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## Controlling the Wrath of Self-Representation: The ICTY's Crucial Trial of Radovan Karadžić

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## CONTROLLING THE WRATH OF SELF- REPRESENTATION: THE ICTY'S CRUCIAL TRIAL OF RADOVAN KARADŽIĆ

### I. INTRODUCTION

The brutalities of the Bosnian War are best narrated by someone who witnessed the worst of the atrocities.<sup>1</sup> Various concentration camps, such as Omarska, populated the Bosnian landscape, and “the screams of those being ‘interrogated’ by Serb camp guards determining who took part in the ‘Muslim rebellion’” echoed throughout the land.<sup>2</sup> Fear filled the air when “[t]he guards would call out their victim’s name, drag him out of the room and then beat him: with wooden batons, metal rods, rifle butts, knives, hammers, pipes filled with lead, and long lengths of thick industrial cable with metal affixed on both ends.”<sup>3</sup> One particular Muslim prisoner, Hamdo, spent a portion of his life “[p]acked in a filthy, lice-infested room in a two-story white garage with about 150 men.”<sup>4</sup> These prisoners begged for food, and when their once-a-day meal did arrive, the “jeering guards made Hamdo and the others run a gauntlet to the canteen to get it, pouring water on the tiles to make them slippery. Whoever fell got beaten or, sometimes, shot.”<sup>5</sup> The prison guards allowed the deplorable conditions to continually worsen with “feces foul[ing] the room.”<sup>6</sup> Guards “forced the prisoners to crawl on their knees, like animals, to pick up food while the guards peppered the ground with bullets.”<sup>7</sup>

Unfortunately, female victims did not escape the horrors of the concentration camps either, and some “spent their days crammed in the mining complex’s glass-walled restaurant” where guards would rape them.<sup>8</sup> In addition, the guards “forc[ed] the women to clean the blood from the walls” and “[i]f they didn’t cooperate, they’d join the corpses they saw on a daily basis being thrown over the hedges or stacked like cordwood on the grass.”<sup>9</sup>

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<sup>1</sup> See ELIZABETH NEUFFER, *THE KEY TO MY NEIGHBOR’S HOUSE: SEEKING JUSTICE IN BOSNIA AND RWANDA* (2006). Neuffer is a journalist who interviewed victims, perpetrators, judges, and war criminals and shares their experiences and what she witnessed in this novel. *Id.* at back cover. Neuffer follows her characters from the battlefield to the courtroom as they search for justice, catharsis, and reconciliation. *Id.*

<sup>2</sup> *Id.* at 40.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 41.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

Victims of the Bosnian War, such as Hamdo, have had a hard route to justice. The United Nations Security Council created the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) to attempt to establish accountability.<sup>10</sup> However, some defendants found ways to avoid or delay being held responsible by acting as their own counsel and adopting a defense strategy that involved disrupting the trial proceedings.<sup>11</sup> These disruptions caused embarrassment for the tribunal and delayed exposing those responsible for the crimes committed.

The ICTY must adjust its current framework for balancing its own interest of conducting an efficient trial against the defendant’s right to self-representation.<sup>12</sup> A change is needed to ensure that the courtroom cannot be used for a defendant’s own personal gain.<sup>13</sup> Moreover, the ICTY can accomplish a balance without impinging on the defendants’ right of self-representation.<sup>14</sup>

This Note reveals the deficiency of a proper mechanism at the ICTY for controlling self-represented, defiant defendants in addition to offering a solution that addresses concerns of opposing sides. Part II of this Note focuses on Yugoslavia’s history of conflicts, the creation of the ICTY, and its treatment of the right of self-representation that led to Radovan Karadžić (“Karadžić”) manipulating this right.<sup>15</sup> Part III of this Note analyzes the reasons why ICTY defendants choose self-representation and why the ICTY needs to control these defendants.<sup>16</sup> Further, Part III analyzes strengths and weaknesses of its control mechanisms and treatment of self-representation, in addition to analyzing the implications if a mechanism is not developed in the Karadžić trial.<sup>17</sup> Part IV of this Note proposes a balancing method that elaborates on a three-strikes approach, which will serve as a clear guide

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<sup>10</sup> See generally *infra* Part II.A.2 (discussing the need for the creation of the ICTY).

<sup>11</sup> See generally *infra* Parts II.C–E (discussing the origin of self-representation).

<sup>12</sup> See generally *infra* Part III.D (discussing the control mechanisms used by the ICTY to control self-represented defendants).

<sup>13</sup> See generally *infra* Parts III.A–B (discussing why defendants decide to use self-representation and why it is crucial for the ICTY to control the self-represented defendants).

<sup>14</sup> See generally *infra* Part IV (discussing the solution to maintaining order in the courtroom while respecting the defendant’s right to self-representation).

<sup>15</sup> See *infra* Part II (setting up the background and history of the ICTY with a specific focus on its recent trials involving self-represented defendants).

<sup>16</sup> See *infra* Part III (looking at both the defendant’s and ICTY’s point of view with respect to self-representation).

<sup>17</sup> See *infra* Part III (analyzing control mechanisms’ strengths and weaknesses, and implications on tribunals).

for future regional criminal tribunals and other courts faced with the same dilemma.<sup>18</sup>

## II. BACKGROUND

The right of self-representation applies to defiant defendants of the ICTY, but it also serves as a reflection of the world's ideals of fairness, justice, and fundamental rights.<sup>19</sup> Part II.A.1 provides background of the former Yugoslavia leading up to the Bosnia-Herzegovina War of the early 1990s and provides a summary of the cultural and ethnic relationships that led to its descent into violence.<sup>20</sup> Part II.A.2 discusses the creation of the ICTY and its various departments.<sup>21</sup> Part II.B summarizes the ICTY's major trial of Slobodan Milošević and how he redefined self-representation by incorporating delays and stall tactics.<sup>22</sup> Part II.C explains the right of self-representation and how other defendants emulated Milošević's strategy to frustrate the ICTY.<sup>23</sup> Part II.D discusses the various control mechanisms the ICTY used to control self-represented, defiant defendants.<sup>24</sup> Finally, Part II.E discusses Radovan Karadžić's arrest, upcoming trial, and threat to exercise his right of self-representation to embarrass the ICTY through delays and stall tactics.<sup>25</sup>

### A. *The International Criminal Tribunal for the Former Yugoslavia*

The ICTY developed from a gruesome war filled with outrageous crimes.<sup>26</sup> However, exploring the history leading up to the Bosnian conflict provides deeper insight into the specific purpose of the ICTY and

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<sup>18</sup> See *infra* Part IV (attempting to resolve the conflict between respecting the defendant's right to self-representation and the court's right to an efficient trial).

<sup>19</sup> See *infra* notes 73–75 (discussing the origin and treatment of the fundamental right of self-representation).

<sup>20</sup> See *infra* Part II.A.1 (setting out the background leading up to the Bosnian Conflict of the 1990s and the creation of the ICTY).

<sup>21</sup> See *infra* Part II.A.2 (discussing the various departments and its functions in the ICTY).

<sup>22</sup> See *infra* Part II.B (discussing how Slobodan Milošević developed a new defense strategy with his use of self-representation).

<sup>23</sup> See *infra* Part II.C (discussing the origin and evolution of self-representation).

<sup>24</sup> See *infra* Part II.D (discussing the various control mechanisms implemented by the ICTY to control defiant, self-represented defendants).

<sup>25</sup> See *infra* Part II.E (discussing the arrest of Radovan Karadžić, his upcoming trial, and his threat of the use of self-representation).

<sup>26</sup> See *infra* Part II.A.1 (discussing the events that led up to the establishment of the ICTY).

the reasons that the United Nations Security Council passed a resolution creating the tribunal.<sup>27</sup>

### 1. Brief History of the Events Leading up to the Creation of the ICTY

The United Nations Security Council created the ICTY after the Yugoslavia conflict of the 1990s, in order to establish accountability for crimes and punish perpetrators.<sup>28</sup> The Bosnian War of the 1990s developed from a long history of turmoil, ethnic strife, and conflict.<sup>29</sup> Various powers controlled Yugoslavia for many years and infused hatred into the culture.<sup>30</sup> Battles for control signaled Yugoslavia's role in World War I as Austria annexed Bosnia-Herzegovina despite Russia's and Serbia's protests, leading to the 1914 assassination of Archduke Ferdinand and the start of World War I.<sup>31</sup> World War II also disrupted

<sup>27</sup> See *infra* Part II.A.1 (outlining the significant history necessary to explain the need for the ICTY).

<sup>28</sup> See United Nations International Criminal Tribunal for the Former Yugoslavia, Establishment, <http://www.icty.org/sid/319> (last visited Feb. 26, 2009). The ICTY website explains that the United Nations created the tribunal in order to end impunity for war crimes committed throughout the Bosnian war. *Id.* In late 1992, the UN assigned experts to examine the situation in Yugoslavia. *Id.* The Commission of Experts reported serious violations of the Geneva Conventions and international humanitarian law. *Id.* That report led to the Security Council's decision to establish the tribunal. *Id.*

<sup>29</sup> See James B. Steinberg, *International Involvement in Internal Conflicts*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 27, 30 (Lori Fisler Damrosch, ed., 1993). Steinberg explains that:

Modern Yugoslavia arose after World War I from the ashes of millennia of conflict and two great empires: the Austro-Hungarian empire (which at its height embraced all of Slovenia, Croatia, Bosnia, and Vojvodina) and the Ottoman empire (which conquered Kosovo in 1389 and at one time controlled virtually all of the region, but whose influence diminished until the empire was finally expelled during the First Balkan War in 1912).

