Self-Representation before the International Criminal Court:
Safeguarding the Interests of Justice and Protecting Human Rights

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1. Introduction

At the beginning of the new millennium, two cases before the International Criminal Tribunal for the former Yugoslavia (ICTY) — namely, Milosević and Šešelj — sparked an outburst of scholarly comment regarding the right to self-representation within international criminal tribunals. The right that serves as an instrument of a fair trial suddenly became an interesting topic of research for at least two reasons. The first one relates to the status of the persons who invoked such right. Slobodan Milošević was the president of Yugoslavia during the war in early 1990’s, while Vojislav Šešelj was arguably one of the most prominent political figures of that time, and most certainly, the second in the line — together with Milošević — who was tried before the ICTY. The second reason was the existence of a certain ambiguity in interpretation, since there was no jurisprudence concerning this matter before international criminal tribunals.

The right to self-representation, as a segment of the right to a fair trial, is guaranteed under Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR). However, due to the plurality of legal systems and different approaches to the interpretation of legal instruments, the general consensus for the scope of interpretation and limitations is lacking in this area of law. In the civil law society where criminal proceedings are of the inquisitorial character, the practice is to avoid self-representation in serious cases. Criteria for the ‘seriousness’ varies from county to country, though the requirements are more stringent than in a common-law tradition. Setting out such limitations does not necessarily violate the right to self-representation. The European Court of Human Rights (ECtHR) voiced this opinion, maintaining that the right to self-representation is not absolute. The ECtHR spelled out certain constraints that do not infringe the right to a fair trial, laid down in Article 6(3) of the European Convention on Human Rights (ECHR). On the other hand, in the common law countries — where proceedings are adversarial — the right to self-representation is frequently exercised without exacting requirements.

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1 Arts 20–21 ICTYSt. are seen as a fair trial provisions. The right to self-representation is laid down in Art. 21(4)(d) ICTYSt. which reads:

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.

2 International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 16 December 1966, entry into force 23 March 1976 (hereafter ‘ICCPR’).


The rules that determine proceedings before the International Criminal Court (ICC) comprise both the inquisitorial and adversarial systems. Yet, indeed remotely, elements of the latter prevail. To that end, without neglecting the complexity of international criminal cases, the ICC should be more flexible when deciding upon the right of the accused to represent himself in person, contrary to the civil law tradition. It should strike a fair balance between the aspirations of the accused on the one hand, and the interests of justice on the other. Moreover, due to the large publicity which most cases at the ICC enjoy, the court should deliberate on this matter with a certain caution. Mainly, political leaders are those who are brought to justice in these cases and they tend to act in a disruptive manner so to challenge the authority of the court. By doing so, their goal is not to mount their defense, but rather to collect as many possible political points in their home countries. Without a proper reaction from the court, the courtroom could be easily turned into a political yard and the credibility of the whole ICC could be endangered.

Hence, this paper focuses on the following question: how can the ICC safeguard against an accused’s misuse of the right to self-representation, thus preserving his right to a fair trial, and why such safeguards are needed at the first place?

In this article I will tackle the research problem by using the legal-dogmatic approach. Accordingly, I will attempt to provide an accurate understanding on where the international law stands in this area of study. It should be noted that this paper is delimited to the purview of the ICC.

In furthering my argument, I will avail myself on the opinions of respectful scholars that hallmarked the discourse on this point. The existing scholarly work focuses mainly on the jurisprudence of the ICTY. By using the analogy, I will voice relevant thoughts and at the same time try to anticipate different scenarios in future proceedings before the ICC. I am going to examine both the Milošević and Šešelj cases with their interlocutory decisions, as the reasoning in those cases represents the cornerstone for future deliberations upon the right to self-representation before international criminal tribunals. Moreover, provisions from the international law opus relating to this matter will be analyzed accordingly.

