers feel that a litigant in person adds to the lengthiness of the proceedings, and that trials would be more efficiently and effectively conducted if in the hands of lawyers.

These are also trials that are televised and widely reported in the international press and attract much publicity for the parties. The publicity extends to both the Prosecution case³ and the Defence case⁴ and may result in allegations and evidence being reported that is not welcome by all. The rationale behind holding international criminal trials to deal with serious violations of international humanitarian law is that they are considered to be one of the measures by which peace may be maintained and enforced in regions of conflict.⁵ Reporting by the media is viewed as a means by which all may see that justice is being done and that the harm suffered by victims is recognized. However, the publicity given to the evidence is also highly likely to inspire the original hatreds and grievances that caused the conflict in the first place. If an Accused represents

¹ The Washington Post 29 August 2004 *Making a Spectacle of Himself – Milosevic Wants a Stage, Not the Right to Provide His Own Defense* by Prof. Michael P. Scharf. This is perhaps the most extreme of the articles.

² The Milosevic case *The Prosecutor v. Slobodan Milosevic IT-02-54-T* started on 12 February 2002 and was only terminated on 14 March 2006 upon the death of the Accused. The Prosecution case took 300 days. The Accused was allotted exactly the same period taken by the Prosecution in the presentation of its evidence. The trial consisted of three joined indictments concerning the conflicts in Kosovo (1999), Croatia (1991-1995) and Bosnia 1992-1995 arising out of the dissolution of the former Yugoslavia – *Decision on Prosecution Interlocutory appeal from Refusal to Order Joinder* IT-99-37-AR37; IT-01-50-AR73; IT-01-51-AR73 dated 1 February 2002.

³ The Times 3 June 2005 *“The Road to death at Srebrenica”*. This article concerns a video shown to a witness by the Prosecution in the Milosevic trial. The video contained scenes in which men alleged to be from Srebrenica were shot by paramilitaries. The video was not made an exhibit but the proceedings were public and broadcast on television after which some of the men in the footage were arrested.

⁴ It is alleged in The Washington Post article of 29 August 2004 that Slobodan Milosevic was able to obtain much political publicity by conducting his own defence which benefits his party.

⁵ The International Criminal Tribunal for the Former Yugoslavia was established by Security Council Resolution 827 on 25 May 1993 in the exercise of its powers under Chapter VII of its Charter. This includes provisions to take measures to enforce and maintain peace in regions where there is a danger of a conflict spreading. It does not provide for the establishment of a Court specifically. Article 20.4 of the Statute for the ICTY provides for public trials.

himself and at the time still retains a public profile, the publicity may be to his advantage which will be a result not intended or desired by those prosecuting.

The right of an accused to represent himself is set down in the Statute of the International Criminal Tribunal for the Former Yugoslavia:⁶

Article 21(4)(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;

This is one of several fair trial rights expressed as minimum guarantees to an accused in the determination of charges against him.⁷ It is present in the Statutes of the other International Tribunals: The International Criminal Court;⁸ The International Criminal Tribunal for Rwanda;⁹ The Iraqi Special Tribunal;¹⁰ and The Sierra Leone Special Court.¹¹ It was also a right held by the Accused in the Nuremburg Trials of World War II.¹² International Conventions also contain the identical right.¹³

In the leading decision on the subject before international tribunals, the ICTY Appeals Chamber in the trial of Slobodan Milosvevic¹⁴ emphasized that the right of self-representation is a fundamental right:

Both the Trial Chamber and the Prosecutor recognize that defendants have a presumptive right to represent themselves before the Tribunal. It is not hard to see why. Article 21 of the ICTY Statute, which tracks Article 14 of the International Convention on Civil and Political Rights, recognizes that a defendant is entitled to a basic set of “minimum guarantees, in full equality,” including the right “to defend himself in person or through legal assistance of his own choosing.” This is a straightforward proposition: given the text’s binary opposition between

⁶ U.N. Security Council Resolution 827 of 25 May 1993.

⁷ ICTY Statute Article 21.4.

⁸ Article 67(1)(d) Statute of the International Criminal Court. This right is subject to Article 63(2), which deals with disruptive conduct by the accused in the courtroom.

⁹ Article 20.4(d) Statute of the International Criminal Tribunal for Rwanda.

¹⁰ Article 20 Statute of the Iraqi Special Tribunal issued 10 December 2003.

¹¹ Article 17.4(d) Statute of the Sierra Leone Special Court.

¹² Article 16 (d) Constitution of the International Military Tribunal.

¹³ Article 6(3) of the European Convention on Human Rights; Article 14(d) of the International Covenant on Civil and Political Rights; Article 8(2)(d) of the American Convention on Human Rights.