*Id.*

<sup>30</sup> See Scott Grosscup, *The Trial of Slobodan Milošević: The Demise of Head of State Immunity and the Specter of Victor's Justice*, 32 DENV. J. INT'L L. & POL'Y 355, 381 (2004) (discussing that in 1389, the Turks defeated the Serbs in the Battle of Kosovo Polje, which resulted in turmoil that lasted nearly 700 years); see also Michael P. Roch, *Military Intervention in Bosnia-Herzegovina: Will World Politics Prevail Over the Rule of International Law?*, 24 DENV. J. INT'L L. & POL'Y 461, 463 (1996) (asserting that the Austro-Hungarian Empire and Ottoman Empire each wanted their newly acquired region to live by their values, that the people of the region became resentful, leading to restlessness and ethnic clashes, causing upheavals, migration, and the need for independence). See generally Richard F. Iglar, *The Constitutional Crisis in Yugoslavia and the International Law of Self-Determination: Slovenia's and Croatia's Right to Secede*, 15 B.C. INT'L & COMP. L REV 213, 234 (1992) (discussing that the Hungarian throne ruled Croatia for over 800 years).

<sup>31</sup> John Laughland discusses how:

There seemed to be no immediate consequences when, in 1908, Austria annexed Bosnia-Herzegovina. Vienna was in clear violation of the

Yugoslavia, as various European powers divided and ruled Yugoslavia, prompting violence throughout the territory.<sup>32</sup>

After World War II, two competing political views enveloped Yugoslavia, leading to internal conflicts between the Greater Serbian nation ("Chetniks") and the Communist Party ("Partisans").<sup>33</sup> Eventually the Partisans, led by Josip Broz Tito ("Tito"), prevailed, and the country enjoyed peace and prosperity from 1945 until Tito's death in 1980.<sup>34</sup> Those ethnic groups, which once fiercely fought against each

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1878 Treaty of Berlin, which it had signed and kept Bosnia in Turkey, yet the protests of Russia and Serbia were in vain. Six years later, a Russian-backed Serbian gunman exacted revenge by assassinating the heir to the Austrian throne in Sarajevo in June 1914. The rest is history.

*A Post-Modern Declaration*, HINDU 11, Feb. 21, 2008, available at 2008 WLNR 3330345.

<sup>32</sup> See YUGOSLAVIA, A COUNTRY STUDY 37 (Glenn E. Curtis 3d ed. 1992). Yugoslavia was divided as follows: Germany had Serbia, parts of Vojvodina, Croatia, and most of Bosnia and Hercegovina. *Id.* Italy took southern Slovenia and most of Dalmatia, Kosovo, and Montenegro. *Id.* Hungary occupied a part of Vojvodina and Slovenian and Croatians borders. *Id.* Bulgaria had Macedonia and a part of southern Serbia. *Id.* See also NOEL MALCOLM, BOSNIA: A SHORT HISTORY 175-76 (1994) (explaining that the Independent State of Croatia's internment of Jews began in June of 1941 and that in August, 1941, Serbia began the process of capturing Jews and by the end of 1941 Serbia placed a majority of the Jews in concentration camps); Roch, *supra* note 30, at 465-66 (explaining that it is estimated that nearly two million Serbs, Jews, and Gypsies were destroyed through such tactics as religious conversion, deportation, and violence).

<sup>33</sup> See *Prosecutor v. Blaškić*, Case. No. IT-95-14, Transcript (Sept. 8, 1998). The communist party gathered troops to wage liberation against the occupiers. *Id.* Followers of the Greater Serbia vision sought to redefine their borders and focused on creating a 'Greater' nation. *Id.* This meant that it needed to eliminate Croatia and acquire Vojvodina, Montenegro, Macedonia, Bosnia-Herzegovina, and Dalmatia. *Id.* Also, Serbia depended on obtaining Bajo, Pec, a part of Bulgaria, and a portion of Romania because it was an allied country. *Id.* The Chetniks envisioned the Great Serbian nation and their leader was Mihajlović; Josip Broz Tito led the Communist Party, which included the Partisans. *Id.* There was a myth about Mihajlović campaigning against fascism and he was deemed a hero. *Id.* Furthermore, tensions arose between Tito and Mihajlović and their respective armies. *Id.* The communist party believed the Kingdom of Yugoslavia needed to be divided and tried to advance this idea by forming federal, military, and political structures to wage war against Mihajlović and his troops. *Id.* The communist party sought to have each population acquire its own independent nation, with Serbia restricted to its original boundaries. *Id.* See also ROBERT J. DONIA & JOHN V.A. FINE, JR., BOSNIA AND HERCEGOVINA: A TRADITION BETRAYED 146-47 (1994) (explaining that the Partisans preached that there should be no hatred among the various groups and that they should unite; the Communist party thought of all ethnic groups as distinct yet equal and that they should unite to fend off the occupying powers; and the Chetniks and Mihajlović strongly opposed this idea and maintained a Serbia-centric mindset).

<sup>34</sup> See NEUFFER, *supra* note 1, at 18. Neuffer explains that:

Tito represented Yugoslavia's potential for diversity. He decided the best way to preserve that diversity was to do away with ethnic identity in favor of a nationalist one. Declaring a policy *Bratstvo i Jedinstvo*, or "Brotherhood and Unity," Tito mandated that all Croats, Serbs, Macedonians, and all the rest no longer existed: All were Yugoslavs.

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other, began socializing with one another.<sup>35</sup> However, when Tito died, the feeling of distrust and hatred reemerged, and the Bosnian War erupted.<sup>36</sup>

Throughout the Bosnian conflict in the early 1990s, political leaders and corrupt military officers committed atrocious crimes.<sup>37</sup> These

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*Id.*

See also YUGOSLAVIA, A COUNTRY STUDY, *supra* note 32, at 50 (noting that after passage of the amendments to the Constitution, living conditions and the economy improved. For example, between 1957 and 1960, Yugoslavia had the second highest economic growth rate. Furthermore, the government re-invested in production of consumer goods and allowed foreign products to enter the region. Religious restrictions loosened, and artists were free to express their views, including the Nobel Prize-Winner Ivo Andrić. Moreover, throughout the reforms in the 1960s Yugoslavia extended its self-management theory to the social realm, and created local councils for the areas of education, religion, health, and politics); Grosscup, *supra* note 30, at 357 (explaining that peace was the norm in Yugoslavia because “[f]rom 1945 until Tito’s death in 1980, ethnic tensions and nationalistic movements were suppressed by the state through relocating Serb minorities in the various republics outside of Serbia”); Sergio Baches Opi & Ryan Floyd, *A Shaky Pillar of Global Stability: The Evolution of the European Union’s Common Foreign and Security Policy*, 9 COLUM. J. EUR. L. 299, 305 (2003) (discussing how Tito was able to maintain his multinational state and actually have moderate economic growth); Peter J. Cannon, *The Third Balkan War and Political Disunity: Creating a Confederated Cantonal Constitutional System*, 5 J. TRANSNAT’L L. & POL’Y 373, 386 (1996) (explaining that the Constitution of the Socialist Federal Republic of Yugoslavia contained ideological ideas and extended responsibilities to the Yugoslavia population).

<sup>35</sup> See Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 48 (July 31, 2003). Ethnically diverse marriages and personal friendships displayed this idea of tolerance. *Id.* Various people created relationships despite ethnic divides. *Id.* This positive attitude towards each other maintained peace in the area for almost fifty years. *Id.* See also Prosecutor v. Stanišić, Case No. IT-08-91-PT, Supplemental Pre-Trial Brief of the Defence of Mićo Stanišić ¶ 5.m (July 31, 2009) (indicating that many people of the region spoke “of good inter-communal relations, of friendships across ethnic and coincident religious divides, of intermarriages and of generally harmonious relations”); LAURA SILBER & ALLAN LITTLE, YUGOSLAVIA: DEATH OF A NATION 28–29 (1997) (stating that Josip Broz Tito unified Yugoslavia by “work[ing] to prevent his state from suffering the same fate as its predecessor” and “keep[ing] the nations on an equal footing...[by] ruthlessly suppress[ing] any expression of resurgent nationalism”); Jetish Jashari, *U.N. Field Missions in the Context of Legal and Judicial Reform: The Kosovo Case*, 1 COLUM. J. E. EUR. L. 76, 87 (2007) (explaining that at the ceremony for the creation of the Federal Yugoslavia, at Jajce in 1943, Tito reiterated his message that Yugoslavia was “founded on a democratic and federative principle and champion[ed] equal rights for all peoples”).

<sup>36</sup> See Lindsay Peterson, *Shared Dilemmas: Justice for Rape Victims Under International Law and Protection for Rape Victims Seeking Asylum*, 31 HASTINGS INT’L & COMP. L. REV. 509, 512 (2008). After Tito unified the countries into Yugoslavia, the ethnic tensions rekindled and exploded when Tito died in 1980. *Id.* This led to dramatic events during the 1980s and 1990s such as Croatia, Slovenia, and Bosnia declaring independence and the Bosnia-Serbs initiating an ethnic-cleansing plan. *Id.*

<sup>37</sup> See Prosecutor v. Milošević, Case No. IT-01-51-I, Initial Indictment (Nov. 22, 2001). The ICTY indicted, former head of state, Slobodan Milošević, and charged him with genocide, crimes against humanity, grave breaches of the Geneva conventions, and violations of the law or customs of war. *Id.* See also Prosecutor v. Šešelj, Case No.IT-03-67-I,

violations spanned across all involved parties, not just one side.<sup>38</sup> To seek justice for these acts, the United Nations Security Council created the ICTY.<sup>39</sup>

## 2. Creation of ICTY

The crimes committed throughout Yugoslavia's conflict outraged the public and demanded a response in the form of a tribunal.<sup>40</sup> The Security Council of the United Nations passed Resolution 827 in order to establish the International Tribunal for the Prosecution of Persons

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Initial Indictment (Feb. 15, 2003) (explaining that the ICTY indicted Vojislav Šešelj, leader of the Serbian Freedom Movement, and charged him with crimes against humanity and violations of the laws or customs of war); Prosecutor v. Krajišnik, Case No. IT-00-39-I, Initial Indictment (Mar. 21, 2000) (explaining that the ICTY indicted Momčilo Krajišnik, leader of the Serbian Democratic Party, and charged him with genocide, crimes against humanity, violations of the laws and customs of war, and grave breaches of the Geneva Conventions); Prosecutor v. Karadžić and Mladić, Case No. IT-95-5-I, Initial Indictment (July 24, 1995) (explaining that the ICTY indicted Radovan Karadžić, president of the Serbian Democratic Party, and Ratko Mladić, Commander of the Yugoslav People's Army, and charged them with genocide, crimes against humanity, crimes that were perpetrated against the civilian population and against places of worship throughout Bosnia, sniping against civilians, and taking United Nations peacekeepers as hostages).