The structure of the article is determined by its aim which is the analysis and application of the right to self-representation. In effect, the first part ponders on the two practical situations where the court is allowed to interfere with the defendant’s rights. If the accused is behaving in a disrupting manner or if the case is ‘highly’ complex, the court should restrain the exclusive self-representation. By acknowledging that the interference could be justifiable, I will then put forward in the following section three possible solutions for the court to react. So to speak, imposing a legal representative is not the only possibility, viz. representation in person could be still allowed, however, with particular modifications. In

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6 See 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, Milošević, (IT-02-54), Trial Chamber, 8 November 2002; the International Criminal Tribunal for the former Yugoslavia (ICTY) acknowledged the presence of both inquisitorial and adversarial proceedings, however with an opinion that adversarial are prevailing.
the last chapter I will question the incentive of the court's encroachment into the defendant's rights. I find the notion of justice essential in understanding this issue and therefore I will circle my argument around it. By way of conclusion, I will highlight circumstances and options for the court's justifiable interference and present the notion of justice — as a value that protects the legitimacy of the court's proceedings — in the way I see it.

2. **Threshold for Interference into the Rights of the Accused**

Generally speaking, exclusive self-representation is rare. The most common practice for the conduct of defense is to be left entirely to a counsel. The incentive for self-representation could be a lack of trust towards lawyers, or, for political leaders, more leeway to express their political aspirations and to attract more support for their political ideas. For instance, one of the opinions about Milošević’s appearance before the ICTY was that he did not want to defend himself from charges as much as he wanted to prove that the Serbs were true victims during the Yugoslavian war, and that he strived to bring the conflict to an end and not to incite more atrocities, as it was believed.7

This behavior amounts to what is classified as a disruption of the trial. The courtroom is not the place where political speeches are to be held. It is the place where one's guilt should be proven or his or her acquittal directed. Those individuals openly challenge the credibility of the court, make irrelevant theatrical speeches and browbeat witnesses.8 In cases where a lawyer is representing an accused, the judge would have the ability to expel him from the courtroom or disbar him and impose fines or prison time.9

This begs a question of what is the threshold for the court’s interference into the one's right to self-representation? According to the ICC Statute, the accused has the right to be represented in person or through legal assistance.10 Conditions for curtailing his rights are not specified in that body of law. The threshold is undoubtedly crossed where an accused deliberately bullies witnesses, obstructs or boycotts the trial or by any other means behaves in a way that could amount to

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7 Jørgensen, supra note 3, at 711.
9 Ibid.
10 Art. 67(1)(d) ICCSt, which reads:

In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused’s choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it.
the forfeit of his right entirely. However, putting aside the obvious, what are the instances that could lead to the forfeiture of the right to be represented in person?

One of the justifications for interfering in the defendant’s rights could be found in the complexity of international cases. The ICC is founded precisely because of the complexity of international crimes as such. Putting on trial former high-political or military leaders for war crimes represents one of the biggest challenges for international judiciary in our time. There are at least four reasons why cases before the ICC should be considered as complex.

Firstly, international criminal law, as a branch of international law, is a system of secondary norms with the main purpose to protect primary norms, viz. international humanitarian law. In national proceedings it is sufficient enough for a lawyer to be acquainted with knowledge of a specific field of law in order to represent clients. On the contrary, a defense counsel, in order to act before the ICC, should master not only international criminal law, but also humanitarian law, law on use of force and international procedural law at the very least.

Secondly, as afore mentioned, the nature of criminal proceedings could be categorized into two main traditions — inquisitorial and adversarial. The ICC represents mixture of both models, with a slight prevalence of the latter. Consequently, the ICC is characterized as a hybrid court with judges from both systems, thus representing challenge to even the most prominent international lawyers.

The third reason comes as a logical conclusion. Mass atrocities are often committed by a large group of men. Prosecuting those who are alleged to be perpetrators involves preparing numerous numbers of witnesses, examining a large gamut of evidence etc. Without a proper team of legal experts, this could be rather overwhelming.