¹⁴ IT-02-54 AR73.7.

representation “through legal assistance” and representation “in person,” the Appeals Chamber sees no reasonable way to interpret Article 21 except as a guarantee of the right to self-representation. Nor should this right be taken lightly. The drafters of the Statute clearly viewed the right to self-representation as an indispensable cornerstone of justice, placing it on a structural par with defendants’ right to remain silent, to confront the witnesses against them, to a speedy trial, and even to demand a court-appointed attorney if they cannot afford one themselves. In the words of the United States Supreme Court in Faretta v. California, which was recognized by the Trial Chamber as the classic statement of the right to self-representation, an “unwanted counsel ‘represents’ the defendant only through a tenuous and unacceptable legal fiction,” such that “counsel is not an assistant, but a master.” Defendants before this Tribunal, then, have the presumptive right to represent themselves notwithstanding a Trial Chamber’s judgment that they would be better off if represented by counsel.

The case cited of *Faretta v. California*¹⁵ produced the following conclusion by the Supreme Court:

The question before us now is whether a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so. Stated another way, the question is whether a State may constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense. It is not an easy question, but we have concluded that a State may not constitutionally do so.

The right to represent oneself is nevertheless not unlimited, as the Appeals Chamber in the *Milosevic* trial noted, again drawing upon the case of *Farretta v. California*:

While this right to self-representation is indisputable, jurisdictions around the world recognize that it is not categorically inviolable. In Faretta itself, the United States Supreme Court noted that, since “right of self-representation is not a license to abuse the dignity of the courtroom,” a trial judge “may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct.” Recognizing this same basic contingency of the right, England, Scotland, Canada, New Zealand, and Australia have all developed the principle that, in order to protect vulnerable witnesses from trauma, courts may severely restrict the right of defendants to represent themselves in sexual assault

¹⁵ 422 U.S. 806.

trials. Scotland goes so far as to forbid such defendants from conducting any portion of their defenses in person.

Any restrictions on the right of an accused to represent himself, must, according to the Appeals Chamber in *Milosevic*, be invoked only as a proportionate response to a problem caused by the exercise of the right.

The United Nations Human Rights Committee has observed that any such restrictions ...must be proportionate to the interest to be protected.

Restriction of the right to self-representation

(a) Obstructionist conduct

Obstructionist behaviour may restrict the right of self-representation. In another case at the ICTY involving the prominent Serbian politician Vojislav Seselj, who was the leader of the Serb Radical Party and awaiting his trial upon serious crimes, the pre-trial Judge after several outbursts from the Accused ordered the appointment of a stand-by counsel. This was because he was “*increasingly demonstrating a tendency to act in an obstructionist fashion, while at the same time revealing a need for legal assistance.*”¹⁶ Counsel will be called upon to take-over the conduct of the defence if the behaviour of that Accused reaches a level whereby it obstructs the administration of justice in the court room. The Appeals Chamber in *Milosevic* referred to the following passage from *Faretta*: *self-representation is not a license to abuse the dignity of the courtroom ...may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct.*

In *The Prosecutor v. Barayagwiza*,¹⁷ a trial at the International Criminal Tribunal for Rwanda, the Defendant chose not to attend his trial and, crucially did not assert his right to self-representation. The issue was whether the Trial Chamber would allow defence counsel to withdraw from the case in circumstances where the Accused had instructed defence counsel not to represent him in any respect during the trial. The Trial Chamber held that the Accused was boycotting the trial, his actions were obstructing the course of justice, and that defence counsel should not withdraw even if the Accused failed to attend proceedings. The duty of the Court being to ensure a fair trial took place and in respect of which they needed counsel to be present and participate in the proceedings on behalf of the Accused even if he failed to engage in them.

¹⁶ The Prosecutor v. Vojislav Seselj, “*Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Seselj With His Defence*”, 9 May 2003.

¹⁷ The Prosecutor v. Barayagwiza, Case No. ICTR-97-19-T, “*Decision on Defence Counsel Motion to Withdraw*”, 2 November 2000.

The Special Court for Sierra Leone faced the issue when one of the Accused Hinga Norman,¹⁸ informed the Court that he wished to dispense with his counsel and represent himself on the date set for the start of his trial. The Court did not allow that request and distinguished the Milosevic trial by stating:

The distinction between these two cases is that whilst Milosevic is being tried separately and alone, Hinga Norman is being tried with two accused persons. In addition to this, whilst Milosevic indicated his option for self-representation from the outset as soon as he was transferred to the custody of the ICTY, Hinga Norman did this only on the 3rd June 2004, in fact, on the date which had, with his consent, been fixed for the commencement of his trial, to invoke and exercise this same statutory right.