<sup>38</sup> See Ivana Nizich, *Violations of the Rules of War by Bosnian Croat and Muslim Forces in Bosnia-Herzegovina*, 5 HASTINGS WOMEN'S L.J. 25, 30-36 (1994). Bosnian Croat troops were responsible for the massacres of Muslim civilians in the villages of Ahmići and Stupni, the detention of thousands of Muslim men, women, and children, and the expulsion of families from their homes. *Id.* The Bosnian Government and Muslim Troops executed civilians and displaced Croat families from Central Bosnia. *Id.*

<sup>39</sup> See *infra* Part II.A.2 (discussing the creation of the ICTY).

<sup>40</sup> In the Resolution's preamble the Security Council stated that it was:

Expressing once again its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of "ethnic cleansing", including for the acquisition and the holding of territory, . . .

Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them

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S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter Resolution], at 1. See United Nations: Security Council Resolution on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law [sic] Humanitarian Law Committed in the Territory of the Former Yugoslavia, May 25, 1993, 32 I.L.M. 1203, 1204. See also *Justice, Accountability, and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, 18 BERKELEY J. INT'L LAW 102, 144 (2000) (asserting that the establishment of tribunal for the crimes committed in Yugoslavia was the first war crimes tribunal since Tokyo).

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Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia.<sup>41</sup>

The Security Council formed the ICTY with the hope of revealing the truth, creating a historical record, deterring denials, ceasing violence, and identifying responsible individuals.<sup>42</sup> To accomplish these goals, the ICTY used the Nuremberg Tribunal as a model, specifically with regard to jurisdiction.<sup>43</sup> Article 3 of the ICTY statute gave the tribunal

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<sup>41</sup> Resolution, *supra* note 40, at 2. One of the main reasons behind the establishment of the ICTY was that the Security Council considered the situation in Yugoslavia to be a "threat to international peace and security." *Id.* at 1. See also Rebecca L. Haffajee, *Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory*, 29 HARV. J. L. & GEN. 201, 201 (2006) (explaining that around the same time as the Yugoslavia Conflict, a similar atrocity was occurring in Rwanda; in the Rwanda conflict in 1994, perpetrators used rape and sexual violence as a tool for genocide, targeting the Tutsi women civilians); Bethany Conner, "You Made a Mistake – You Selected a Woman!": *The Implementation of Political Gender Quotas in Post Conflict African Nations*, 17 TUL. J. INT'L & COMP. L. 203, 222 (2008) (stating that throughout the Rwandan genocide, over 800,000 people were killed); Katharine Orlovsky, *International Criminal Law: Towards New Solutions in the Fight Against Illegal Arms Brokers*, 29 HASTINGS INT'L & COMP. L. REV. 343, 355 (2006) (asserting that as for the ICTY and its statute, the United Nations Security Council established the International Criminal Tribunal for Rwanda as a response to the crimes that took place throughout its conflict); Laura Bingham, *Strategy or Process? Closing the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 24 BERKELEY J. INT'L L. 687, 695 (2006) (indicating that the Security Council vote was not unanimous to uphold the resolution to create the ICTR, unlike the ICTY).

<sup>42</sup> See Anna Petrig, *Negotiated Justice and the Goals of International Criminal Tribunals*, 8 CHI.-KENT J. INT'L & COMP. L. 1, 11-12 (2008). Petrig asserts that another reason for the establishment of the ICTY was to allow victims to be heard, to have their suffering acknowledged, and to possibly award them retribution. *Id.* See also United Nations International Criminal Tribunal for the Former Yugoslavia, *Achievements*, <http://www.icty.org/sid/324> (last visited Feb. 26, 2009). The tribunal listed additional goals of developing international law and strengthening the rule of law. *Id.* The ICTY is credited as a precedent for establishing other international courts, including the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the International Criminal Court. *Id.* The ICTY has developed the law concerning torture, legal treatment and punishment of sexual violence in wartime, genocide, enslavement and persecution, and command responsibility. *Id.* The ICTY also developed procedural measures for protecting witnesses, confidentiality and disclosure of information relevant for the national security of states, guilty pleas of accused, and duress as a defense. *Id.* To strengthen the rule of law, the ICTY worked with domestic courts throughout Yugoslavia in order to transfer evidence, knowledge, and jurisprudence to the region to help continue to bring justice to the victims. *Id.*

<sup>43</sup> Courts like the ICTY and ICTR are unique and temporary courts that certain advocates suggest be used to solve international problems. Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1, 60 (2006). However, most of the international ad-hoc courts are established after a catastrophic event, and activists need to have a template ready in case a situation arises where a court is necessary. *Id.* In order to proceed to seek justice from the conflict in Yugoslavia, the ICTY needed to narrow its scope and decide which topic areas it would prosecute. Statute of the International Tribunal arts. 2-5, May 25, 1993, 32 I.L.M. 1192

jurisdiction over war crimes, defined as acts that violate the law of war.<sup>44</sup> Article 5 of the statute gave the ICTY jurisdiction over crimes against

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[hereinafter International Tribunal Statute]. Furthermore, the ICTY is restricted to trying only incidents that occurred in the territory of the former Yugoslavia since 1991. *Id.* art. 8. It has also announced that its jurisdiction is only over individual persons, and is not allowed to prosecute "organisations, political parties, administrative entities, or other legal subject."

<sup>43</sup> United Nations International Criminal Tribunal for the Former Yugoslavia, About the ICTY – Mandate and Jurisdiction, <http://www.icty.org/sid/320> (last visited Feb. 11, 2010). Lastly, the ICTY proclaimed that it would have concurrent jurisdiction but it can claim primacy and take over national proceedings "if this proves to be in the interest of international justice." International Tribunal Statute art. 9; Andrew Dubinsky, *An Examination of International Sentencing Guidelines and a Proposal for Amendments to the International Criminal Court's Sentencing Structure*, 33 *NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT* 609, 612 (2007) (explaining that the ICTY looked to the Nuremberg trial for guidance with establishing which crimes to charge). The International Criminal Court has different jurisdiction than the ICTY and has jurisdiction only if:

[t]he accused is a national of a State Party or a State otherwise accepting jurisdiction of the Court; [t]he crime took place on the territory of a State Party or a State otherwise accepting the jurisdiction of the Court; or [t]he United Nations Security Council has referred the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime.

International Criminal Court, Jurisdiction and Admissibility, [http://www.icc-cpi.int/about/ataglance/jurisdiction\\_admissibility.html](http://www.icc-cpi.int/about/ataglance/jurisdiction_admissibility.html) (last visited Feb. 26, 2009).

<sup>44</sup> International Tribunal Statute, *supra* note 43, art. 3. The ICTY explicitly can charge war crimes. *Id.* See also Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 94 (Oct. 2, 1995). During the Tadić trial, the ICTY established a more in-depth definition of war crimes. *Id.* The ICTY held that war crimes consist of:

(i) an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or [be a part of an applicable treaty]; (iii) the violation must be "serious", [which means the broken rule must] protect[] important [human] values and must involve grave consequences for the victim . . . ; (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

*Id.* Each war crime must take place during an international armed conflict and the perpetrator must be aware of the facts that caused the armed conflict. ASSEMBLY OF STATES PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, New York, U.S., Sept. 3-10, 2002, Official Records, pt. II(B), U.N. Doc. ICC-ASP/1/3, [http://www.icc-cpi.int/library/about/officialjournal/Element\\_of\\_Crimes\\_English.pdf](http://www.icc-cpi.int/library/about/officialjournal/Element_of_Crimes_English.pdf). *Id.* Therefore with respect to these two elements:

There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international; In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international; There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms "took place in the context of and was associated with."

humanity, or more commonly known as crimes of mass atrocity.<sup>45</sup> Article 2 of the ICTY statute also permitted the tribunal to hear claims of

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*Id.*

The indictment of Šešelj gives examples of Šešelj's war crimes. Prosecutor v. Šešelj, Case No. IT-03-67-I, Initial Indictment, ¶¶ 22, 25–26 (Jan. 15, 2003). For example, in April 1992, Serb forces under his control attacked and seized the town of Zvornik, killing non-Serb civilians. *Id.* Additionally, Šešelj's troops executed twenty non-Serb men and boys in Zvornik. *Id.* During this attack, Šešelj's forces detained, beat, and tortured non-Serbs. *Id.* Šešelj's followers detained and killed many non-Serbs at the shoe factory, a technical school, and slaughter-house. *Id.* On another occasion Šešelj's troops captured and detained hundreds of Croat, Muslim, and non-Serb civilians at a warehouse, farm, and police headquarters. *Id.* The conditions of these facilities were deplorable and included "inhumane treatment, overcrowding, starvation, forced labour, inadequate medical care and systematic physical and psychological assault, including torture, beatings and sexual assault." *Id.* Milošević's war crimes included destroying homes of Bosnian Muslim, Bosnian Croat, and other non-Serb civilians in order to force them from their legal domiciles and prevent their return. Prosecutor v. Milošević, Case No. IT-01-51-I, Initial Indictment, ¶ 42–43 (Nov. 22, 2001). Additionally, Milošević destroyed mosques, churches, libraries, educational building, and cultural centers. *Id.* Over a three-year span from 1992 to 1995, Milošević shelled and sniped civilian areas of Sarajevo, killing and injuring thousands of all ages and of both sexes. *Id.* Krajišnik attempted to control parts of Bosnia by creating impossible living condition, involving persecution and terror tactics, deporting citizens who were reluctant to leave, and liquidating others. Prosecutor v. Krajišnik, Case No. IT-00-39-I, Initial Indictment, ¶ 5–6 (Mar. 21, 2000).