And fourthly, mounting a defense should always include a visit to the actual crime scenes, so a clear picture about the crime can be produced. As the ICC is located in The Hague, crime scenes will be in most cases located in far-away countries where the knowledge of different languages will be required, i.e. only a group of international lawyers is suitable to conduct the preparation of the defense. Moreover, it should be born in mind that many (if not every) accused would be incarcerated during the investigation process. Consequently, it would be practically impossible for them to collect the evidence outside their detaining institution.

All of these reasons stipulate the complexity of international trials before the ICC. If taken to its fullest extent, the norm in the ICC Statute prescribing the right to self-representation would not have much of a sense. It is then up to the court to decide upon which cases are highly complex and so require presence of

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12 Scharf, supra note 8, at 38.
a defense counsel, and which ones are complex as well, but not to the point that could be considered as ‘high’ to impose a legal representative.

3. Modes of Representation before the International Criminal Court

To summarize the above section, it is clear that the ICC has the ability to interfere in the defendant’s rights and to appoint a counsel, when he or she is acting in a disruptive manner, or when the court considers a case highly complex. However, imposing a counsel upon an accused is not the only possibility for the court in such cases; the ICC can decide to allow self-representation with remote modifications to safeguard the interests of justice, and at the same time to preserve the defendant’s rights and interests.

A. The Role of the Amici Curiae

One of the options for the ICC is to appoint amici curiae in cases that require legal assistance, but not necessarily traditional legal representation. The study of Milošević’s case can indeed bring one closer to understanding the ancillary role of amici curiae to the court in interest of justice. Slobodan Milošević stated from the outset of his trial before the ICTY, that he wants to represent his defense in person, without any solicitation. The ICTY accepted that he has the right to self-representation, however, in order for a trial to be fair and the interests of justice to be fulfilled, the court appointed three amici curiae to assist the court in the proper determination of the case. 15 Amici curiae is not a legal counsel of an accused; it rather has an assisting role to the court by providing legal assistance to the defendant when he is devoid of such knowledge in due proceedings. An amici curiae in the course of trial is able to make proper submissions for the accused in the pretrial phase; secondly, he can make submissions and objections during the trial proceedings and cross-examine witnesses; thirdly, by drawing the court’s attention to any mitigating evidence he secures the interests of justice; and finally, by any other means amici curiae can act in order to protect the right to a fair trial. 16

An interesting issue arose during Milošević’s trial when one of the three assigned amici curiae lodged an appeal in favor of the accused. According to Rule 73 of the ICTY Rules of Procedure and Evidence, only ‘a party’ is able to bring an appeal. As explained above, amici curiae is an assistant to the trial chamber and not the representative of the accused. Conversely, he could not be regarded as ‘a party’ in terms of Rule 73. Nevertheless, the ICTY decided to consider the appeal. The line of reasoning goes to the very essence of confronting interests of the parties before the court. The ICTY maintained that the interest of the amici curiae and the accused are in alignment, and the appeal does nothing to infringe

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15 See Order Inviting Designation of Amicus Curiae, Milošević (IT-02-54), Trial Chamber, 30 August 2001.
16 Ibid., paras 6–7.
the rights of the defendant.\textsuperscript{17} As there is no confrontation of interests, the appeal of a 'non-party' has been taken into consideration.\textsuperscript{18}

B. Standby Counsel

Another possibility for the ICC to enable an accused to represent himself in person, in a situation where it is not perceivable that the defendant would be able to present his or her defense solely, is the assignment of a standby counsel. In the 
\vspace{-0.5cm}Šešelj\ case, the ICTY appointed a standby counsel to the defendant who was asserting his right to self-representation, and thus maintained that

For the purposes of these proceedings, the role of standby counsel is strictly defined as follows:

- to assist the Accused in the preparation of his case during the pre-trial phase whenever so requested by the Accused;