The proportionality aspect of this decision is open to question, as lawyers for the Accused would only be conducting the case in accordance with the instructions given to them by him. The Court made its decision from the point of view that the fairness of the trial itself was of greater concern than the exercise of the rights available to an Accused:

*Permitting self representation regardless of the consequences, threatens to divert criminal trials from their clearly defined purpose of providing a fair and reliable determination of guilt or innocence...a defendant could not waive his right to a fair trial, and that this right implicated not only the interests of the accused but also the institutional interests of the judicial system.*¹⁹

(b) Health

Defence Counsel was eventually assigned to the Accused in the *Milosevic* case due to the interruptions and delays caused to the trial by his ill-health.²⁰ Originally, in order to ensure the fairness of the trial and to assist the Accused in countering the expertise of the Prosecution, the Trial Chamber had appointed three *Amici Curiae* with a brief to advance the interests of the defence in the

¹⁸ The Prosecutor v. Norman et al., 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*”, 8 June 2004.

¹⁹ The Prosecutor v. Norman et al., 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*”, 8 June 2004.

²⁰ 3 September 2004; *Reasons for Decision on Assignment of Defence Counsel* dated 22 September 2004. By this time 66 hearing days had been lost due to illness and the start of the defence case delayed by 3 months. Although some of the days lost were as a result of commonly occurring ailments such as influenza.

trial.²¹ This was an appointment based upon the complexities of the trial rather than connected with the Accused's health. It preserved the right of self-representation whilst providing a service to the Accused and Trial Chamber to ensure defence issues were dealt with adequately. After initially expressing opposition, Milosevic in fact used the services of the amici curiae on a regular basis, relying upon their questioning of witnesses, issues of law raised by them on his behalf and giving a *carte blanche* to them to deal with all the legal filings in the proceedings.²²

Slobodan Milosevic had a pre-existing genuine medical condition²³ and the exertions caused by representing himself in his trial were said by doctors to have exacerbated that condition to such an extent that he was at risk of serious illness.²⁴ In response to the bouts of illness the Trial Chamber had already reduced the hours spent in court each week and scheduled periods of rest.²⁵ The Trial Chamber had considered the issue of self-representation on several occasions prior to the assignment, the Prosecution always having been opposed to him exercising the right and had continued their opposition when his illness delayed the proceedings.²⁶ Although the Trial Chamber had upheld the right throughout the Prosecution case, after several attempts to start the Defence case had failed, it decided the time had come to assign counsel. The Appeals Chamber in *Milosevic* expressed the reasons thus:²⁷

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 work — the late nights, the

²¹ *Order to the Registrar to Appoint Amicus Curiae* dated 28 August 2001. This was also followed by further orders to deal with situations as they arose in the trial see *Order on Amici Curiae Request Concerning their future Engagement and Procedural Directions under Rule 98 bis* dated 27 June 2003. The original Amicus Curiae were Steven Kay QC, Branislav Tapuskovic, Michail Wladimiroff. After the discharge of the latter two, Steven Kay QC was joined by an Amica Curiae, Gillian Higgins.

²² By the end of the proceedings there had been over 2,800 filings, see particularly *The Prosecutor v. Milosevic*, "Amici Curiae Motion for Judgement of Acquittal Pursuant to Rule 98bis", 3 March 2004.

²³ High blood pressure and cardiovascular disease.

²⁴ *Reasons for Decision on Assignment of Defence Counsel* dated 22 September 2004.

²⁵ 30 September 2003, HHJ May: "In the light of the medical recommendations, from next Monday, the court will sit three days a week. The appearance of the Accused next Monday will of course depend on the medical recommendation as to his state of health."

²⁶ See for example, oral ruling by the Trial Chamber dated 18 December 2002 Tr.p.14574; *Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel* dated 4 April 2003.

²⁷ *Decision on Interlocutory Appeal of the Trial Chambers Decision on the Assignment of Defence Counsel* dated 1 November 2004 IT-02-54-AR73.7.

stressful cross-examinations, the courtroom confrontations — unless the hearing schedule is reduced to one day a week, or even one day a month? Must the Trial Chamber be forced to choose between setting that defendant free and allowing the case to grind to an effective halt? In the Appeals Chamber's view, to ask that question is to answer it.

The Accused always had the option to appoint his own counsel to conduct his case with him or for him. He also had the option of using counsel assigned by the Court to conduct his case with him or for him. The purpose of the order was to protect his health and prevent the burdens of the case from rendering him seriously ill.

Again, after initially opposing the existence of the Court assigned counsel in the trial, the informal relationship that had been in existence between the parties when counsel had acted as the amicus curiae was restored and in the latter stages of the trial the court assigned counsel were even directly instructed by Milosevic. However, throughout, it was his case and its success or failure would have remained with him. What was important to him and his supporters, was that on the face of it, it was his trial.