<sup>45</sup> International Tribunal Statute, *supra* note 43, at art. 5. The ICTY can charge crimes against humanity. *Id.* See also Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 280. The Nuremberg Tribunal originally defined crimes against humanity as:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime . . . whether or not in violation of the domestic law of the country where perpetrated.

*Id.* The Rome Statute of the International Criminal Court provides the broadest definition of crimes against humanity, including:

[T]he following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) murder; (b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) enforced disappearance of persons; (j) the crime of apartheid; (k) other inhumane acts of a similar character

grave breaches of the Geneva Conventions, which consisted of violations against the protected people included in the Geneva Conventions.<sup>46</sup>

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intentionally causing great suffering, or serious injury to body or to mental or physical health.

Rome Statute of the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 90 art 7.

Karadžić, Mladić, the Bosnian Serb military, and the Bosnian Serb police specifically persecuted civilian political leaders, members of the Bosnian Muslim political party, members of the Party for Democratic Action, and members of the Croatian Democratic Union. Prosecutor v. Karadžić and Mladić, Case No. IT-95-5-I, Initial Indictment, ¶ 23-25 (July 24, 1995). Under the direction of Karadžić and Mladić, the Bosnian Serb military forced thousands of Bosnian Muslim and Bosnian Croats out of their homes, detained them, and deported or transferred them outside the boundaries of Bosnia. *Id.* In May 1992, Šešelj gave a speech mandating the expulsion of Croats from the area and listed individual Croats who should leave. Šešelj, IT-03-67-I, Initial Indictment at ¶ 29. After his speech, Šešelj campaigned for ethnic-cleansing directed at Croats and began to harass, threaten, intimidate, and force them to leave the area. *Id.* Serbs looted the homes of Croats. *Id.*

<sup>46</sup> International Tribunal Statute, *supra* note 43, art. 2. The ICTY has the power to charge grave breaches of the four Geneva Conventions. *Id.* See also Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (providing that fixed or mobile medical units may not be attacked, medical personnel performing medical treatment are protected, and buildings and material of medical establishments cannot be intentionally destroyed); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (providing that armed forces or persons at sea who are wounded, sick, or shipwrecked are protected, parties performing burials at sea must confirm death, establish an identity, and make a report, and military hospital ships may not be attacked); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (providing that prisoners of war must be humanely treated, questioning of prisoners must be in a language they understand, personal effects, including identification documents shall remain in the possession of prisoners of war, and prisoners of war must be afforded daily food rations, sufficient drinking water, and adequate clothing, underwear, and footwear); Geneva Convention Relative to the Protection of Civilians in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (providing that populations of countries, without distinction between race, nationality, religion, or political opinion, are intended to be protected from the suffering of war, civilian hospitals may not be attacked, women cannot be raped or forced into prostitution, collective punishments, terrorism and pillage are prohibited, private property is protected, the taking of hostages is not allowed); Richard John Galvin, *The ICC Prosecutor, Collateral Damages, and NGOs: Evaluating the Risk of a Politicized Prosecution*, 13 U. MIAMI INT'L & COMP. L. REV. 1, 32 (2005) (explaining that the difference a grave breach and a non-grave breach of the Geneva Conventions; the difference is that "a grave breach is considered an offense of universal jurisdiction that imposes a duty for a state to prosecute or extradite an offender," whereas a non-grave breach "leaves the method for preventing such breaches to the discretion of the parties who may use administrative or disciplinary sanctions as well as penal sanctions"); *Krajišnik*, IT-00-39-I, Amended Indictment at ¶ 11 (explaining that under the control of Krajišnik, his forces in June 1992 executed hundred of Bosnian Muslim men, women, and children of Vieggrad at various bridges over the Drina; in November of 1992, Krajišnik's troops killed approximately 190 Bosnian Muslim males in the village of Dabovci; on or about May 25, 1992, Krajišnik's forces killed more than thirty Bosnian Muslim and Bosnian Croat women and children in the village of Hrustovo). Milošević and his troops coerced Bosnian citizens

Last, Article 4 allowed the ICTY to prosecute genocide, which included the attempt to extinguish an entire group of people based on a characteristic, such as religion or race.<sup>47</sup> However, the ICTY needed specialized groups, such as office of the prosecution and office of the registry, to carry out its mission.<sup>48</sup>

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to sign documents relinquishing their property rights. *Milosevic*, IT-01-51-I at ¶ 42, Schedule c, D. Milošević allowed for the establishment of detention centers to unlawfully detain citizens at the Petar Kočić Elementary School, the Mlakve Football Stadium, the Mostina Hunting Lodge, and at the Kotor Varos Sawmill among many others. *Id.* Milošević and his followers forcibly and unlawfully transferred or expelled 268,050 people from Bosnia. *Id.*

<sup>47</sup> International Tribunal Statute, *supra* note 43, art. 4. For proof of genocide one needs to prove one or more underlying crime or act such as:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

*Id.* Furthermore, any of the following acts are punishable:

- (f) genocide;
- (g) conspiracy to commit genocide;
- (h) direct and public incitement to commit genocide;
- (i) attempt to commit genocide;
- (j) complicity in genocide.

*Id.*

Milošević detained thousands of Bosnian Muslims and Bosnian Croats “under conditions of life calculated to bring about the partial physical destruction of those groups, namely through starvation, contaminated water, forced labour, inadequate medical care and constant physical and psychological assault.” *Milošević*, IT-01-51-I, Indictment at ¶ 32. The definition of genocide does not include the attempt to annihilate cultural or sociological characteristics that give a group its identity. *Prosecutor v. Krstić*, Case No. IT-98-33-I, Judgment, ¶ 580 (Aug. 2, 2001), *aff’d*, Case No. IT-98-33-A, Judgment, ¶ 25 (Apr. 19, 2004). However, because physical or biological destruction of a group is often accompanied with destruction of culture or religion, these instances can be used as evidence to prove intent to demolish a particular group. *Id.* For example, in the *Krstić* Case, the Trial Chamber considered the destruction of mosques and houses belonging to Muslims as evidence of intent to destroy the group. *Krajišnik* advocated for a new Serbian state that contained nearly no Bosnian Muslim or Bosnian Croat. *Krajišnik*, IT-00-39-I, Amended Indictment at ¶ 46. In order to accomplish this goal, the Serbian Democratic Party implemented a plan to permanently remove or ethnically cleanse the territory of most Bosnian Muslim, Bosnian Croat, and non-Serb population, allowing only a small percentage to remain if they agreed to living in a Serb-controlled state. *Id.* Under the reign of Karadžić and Mladić, thousands of Bosnian Muslim and Bosnian Croat civilians were persecuted. *Karadžić and Mladić*, IT-95-5-I, Indictment at ¶ 18, 22. Serbian guards under the command of Karadžić and Mladić raped women and girl detainees, starved the detainees, and failed to provide adequate medical care. *Id.*

<sup>48</sup> See *infra* notes 49–51, 53–55 (discussing the various departments of the ICTY and their duties).

With the tribunal and its jurisdiction and goals approved, the ICTY also needed to establish its organizational facets such as the Chambers, the Registry, and the Office of the Prosecutor to carry out the duties of the tribunal.<sup>49</sup> The Chambers of the ICTY created sixteen permanent judges and at most twelve *ad litem* judges.<sup>50</sup> The maximum sentence the ICTY allowed was life imprisonment.<sup>51</sup> The Offices of the Registry and the Prosecutor also served an extremely important role in the ICTY.<sup>52</sup>

<sup>49</sup> See Dominic Raab, *Evaluating the ICTY and its Completion Strategy*, 3 J. INT'L CRIM. JUST. 82, 89 (2005) (explaining that recent procedural reforms to the Appeals Chambers enabled the three organs to operate more effectively). See also Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 COLUM. J. TRANSNAT'L L. 635, 652 (2007) (describing how the Chambers performs the adjudicative function, the Prosecutor performs the prosecutorial function, and the Registry performs the administrative function).