- to assist the Accused in the preparation and presentation of his case at trial whenever so requested by the Accused;

- to receive copies of all court documents, filings and disclosed materials that are received by or sent to the Accused;

- to be present in the courtroom during the proceedings;

- to be engaged actively in the substantive preparation of the case and to participate in the proceedings, in order always to be prepared to take over from the Accused at trial (see below);

- to address the Court whenever so requested by the Accused or the Chamber;

- to offer advice or make suggestions to the Accused as counsel sees fit, in particular on evidential and procedural issues;

- as a protective measure in the event of abusive conduct by the Accused, to put questions to witnesses, in particular sensitive or protected witnesses, on behalf of the Accused if so ordered by the Trial Chamber, without depriving the Accused of his right to control the content of the examination;

- in exceptional circumstances to take over the defense from the Accused at trial should the Trial Chamber find, following a warning, that the Ac-

\textsuperscript{17} Decision on Appeal by Amici Curiae, Milosević (IT-02-54-AR73.6), Appeals Chamber, 20 January 2004, paras.

\textsuperscript{18} See Separate Opinion of Judge Shahabuddeen, Milosević (IT-02-54-AR73.6), Appeals Chamber, 20 January 2004; judge Shahabuddeen held that ‘an amicus curiae is limited to his essential function as a friend of the court, as distinguished from being a friend of the accused.... [U]nder the system of the Tribunal, he is not legally competent to act as counsel for the accused, and he certainly is not an intervener.’
As we can see, a conspicuous difference between the standby counsel and *amici curie* is that the former is an assistant to the defendant, and the latter is only ensuring the right to a fair trial. The standby counsel is different to an appointed counsel of the accused. Unlike the regular defense lawyer, a standby counsel is more of an assistant than a legal representative of the defendant. The standby counsel should not raise issues to the court on his own initiative, while the regular defense lawyer solely mounts a defense. In a situation of regular legal representation, the defense counsel is in charge of making an argument before the court and the accused gives his advice, mainly relating to factual circumstances. On the contrary, in the example of a representation with a standby counsel, the accused is the one who is pulling strings and the lawyer is there only to give legal advices.  

C. Appointed Counsel

Notwithstanding the two possibilities to preserve the accused’s right to self-representation — assigning *amici curiae* or a standby counsel — in most cases before the ICC, the interests of justice will demand appointment of a counsel to the defendant, although he is asserting the right to be represented in person. An obvious example is a situation where the accused is mentally incompetent. He is fit to stand the trial, however he is unable to present his defense by himself. Furthermore, the ICC is vested with the authority to assign a counsel for the accused who severely disrupts the proceeding of the court, and is thus removed from the courtroom, or even, in cases of repeated misconduct, interdicted from attending the proceedings.

The main issue with the appointed counsel is the protection of best interest of the accused. In the Milošević case, both the accused and the assigned counsel appealed to the ICTY’s decision to appoint a legal representative, pointing out numerous arguments as to why their position was unworkable. Milošević asserted that he is unwilling to cooperate with his legal representative and that he insists on self-representation, while the appointed counsel claimed that in adversarial proceedings — like the ones before the ICTY — the assistance from the accused is paramount to mounting the defense, which was lacking in that case.

The prosecution responded in one manner by putting the issue into the context of forensic interests, stating that such cooperation is perfectly suitable to

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19 Decision on Prosecution’s Motion for Order Appointing Counsel, Sešelj (IT-03-67), 9 May 2003, para.30.
20 See Jørgensen, supra note 11, at 72.
21 See Rule 80(B) ICTY RPE.
22 Appeal against the Trial Chamber’s Decision on Assignment of Defense Counsel, Corrigendum, Milošević, (IT-02–54-AR73.7), 29 September 2004, para.66.
present the case in the best interest of the accused.\textsuperscript{24} It suggested that in the case of a conflict between the defendant and his representative, counsel’s judgment would prevail.\textsuperscript{25}