<sup>50</sup> United Nations International Criminal Tribunal for the Former Yugoslavia, Chambers, <http://www.icty.org/sections/AbouttheICTY/Chambers> (last visited Feb. 26, 2009). The United Nations General Assembly chose the judges. *Id.* The judges serve for four years. *Id.* The United Nations General Assembly also chose *ad litem* judges who also serve for four years. *Id.* With approval, *ad litem* judges may sit on a specific trial for up to three years of the judge's term. *Id.* Furthermore, *ad litem* judges may serve as reserve judges and replace a judge who is no longer able to serve his/her duty. *Id.* The ICTY assigned the judges for placement in the Trial Chambers and the Appeals Chamber, with each trial chamber consisting of three permanent judges and the appeals chambers having either one permanent judge and two *ad litem* judges or two permanent judges and one *ad litem* judge. *Id.* The Appeals Chamber consists of seven permanent judges: five from the permanent judges of the ICTY, and two from the 11 permanent judges of the International Criminal Tribunal for Rwanda (ICTR). *Id.* These seven judges also constitute the Appeals Chamber of the ICTR. *Id.* Each appeal is heard and decided by five judges. *Id.* As of Feb. 26, 2009, the current judges are President Fausto Pocar of Italy, Vice-President Kevin Parker of Australia, Presiding Judge Patrick Lipton Robinson of Jamaica, Presiding Judge Carmel A. Agius of Malta, Presiding Judge Alphonsus Martinus Maria Orije of the Netherlands, Judge Mohamed Shahabuddeen of Guyana, Judge Mehmet Guney of Turkey, Judge Lui Daqun of China, Judge Andresia Vaz of Senegal, Judge Theodor Meron of the United States of America, Judge Wolfgang Schomburg of Germany, Judge O-Gon Kwon of South Korea, Judge Jean-Clude Antonetti of France, Judge Iain Bonomy of the United Kingdom, Judge Christine Van Den Wyngaert of Belgium, Judge Bakone Justice Moloto of South Africa, Ad Litem Judge Janet M. Nosworthy of Jamaica, Ad Litem Judge Arpad Prandler of Hungary, Ad Litem Judge Stegan Trechsel of Switzerland, Ad Litem Judge Antonie Kesia-Mbe Mindua of the Democratic Republic of Congo, Ad Litem Judge Ali Nawz Chowhan of Pakistan, Ad Litem Judge Tsvetana Kamenova of Bulgaria, Ad Litem Judge Kimberly Prost of Canada, Ad Litem Judge Ole Bjorn Stole of Norway, Ad Litem Judge Frederik Harhoff of Denmark, Ad Litem Judge Flavia Lattanzi of Italy, Ad Litem Judge Pedro R. David of Argentina, Ad Litem Judge Elizabeth Gwaunza of Zimbabwe, Ad Litem Judge Michele Picard of France, and Ad Litem Judge Uldis Kinis of Latvia. *Id.*

<sup>51</sup> See United Nations International Criminal Tribunal for the Former Yugoslavia, Judgements and Sentences, <http://www.icty.org/sid/147> (last visited Feb. 26, 2009) (explaining that the Trial Chamber must take into consideration a penalty that a national court has already imposed on the accused for the same act).

<sup>52</sup> See *infra* notes 53-55 and accompanying text (discussing the powers and duties of the Registry and prosecutor and how they impact the ICTY).

The ICTY directed that the Registry control the administrative and judicial services that enable the court to operate efficiently along with handling diplomatic functions.<sup>53</sup> The tribunal allowed the Office of Prosecutor to include police officers, crime experts, analysts, lawyers, and trial attorneys who conduct their investigations independent of the Security Council or any other international organization.<sup>54</sup> The Office of the Prosecutor indicted 161 criminals, arrested 38 accused persons, provisionally released 3 accused persons until further notice, and concluded 116 proceedings as of February 26, 2009.<sup>55</sup>

In order for the ICTY to be effective, the United Nations Security Council established various aspects, such as jurisdiction, organs of the ICTY, and goals.<sup>56</sup> The Bosnian War represented the first conflict involving genocide in Europe since World War II, and the Security Council wanted to deter atrocities.<sup>57</sup> To accomplish that goal, the ICTY

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<sup>53</sup> See United Nations International Criminal Tribunal for the Former Yugoslavia, Registry, <http://www.icty.org/sections/AbouttheICTY/Registry> (last visited Feb. 26, 2009). The registry provides an abundance of administrative and judicial support. *Id.* This includes translating documents and court proceedings. *Id.* In addition the registry organizes the hearings, filings and archive, legal aid program for those who cannot afford counsel, protection of witness, and management of the Detention unit. *Id.* Moreover, the registry is in charge of all communications. *Id.* As of the writing of this Note, the current Registrar was Hans Holthuis of Australia who has held this position since January 1, 2001 and the Deputy Registrar is John Hocking of the Netherlands who has held that position since December 1, 2004. *Id.*

<sup>54</sup> See Dermot Groome, *Adjudicating Genocide: Is the International Court of Justice Capable of Judging State Criminal Responsibility?*, 31 *FORDHAM INT'L L. J.* 911, 958-59 (2008). Groome asserts that Article 16 of the ICTY statute gave the Office of the Prosecutor broad discretionary power when deciding whom to charge and what to charge. *Id.* Furthermore, "[u]nlike many continental systems the prosecutor is not required to submit all charges that are supported by prima facie evidence." *Id.* See also Office of the Prosecution, <http://www.icty.org/sections/AbouttheICTY/OfficeoftheProsecutor> (last visited Feb. 26, 2009) (listing the activities the Office of the Prosecutor conducts, such as collecting evidence, identifying witnesses, exhuming mass graves, preparing indictments, and presenting prosecutions before the Tribunal).

<sup>55</sup> United Nations International Criminal Tribunal for the Former Yugoslavia, Key Figures, <http://www.icty.org/sections/TheCases/KeyFigures> (last visited Feb. 26, 2009). Numerous statistics are compiled for the ICTY. *Id.* In addition, there were forty-five ongoing proceedings as of February 26, 2009. *Id.* Of these, ten are before the Appeals Chamber, twenty-one are currently at trial, six are awaiting Trial Chamber, six are at the pre-trial stage, and two still are at large. *Id.* Moreover, of the 116 complete proceedings ten were acquitted, fifty-seven were sentenced, two are awaiting transfer, twenty-nine have been transferred, twenty-four have served their sentences, thirteen have been referred to national jurisdiction, twenty indictments have been withdrawn, ten died before transfer to the Hague, and six died after transfer to the Hague. *Id.*

<sup>56</sup> See *supra* notes 44-47, 49-51, 53-55 (discussing the provisions needed for the ICTY to be an effective tribunal).

<sup>57</sup> See Holocaust Encyclopedia Genocide Timeline, <http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10007095> (last visited Feb. 26, 2009). During World War

targeted top-ranking officials and leaders.<sup>58</sup> That decision prompted the first trial of a former head of state before an international tribunal: Slobodan Milošević.<sup>59</sup>

*B. The Slobodan Milošević Trial*

The ICTY originally indicted Slobodan Milošević on November 22, 2001 for actions committed during the Bosnian War from 1992 through 1995, charging him with twenty-nine counts including grave breaches of the Geneva Conventions of 1949, crimes against humanity, and genocide.<sup>60</sup> The ICTY also indicted Milošević for his actions in Kosovo

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II, genocide was referred to as the crime without a name. *Id.* In 1944, the U.S. War Department defined the crime without a name as genocide. *Id.* When perpetrators in Bosnia committed the crime of genocide, the world knew of its seriousness because of the world's experience in World War II and the Nazi regime. *Id.*

<sup>58</sup> See Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L L. 551, 563 (2006). As part of its completion strategy, the ICTY "intensified its focus on top-level officials." *Id.* See also Richard P. Barrett & Laura E. Little, *Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals*, 88 MINN. L. REV. 30, 50 (2003) (stating that to further this goal with regard to rape cases, the ICTY prosecuted lower ranking people in order to build a case against top officials).

<sup>59</sup> See M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711, 804 (2008). Since Milošević, other heads of state have been charged, such as Jean Kambanda, the Hutu former head of state of Rwanda, Saddam Hussein of Iraq, Charles Taylor, former head of state of Liberia, Hissene Habre, former head of state of Chad, Alberto Fujimori, former head of state of Peru, General Augusto Pinochet of Chile, and General Jorge Videla, former head of state of Argentina. See also ASIL Insights, <http://www.asil.org/insigh76.cfm> (last visited Feb. 26, 2009) (discussing Milošević as the first head of state to be tried before an international court).

<sup>60</sup> Prosecutor v. Milošević, Case No. IT-01-51-I, Indictment, ¶ 32-45 (Nov. 22, 2001) (Count 1: Genocide; Count 2: Complicity in Genocide; Count 3: Persecutions on political, racial, or religious grounds as a Crime against Humanity; Count 4: Extermination as a Crime against Humanity; Count 5: Murder as a Crime against Humanity; Count 6: Wilful killing as a Grave Breach of the Geneva Convention of 1949; Count 7: Murder as a violation of the Laws or Customs of War; Count 8: Imprisonment as a Crime against Humanity; Count 9: Torture as a Crime against Humanity; Count 10: Inhumane acts as a Crime against Humanity; Count 11: Unlawful Confinement as a Grave Breach of the Geneva Convention of 1949; Count 12: Torture as a Grave Breach of the Geneva Convention of 1949; Count 13: Wilfully causing great suffering as a Grave Breach of the Geneva Convention of 1949; Count 14: Torture as a violation of the Laws or Customs of War; Count 15: Cruel Treatment as a violation of the Laws or Customs of War; Count 16: Deportation as a Crime against Humanity; Count 17: Inhumane Acts (Forcible Transfers as a Crime against Humanity); Count 18: Unlawful Deportation or Transfer as a Grave Breach of the Geneva Conventions of 1949; Count 19: Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly as a Grave Breach of the Geneva Conventions of 1949; Count 20: Wanton destruction of villages, or devastation not justified by military necessity as a Violation of the Laws or Customs of War; Count 21: Wilful destruction or wilful damage done to historic monument and institutions dedicated to education or religion as Violation of the Laws or

and Croatia, making a grand total of sixty-six counts and seventeen substantive crimes.<sup>61</sup>

In February 2002, Milošević's trial began, and he acted as his own defense counsel.<sup>62</sup> The prosecution's presentation of its case against Milošević lasted more than two years.<sup>63</sup> During the proceedings, Milošević made a mockery of the tribunal and consistently used stall tactics, such as making a long opening statement and submitting a huge witness list.<sup>64</sup> Milošević also presented videos and slide shows, berated

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Customs of War; Count 22: Plunder of public or private property as a Violation of the Laws and Customs of War; Count 23: Murder as a Crime against Humanity; Count 24: Inhumane acts as a Crime against Humanity; Count 25: Wilful killing as a Grave Breach of the Geneva Conventions of 1949; Count 26: Wilfully causing great suffering as a Grave Breach of the Geneva Conventions of 1949; Count 27: Murder as a Violation of the Laws or Customs of War; Count 28: Cruel treatment as a Violation of the Laws or Customs of War; and Count 29: Attacks on civilians as a Violations of the Laws or Customs of war).

<sup>61</sup> Prosecutor v. Milošević, Case No. IT-01-50-I, Indictment, ¶ 36 (Sept. 27, 2001). On September 27, 2001 the ICTY indicted Milošević for his crimes in Croatia. *Id.* The ICTY charged him with crimes against humanity, grave breaches of the Geneva Conventions, and violations of the laws or customs of war. *Id.* Some specific actions included exterminating or murdering hundreds of Croat and non-Serb civilians, imprisoning thousands of Croat and non-Serb civilians, perpetrating inhumane living conditions within detention facilities, beating Croat and non-Serb civilians, forcing labor onto Croat and non-Serb civilians, deporting nearly 200,000 Croat and non-Serb civilians from their homes, and destroying homes, public and private property. *Id.* The ICTY initially indicted Milošević on May 22, 1999 for his actions in Kosovo. Prosecutor v. Milošević, Case No. IT-99-37-I, Indictment, ¶ 92-97 (May 22, 1999). The ICTY charged him with crimes against humanity and violations of the law or customs of war. *Id.* Specific crimes he committed were expelling and displacing hundreds of thousands of Kosovo Albanians from their homes, looting and pillaging personal and commercial property belonging to Kosovo Albanians, harassing, humiliating, degrading Kosovo Albanian civilians through physical and verbal abuse, and killing scores of people through Kosovo villages. *Id.*

<sup>62</sup> See Marliese Simons, *Milosevic's Lawyers, Frustrated by Client, Ask to be Taken off Case*, N.Y. TIMES, Oct. 28, 2004, at A7. Milošević defended himself from the beginning of his trial. *Id.* When Milošević began to suffer from health issues in September 2005, the United Nations assigned lawyers to assist in his defense. *Id.* However, the lawyers asked to be taken off his case because Milošević would not cooperate and some witnesses said they would testify only if Milošević represented himself. *Id.*

<sup>63</sup> See Milan Markovic, *In the Interests of Justice?: A Critique of the ICTY Trial Court's Decision to Assign Counsel to Slobodan Milosevic*, 18 GEO. J. LEGAL ETHICS 947, 947 (2005) (describing how the onerous trial of Milošević was more than the prosecution anticipated); see also Joanne Williams, *Slobodan Milosevic and the Guarantee of Self-Representation*, 32 BROOK J. INT'L L. 553, 554 (2007) (noting that Milošević's trial lasted more than four years before he died in his cell on March 11, 2006); Groome, *supra* note 54, at 934 (asserting that people criticized the Milošević trial as taking too long, but that there are not alternative procedures to make the trial more efficient without sacrificing fairness; even trials that were more efficiently run, after Milošević, took over a year to complete).

<sup>64</sup> See Michael P. Scharf, *Self-Representation Versus Assignment of Defence Counsel Before International Criminal Tribunals*, 4 J. INT'L CRIM. JUST. 31, 32-33 (2006) [hereinafter Scharf, *Self-Representation Versus Assignment*]. Some of the tactics Milošević used were making long-winded speeches, which could not be restrained by objections to relevance or be

witnesses, and made political speeches.<sup>65</sup> Additionally, the ICTY faced uncontrollable delays that can be attributed to Milošević's failing health during his trial.<sup>66</sup>

Milošević's health was an additional obstacle for the ICTY because the former head of state and alleged war criminal died in his cell on March 11, 2006 from an apparent heart attack, thus escaping judgment, justice, and accountability.<sup>67</sup> Milošević's death caused much anguish for

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subject to cross-examination. *Id.* Also, Milošević repeatedly challenged the authority of the court. *Id.* See also Gregory A. McClelland, *A Non-Adversary Approach to International Criminal Tribunals*, 26 SUFFOLK TRANSNAT'L L. REV. 1, 36 (2002) (asserting that throughout his trial, Milošević contested every point made by the prosecution, insisted on equal time to examine all witnesses, attempted to intimidate witnesses, and presented drawn-out political discourses on cross-examination). Milošević's tactics forced the prosecution to end its case early due to a court-imposed deadline. *Id.* Milošević also succeeded in "hampering victims from telling the full stories of their sufferings." *Id.* See also Mugambi Jouet, *Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court*, 26 ST. LOUIS U. PUB. L. REV. 249, 293-94 (2007) (explaining that Milošević also used a stalling tactic of submitting a witness list comprising over 1,631 witnesses including Bill Clinton and Tony Blair). The list was five times longer than the prosecution's witness list. *Id.* After Milošević presented his first forty witnesses, he pared down his witness list and said he only needed to call 199 more, and that was what he considered the absolute minimum. *Id.*

<sup>65</sup> See Michael P. Scharf, *The Legacy of the Milosevic Trial*, 37 NEW ENG. L. REV. 915, 918-19 (2003) [hereinafter Scharf, *The Legacy*]. During his opening argument, Milošević included numerous gruesome pictures from the 1999 NATO bombing campaign. *Id.* Milošević made another vivid presentation during his defense of his actions with Croatia. *Id.* Milošević's cross examinations lasted twice as long as the Prosecution's direct examination because of his political rants and abusing witnesses. *Id.* The Trial Chambers warned Milošević that he was supposed to be asking the witness questions and not making speeches. *Id.*

<sup>66</sup> See Jouet, *supra* note 64, at 294. Milošević's health unduly delayed the trial because doctors insisted on long periods of rest for Milošević. *Id.* See also Marlise Simons, *Court Looks for Ways to Speed Milosevic Trial*, N.Y. TIMES, July 28, 2004, at A9 (discussing how the ICTY brought in a cardiologist to evaluate Milošević's health problems which had continually delayed his trial). Marlise Simons reported that the:

United Nations war crimes tribunal postpone[d] [the] start of Slobodan Milosevic's defense until Aug 31, when court reconvene[d] after summer recess; there have been numerous delays in trial because of Milosevic's poor health . . . . Mr. Milosevic, 62, suffer[ed] from high blood pressure and heart disease and has repeatedly pleaded for more time to prepare to answer charges of genocide, war crimes and crimes against humanity. The opening of his defense has been postponed several times . . . .

Marlise Simons, *Milosevic's Defense Delayed 6 Weeks*, N.Y. TIMES, July 17, 2004, at A6.

<sup>67</sup> See Linda M. Keller, *Seeking Justice at the International Criminal Court: Victims' Reparations*, 29 T. JEFFERSON L. REV. 189, 196 (2007) (noting that Milošević was in the middle of his defense when he died on March 11, 2006). Marlise Simons reported:

An autopsy showed that a heart attack killed Slobodan Milosevic . . . . new evidence emerged that Mr. Milosevic, the former Yugoslav president found dead in his prison cell bed on Saturday, had been

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his victims, but former ICTY prosecutor Richard Goldstone thinks that the “ICTY was an appropriate place for him to die, if he were to die prematurely.”<sup>68</sup>

The Milošević trial signaled a remarkable success in placing the first head of state on trial, but caused unrelenting challenges and produced a great embarrassment of never delivering a judgment.<sup>69</sup> Although the ICTY never completed his trial, Milošević developed a new approach to self-representation that included various delays, which other defendants subsequently used in their trials.<sup>70</sup> Utilizing this right of self-representation in an exploitative manner became notorious throughout the ICTY and its trials.<sup>71</sup> However, to fully comprehend the criticism about the use of self-representation in the ICTY, it is important to know how this right of self-representation came into existence.<sup>72</sup>

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taking medicine not prescribed by his physicians, including an antibiotic known to diminish or blunt the effect of the medicines he had been taking for heart and blood-pressure problems.

*Milosevic Died of Heart Attack, Autopsy Shows*, N.Y. TIMES, Mar. 13, 2006, at A1.

<sup>68</sup> Interview with Justice Richard Goldstone, Former Prosecutor, International Criminal Tribunal of the Former Yugoslavia, in Valparaiso, Ind. (Sept. 24, 2008) (answering a question about the major mistakes and downfalls of the ICTY with regard to the Milošević trial). Justice Goldstone also said that “the fact that he died in prison means something.” *Id.*

<sup>69</sup> Markovic, *supra* note 63, at 947. Because Milošević was the first head of state to be tried before an international tribunal, it was hailed as a momentous event. *Id.* One ICTY official commented on this success by saying that “Milosevic’s transfer to the Hague is the capstone of the tribunal’s somewhat improbable rise from the margins of the international arena to that of a serious international institution.” *Id.* However, obstacles arose such as prolonged presentation of the prosecution’s case, the health and resignation of the Presiding Judge, Richard May, Milošević’s antics of intimidating witnesses and questioning the legitimacy of the tribunal, and Milošević’s stubbornness to conduct his own defense while battling significant health problems. *Id.* One article emphasized that “[t]he early contender for ‘trial of the century’ ended in embarrassing anticlimax, without a defendant against whom to deliver judgment.” *Recent Publications*, 33 YALE J. INT’L L. 513, 513 (2008).