Taking into consideration all submitted remarks, the ICTY took a stand that the best interest of the defendant could be kept, though a legal representative is imposed upon him.\textsuperscript{26} The court furthermore stated that in a situation where the accused is unwilling to give instructions to his lawyer, where the conventional lawyer-client relationship is omitted, it is up to the counsel to act as he believes are the best interests of the accused, presenting the best possible defense for his client and at the same time keeping in mind the duty to ensure a fair trial.\textsuperscript{27} The ICTY concluded that this could be reasonably expected from an appointed counsel.

4. Interests of Justice

In the first section I have attempted to elucidate upon two practical situations where the ICC will be allowed to interfere with an accused’s right to self-representation, with a focus on the complexity of international cases. I strived to develop my argument in order to justify that interference and I have suggested three possible choices that the ICC may resort to when curtailing the rights of the accused. In this last section I shall give my impressions on the process of delivering such decisions. Why is the accused not exclusively entitled to choose upon his guaranteed rights? If he acts in a disruptive manner, why should that be a concern of the court as he, by doing so in the first place, considerably diminishes his chances to prove his innocence?

At this juncture I want to intersperse two empirical observations. First, in a situation where the accused has asserted his right to be represented in person, there is a conflict between his interests and the interests of justice. This could be seen as a rather paradoxical observation since the accused is presumed to be innocent during the course of trial\textsuperscript{28} and his interests should not be at variance with justice. Second, in the process of making a decision on the right to self-representation, the ICC should strike a fair balance between those two conflicted interests, thus issuing a just decision. Due to the limited space of this article, I am unfortunately unable to examine in detail both observations. However, a humble contribution will be given in the next few paragraphs.

As soon as I a permit myself to put the interests of justice into contemplation, and therewith assume the paramount role in preserving the court’s credibility, things get to be interesting. By way of example, both in the Milošević and Šešelj cases, the ICTY upheld the right to self-representation, however acknowledging that the right is not absolute. The ICTY set the groundwork for future proceed-

\textsuperscript{24} Jørgensen, supra note 11, at 74.
\textsuperscript{25} Ibid.
\textsuperscript{26} Decision on Assigned Counsel’s Motion for Withdrawal, Milošević (IT-02–54-T), Trial Chamber, 7 December 2004, para.19.
\textsuperscript{27} Ibid.
\textsuperscript{28} Art. 66 ICCSt.
ings by asserting that the decision will be dependent upon the interests of justice.\textsuperscript{29} Moreover, the ICTY provided us with two more perspectives, as it argued that the catchall phrase ‘the interests of justice’ in not only a ‘fundamental right of the Accused, but also a fundamental interest of the Tribunal related to its own legitimacy.’\textsuperscript{30} First, the ‘interests of justice’ is indeed ‘a fundamental right of the accused’. However, the right to a fair trial — which encompasses the right to self-representation — is clearly distinguishable from the ‘interests of justice’ as it is only a feature of such a notion. Second, and seemingly more important in furthering my argument, the court has the obligation to protect the interests of justice — including the set of defendant’s rights — as it represents the very essence in preserving the legitimacy of its proceedings.\textsuperscript{31}

The conclusion that follows is that the right to self-representation complements the right to counsel, and it should not be seen as a substitute for it.\textsuperscript{32} When an accused is asserting his right to be represented in person, the decision of the court is not only a matter of interest to the accused. The court must also protect the credibility and the legitimacy of its proceedings by promoting the best interests of justice. To that end, if deciding to allow it, the court must ensure that self-representation is adequate and effective.\textsuperscript{33}

By way of Slobodan Milošević’s example, a new perspective could be drawn on political leaders who are invoking their right to self-representation. Milošević presented himself as a single individual against a whole machinery of international lawyers and investigators in order to raise sympathy of the audience. Moreover, he used the latitude given in cross-examination to deliver political speeches in order to attract more people back home and finally, he repeatedly challenged the legitimacy of the ICTY by using his demagogy that could be appealing to the ordinary laymen.\textsuperscript{34} This facet should be also taken into consideration while deliberating upon one’s right to self-representation. Theoretically, it is not possible to anticipate that the accused — a high political leader — would behave in such a manner. However, most certainly this conduct represents a severe disruption to the proceedings and the court’s interference with the defendant’s rights is indeed justified. Again, the best interests of justice require such action.