<sup>70</sup> See *supra* notes 64–65 (discussing specific tactics such as contesting every point, making political speeches, and presenting various slide shows and videos).

<sup>71</sup> See *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Decision on Momčilo Krajišnik’s Request to Self-Represent, on Counsel’s Motions in Relation to Appointment of Amicus Curiae, and on the Prosecution Motion of 16 February 2007, ¶ 24 (May 11, 2007). The Appeals Chamber granted Krajišnik’s request to represent himself. *Id.* See also Michael P. Scharf, *Chaos in the Courtroom: Controlling Disruptive Defendants and Contumacious Counsel in the War Trials*, 39 CASE W. J. INT’L L. 155, 162 (2006) [hereinafter Scharf, *Chaos in the Courtroom*] (explaining that only six months after Milošević’s death, Šešelj decided he would represent himself at his trial).

<sup>72</sup> See *infra* Part II.C (discussing the origins of the ICTY and its importance throughout various jurisdictions).

C. *Right of Self-Representation*

One of the many rights embedded in trials is the right to defend oneself.<sup>73</sup> This right also applied to the trials of the ICTY, as articulated in its statute and its various interpretations.<sup>74</sup> However, defendants may not take advantage of this right by using it as an opportunity to voice their own agenda or to make a circus out of the courtroom.<sup>75</sup>

The ICTY Statute categorized the right to self-representation as one of the “minimum guarantees” for the accused.<sup>76</sup> The article conveying the right of self-representation, Article 21(4)(d) of the ICTY Statute, also maintained the right to be represented by counsel.<sup>77</sup> A reason for

<sup>73</sup> See *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 161–62 (2000) (holding that defendants need to voluntarily elect that right and to be made aware of the disadvantages of self-representation). See also *U.S. v. Thomas*, 357 F.3d 357, 364–65 (3d Cir. 2004) (noting that defendants should be fully apprised of the risks and difficulties that come along with *pro se* defense); *Devine v. Indian River County Sch. Bd.*, 121 F.3d 576, 580 (11th Cir. 1997) (holding that “the right to proceed *pro se* under 28 U.S.C. § 1654 is a fundamental statutory right that is afforded the highest degree of protection. It is a right which is deeply rooted in our constitutional heritage . . .”).

<sup>74</sup> International Tribunal Statute, *supra* note 43, art. 21(4)(d) (explaining that one of the rights of the accused is the right to defend himself). See also *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Decision on Future Course of Proceedings, ¶ 8 (Apr. 9, 2008) (noting that the right to self-representation is an “indispensable cornerstone of justice”); *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Decision on Financing the Defence of the Accused, ¶ 26 (July 30, 2007) (noting that the ICTY registry refers to “self-representation [as] an informed choice which an accused makes, accepting the limitations on his ability to prepare and present a professional defence”).

<sup>75</sup> See *Faretta v. Cal.*, 422 U.S. 806, 852 (1975) (explaining that the right to self-representation is not absolute). See also *U.S. v. Dunlap*, 577 F.2d 867, 868 (4th Cir. 1978) (noting that judges may use their discretion to preserve an orderly courtroom); *Payne v. State*, 367 A.2d 1010, 1017 (Del. 1976) (explaining that defendants’ conduct must conform to orderly standards of the courtroom); *People v. Burson*, 143 N.E.2d 239, 247 (Ill. 1957) (stating the court has the responsibility to ensure that proceedings will not deteriorate as a result of improper conduct); *State v. Plunkett*, 934 P.2d 113, 117 (Kan. 1997) (explaining that counsel will be appointed to the defendant if the judges feel the defendant’s self-representation would interrupt the court’s business). One article reiterated that “[t]he strategy, which some of these prominent Serb war crimes indictees have pursued, is not to take the trial seriously in the legal sense, but to turn it into a kind of propaganda circus—so to use the courtroom as an opportunity to make propaganda.” *Bosnia: Radovan Karadzic Goes to Court*, THAI PRESS REPORTS, Aug. 29, 2008.

<sup>76</sup> International Tribunal Statute, *supra* note 43, art. 21(4). The ICTY has also defined other rights as “minimum guarantees.” *Id.* These include the right to be quickly informed about the charges, in detail, in a language he understands, the right to enough time to prepare a defense, the right “to be tried without undue delay”, the right to confront witnesses, the right to an interpreter, and the right to remain silent. *Id.*

<sup>77</sup> *Id.* at art. 21(4)(d). The article also mandates that the defendant be informed of his right to represent himself or to be represented through legal counsel. *Id.* The article also articulates that if a defendant does not have an attorney, the tribunal can assign one to him without cost to him if he does not have the money to pay for an attorney. *Id.* See also

including these two alternatives was that a defendant should have the right to decide how to approach his trial.<sup>78</sup> Although the right to self-representation is well established, the ICTY determined it is a qualified right, not an absolute right.<sup>79</sup>

Various courts, including the ICTY, acknowledged the voidable element of the right of self-representation.<sup>80</sup> For example, in England and Canada, courts restrict the right to self-representation in sexual assault cases to protect witnesses and victims.<sup>81</sup> Moreover, some

Prosecutor v. Milošević, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, ¶ 11 (Nov. 1, 2004) (noting that article 21(4)(d) created a "binary opposition between representation 'through legal assistance' and representation 'in person'").

<sup>78</sup> See *Faretta*, 422 U.S. at 819 (holding that the Sixth Amendment implies a defendant's personal right to choose self-representation). In a concurring opinion Justice Brennan said "personal liberties are not rooted in the law of averages . . . [the defendant's] choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" *Id.* at 834 (Brennan, J., concurring). See also *McKaskle v. Wiggins*, 465 U.S. 168, 176-77 (1984) (noting that the self-representation process "affirm[s] the dignity and autonomy of the accused"); *People v. Gordon*, 688 N.Y.S.2d 380, 382 (N.Y. Sup. Ct. 1999) (stating that the right of self-representation "embodies one of the most cherished ideals of civilization: the right of an individual to determine his own destiny"); *The Accused as Co-Counsel: The Case for the Hybrid Defense*, 12 VAL. U. L. REV. 329, 350 (1978) (explaining how a defendant's procedural rights incorporate a sense of personal character).

<sup>79</sup> Prosecutor v. Šešelj, Case No. IT-03-67-PT, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence, ¶ 20 (May 9, 2003). The Tribunal cited to a rule of procedure and evidence from the Rwanda Tribunal to support its statement that assignment of counsel is in conformity with the right of self-representation. *Id.* The Tribunal also indicated that the Article in the ICTY tribunal articulating the right to self-representation is only a starting point, and determined that the right is not absolute. *Id.*

<sup>80</sup> *Milošević*, IT-02-54-AR73.7 at ¶ 12. The Tribunal in its decision refers to the *Faretta* case, and notes that the United States Supreme Court recognized that because "[t]he right of self-representation is not a license to abuse the dignity of the courtroom," and therefore a judge "may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." *Id.* The Tribunal also referred to the decision of another tribunal, the Special Court for Sierra Leone, for the precedent that denying a defendant's right to self-representation is appropriate when "long adjournments" would result from such a grant. *Id.* at n.39.

<sup>81</sup> England's Youth Justice and Criminal Evidence Act states:

- (1) No person charged with a sexual offence may in any criminal proceedings cross-examine in person a witness who is the complainant, either –
  - (a) in connection with that offence, or
  - (b) in connection with any other offence (of whatever nature) with which that person is charged in the proceedings.

Youth Justice and Criminal Evidence Act, 1999, part II, c. II, §§ 34 (Eng. & Wales). The Canada Criminal Code states:

- (1) In any proceedings against an accused, on application of the prosecutor or a witness who is under the age of eighteen years, the accused shall not personally cross-examine the witness[] . . .

jurisdictions in the United States do not allow a defendant to use self-representation during an appellate proceeding.<sup>82</sup> The ICTY also recognized that the jurisprudence of civil law countries imposed counsel upon the accused “in serious criminal cases.”<sup>83</sup> Finally, the European Court of Human Rights held that requiring a defendant to be assisted by counsel was not incompatible with its Convention.<sup>84</sup>

Although occasionally various interests trumped the right of self-representation, the right remained prominent.<sup>85</sup> Therefore, the ICTY created a test that balanced the defendant’s right of self-representation and expeditious trials.<sup>86</sup> Even with equilibrium established, criminal defendants of the ICTY used a defense strategy that involved self-representation and delay tactics to disrupt the courtroom.<sup>87</sup>

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(2) In any proceedings against an accused, on application of the prosecutor or a witness, the accused shall not personally cross-examine the witness . . . .

Canada Criminal Code, R.S.C. ch. C-46 § 486.3(1)-(2) (2009).

<sup>82</sup> *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 163 (2000). The main reason the Court decided that the right to self-representation does not extend to appellate proceedings is because appellants’ rights in appellate proceedings have been minimal. *Id.* Appellants have no right to be present at appellant proceedings and no right to be present at oral argument. *Id.* The Court added that a state is free to amend its own Constitution to include the right of self-representation during appellate proceedings. *Id.*

<sup>83</sup> *Milošević*, IT-02-54-AR73.7 at ¶ 12 n.38 (citing C. PR. PÉN. arts. 274, 317 (Fr.); Strafprozeßordnung [StPO] [Code of Criminal Procedure] Apr. 7, 1987, Bundesgesetzblatt, Teil I [BGBl. I] 1074, §140 (F.R.G.); Code D’Instruction Criminelle [Criminal Instruction Code] of 9 Decembre 1808 art. 294 (Belg.); Arts. 282-83, Code of Criminal Procedure of the Republic of Korea; Art. 71(1) of the Criminal Procedure Act of the Federal Republic of Yugoslavia). *See also Šešelj*, IT-03-67-PT at ¶ 16-17 (citing Section 731 of the Danish Administration of Justice Act and the Criminal Procedure Act of the Federal Republic of Yugoslavia arts. 13, 71).