Without understanding the importance of the value of justice, it would be rather difficult for me to grasp the process of balancing interests as an intrinsic part of delivering decisions pertaining to this matter. Traditionally, lawyers use the term ‘proportionality’ when analyzing on the relative weight of conflicting values.\textsuperscript{35} The task of striking a fair balance between the interests of the accused on

\textsuperscript{29} Decision on Prosecution’s Motion for Order Appointing Counsel, \textit{Šešelj} (IT-03-67), 9 May 2003, paras 20–21.
\textsuperscript{30} Ibid.
\textsuperscript{31} See Jørgensen, supra note 11, at 69.
\textsuperscript{33} Ibid
\textsuperscript{35} G. Noll, ‘Analogy at War: Proportionality, Equality and the Law of Targeting’, \textit{43 Netherlands Year-
the one side, and the interests of the justice on the other is a rather daunting one. Yet in doing so, the ICC should also acknowledge certain political incentives in cases where defendants are (former) political leaders, which adds even more weight to the already onerous process. Allowing the accused to represent himself in person is therefore a decision that could have far-reaching consequences for the entire credibility of the ICC.

Opting between exclusive self-representation, or, self-representation including *amici curiae* or standby counsel on the one hand, and imposing a legal counsel upon the accused on the other, undoubtedly requires a case-by-case approach. Perhaps a workable solution could be that the ICC should allow the defendant to represent himself — though he is incompetent and unqualified, however without an obstructionist agenda — by assigning *amici curiae* or a standby counsel as a safeguard to ensure adequate and effective representation. Nevertheless, this pattern should not be followed in every case since the incompetence of the accused could cause interruptions and adjournments that could gravely distort the court’s justice. In a case where the accused is misusing his rights, or in other key, disrupts the proceedings by expressing his political inclinations or by any other means, the ICC should impose a legal representative upon him. An accused’s disruption leads to the forfeiture of his guaranteed rights, in favor of justice. By way of example, the interests of justice outweigh the interests of the accused.

5. **Final Remarks**

What I have endeavored to do in this paper is, perhaps only to its slightest degree, to uncover the reasoning behind the ‘rareness’ of exclusive self-representation before international criminal tribunals. Providing an answer to the question that I have posed at the beginning of this article served me to stress the importance of balancing confronting principles in the entire international law. In doing so, firstly, I offered three possible solutions for the ICC in future proceedings where the accused is asserting his right to be represented in person. That said, I anticipate that the ICC will choose between assigning *amici curiae*, standby counsel or imposing a legal representative upon the accused in order to safeguard the interests of justice.

In the last section I have attempted to place the justice beyond the interests of the accused, as I firmly believe that such value is beyond a particular trial, and even a particular institution. I am of the opinion that the interests of justice straddle every decision made pertaining to the proceedings before any court. Grasping that notion will bring one closer to understanding why the interference of the court in one’s guaranteed rights is justified.

Quite often, we lawyers give ourselves the right, indeed selfishly, to couch justice exclusively in law. Quite often we are wrong. It is something more than that, and, having safeguards in order to promote the justice and the interests

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36 Jørgensen, supra note 3, at 726.
thereof, will maintain the ICC’s credibility and the legitimacy of its proceedings. The interests of justice are in-and-beyond the court, i.e. justice is intra-courtal and para-courtal.