<sup>84</sup> *Croissant v. Germany*, 16 Eur. Ct. H.R. 135, 135 (1992). The court added that if a defendant objects to the number of attorneys, that “will be incompatible with the notion of a fair trial . . . if, even taking into account a proper margin of appreciation, it lacks relevant and sufficient justification.” *Id.*

<sup>85</sup> Joseph A. Colquitt, *Hybrid Representation: Standing the Two-Sided Coin on its Edge*, 38 WAKE FOREST L. REV. 55, 65 (2003). Colquitt asserts that just because other interests may supersede the right to self-representation, the courts are mandated to “balance the rights and interests of defendants against other important rights and interests in a manner fair to all.” *Id.*

<sup>86</sup> *Id.* at 127. In order to accomplish justice, striking a proper balance and establishing procedures need to be ascertained. *Id.* *See also* Nina H.B. Jørgensen, *The Problem of Self-Representation at International Criminal Tribunals*, 4 J. INT’L CRIM. JUST. 64, 66-67 (2006) [hereinafter Jørgensen, *The Problem of Self-Representation*] (explaining that the ICTY Trial Chamber in the *Krajišnik* case noted that decisions for the grant or denial of self-representation will depend on the factual circumstance). For example, the Trial Chamber acknowledged that a judge has more discretion to reject a request of self-representation when the request is made during the trial. *Id.* at 67.

<sup>87</sup> *See* *Prosecutor v. Martić*, Case No. IT-95-11-PT, *Prosecutor v. Stanišić*, Case No. IT-03-69-PT, *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Decision on Prosecution Motion for

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Momčilo Krajišnik, (“Krajišnik”) a former Bosnian Serb politician whose trial began on February 3, 2004, refused to waver from this delaying tactic defense strategy.<sup>88</sup> Krajišnik disrupted his trial by filing repeated petitions for various extensions.<sup>89</sup> Another less publicized, yet still groundbreaking, case was that of Vojislav Šešelj (“Šešelj”), the founder and president of the Serbian Radical Party.<sup>90</sup> Šešelj also used the strategy of self-representation during his trial that began on November 7, 2007.<sup>91</sup>

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Joinder, ¶ 51 (Nov. 10, 2005) (noting the Trial Chamber’s concern that Šešelj’s self-representation may cause further delays). See also Scharf, *Chaos in the Courtroom*, *supra* note 71, at 162 (Šešelj made it clear that he intended to utilize self-representation to disrupt his trial when he published three books on the eve of his trial: *Genocidal Israeli Diplomat Theodor Meron, In the Jaws of the Whore Del Ponte*, and *The Lying Hague Homosexual*, Geoffrey Nice.).

<sup>88</sup> See The Hague Justice Portal, *Krajišnik Granted Self-Representation*, <http://www.haguejusticeportal.net/eCache/DEF/7/577.html> (last visited Feb. 26, 2009) (discussing how the ICTY Appeals Chamber allowed Krajišnik to exercise his right of self-representation). See also Krajišnik (IT-00-39) Case Information Sheet, <http://www.un.org/icty/glance/Krajišnik.htm> (last visited Feb. 26, 2009) (explaining that the ICTY charged Krajišnik with two counts of genocide, five counts of crimes against humanity, and one count of violations of the laws or customs of war); Prosecutor v. Krajišnik, Case No. IT-00-30-T, Judgement, ¶ 1179 (Sept. 27, 2006) (stating that the Trial Chamber found Krajišnik guilty and sentenced him to twenty-seven years in jail).

<sup>89</sup> Krajišnik submitted an Appellate Brief to the Tribunal but exceeded the 30,000 word limit. Prosecutor v. Krajišnik, Case No. IT-00-39-A, Decision on Request by Momčilo Krajišnik for Extension of Time to Comply with Appeal Brief Word Limit (Jan. 7, 2008). The Appeals Chambers considered the fact that Krajišnik had the difficult task of shortening his arguments and that he wanted to use lawyers to help him; the court held that approving his petition would help facilitate a fair and expeditious appeal. *Id.* See also Prosecutor v. Krajišnik, Case No. IT-00-39-A, Decision on “Urgent Motion for Extension of Time for Filing Notice of Appeal Pending Translation of the Judgment into the Language of the Convicted Person” (Feb. 1, 2007). Krajišnik filed a petition for “an extension of time for the filing of the Notice of Appeal until the Appellant has received a translation of the Judgment convicting him in his own language,” and “requested that [he] be granted 75 days following the provision of the Judgement in a language he understands for the filing of his Notice of Appeal.” *Id.* In denying the petition, the Appeals Chambers noted that appellants are allowed only thirty days to file a Notice of Appeal and the Pre-Appeal Judge already granted an extension of time on three occasions, which exceeded “what has been granted in similar circumstances in other cases.” *Id.*

<sup>90</sup> See Prosecutor v. Šešelj, Case No. IT-03-67, Indictment (Jan. 15, 2003). Vojislav Šešelj was the President of the Serbian Radical Party and the ICTY accused him of crimes against humanity such as persecution on political, racial, or religious grounds and inhumane acts of forcible transfer. *Id.* Furthermore, he has been accused of violations of the laws or customs of war such as murder, torture, cruel treatment, wanton destruction of villages, or devastation not justified by military necessity, destruction or willful damage done to institutions dedicated to religion or education, and plunder of public or private property. *Id.* Also, Šešelj has some legal education, foreshadowing his exercise of his right of self-representation. *Id.*

<sup>91</sup> See Prosecutor v. Šešelj, Case No. IT-03-67, Initial Appearance Transcript at 6, ¶1-4 (Feb. 26, 2003). Šešelj said: “[i]t is possible that I will engage an assistant and a legal

The recently-developed defense scheme of delaying the trial and embarrassing the tribunal became a major obstacle for the ICTY during its struggle to balance efficient trials against defendants' rights.<sup>92</sup> The copious number of motions filed and use of the courtroom as a personal soapbox undermined these trials.<sup>93</sup> The tribunal used various methods, including assignment of counsel, the assignment of amicus curiae, and the assignment of standby counsel, to control inefficiencies of self-representation.<sup>94</sup>

#### D. ICTY's Control Mechanisms for the Right of Self-Representation

International law permitted the assignment of counsel to an unwilling defendant and acknowledged the necessity to safeguard the integrity of the proceedings.<sup>95</sup> The ICTY used three main control mechanisms: assignment of counsel, assignment of standby counsel, and assignment of amicus curiae.<sup>96</sup>

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advisor who will never appear on my behalf in this courtroom. They will never appear in this courtroom. I retain this exclusivity of appearing in the courtroom on the side of the accused." *Id.* See also Prosecutor v. Šešelj, Case No. IT-03-67-PT, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence (May 9, 2003) (discussing how the prosecution wanted counsel for Šešelj for fear of his delaying the trial; however, this motion was denied); Can Karpat, *The Vojislav Šešelj Trial: Another Judicial Farce Begins*, <http://www.axisglobe.com/article.asp?article=1145> (Nov. 29, 2006) (explaining that Šešelj used such tactics as demanding all documents be in print form because he was afraid a computer would electrocute him; Šešelj also disrupted his proceedings by demanding that judges remove their robes because they looked like medieval inquisitors, and refused a court-imposed lawyer because they wore traditional wigs which looked like "a bird's nest on [the] head").

<sup>92</sup> See *supra* notes 87-91 (discussing how disruptive defendants took advantage of the ICTY).

<sup>93</sup> See *supra* notes 65, 89 (discussing various tactics that self-represented defendant used).

<sup>94</sup> See *infra* Part II.D (discussing and defining the ICTY's three main control mechanisms for defiant defendants).

<sup>95</sup> See Prosecutor v. Barayagwiza, Case No. ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw (Nov. 2, 2000). The court held that it can assign counsel over the protest of the self-represented defendant. *Id.* See also Prosecutor v. Milošević, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, ¶ 13 (Nov. 1, 2004) (holding that the assignment of counsel is permitted "on the grounds that a defendant's self-representation is substantially and persistently obstructing the proper and expeditious conduct of his trial").

<sup>96</sup> See Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Assigned Counsel's Motion for Withdrawal (Dec. 7, 2004). This decision illustrates the option of assignment of counsel. *Id.* See also Šešelj, IT-03-67-PT. This decision illustrates the option of standby counsel. *Id.* See also ICTY Rules of Procedure and Evidence, R. 74, (Nov. 4, 2008), [http://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032\\_Rev42\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_Rev42_en.pdf) (allowing the ICTY to assign amicus curiae to defendants as it sees fit).

The first mechanism was the assignment of defense counsel, who essentially presented the case for the defendant.<sup>97</sup> For assignment of counsel, the ICTY balanced the defendant's personal right and choice of pro se litigation against the tribunal's interest in achieving a fair and expeditious trial.<sup>98</sup> However, once the ICTY decided to assign counsel, the assignment prohibited the defendant from making submissions or questioning witnesses.<sup>99</sup> The assigned counsel also made submissions on law or fact and acted in the best interest of the accused.<sup>100</sup> Nevertheless, the ICTY judges thought this control mechanism was unfair and

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<sup>97</sup> See Mikhail Wladimiroff, *Former Heads of State on Trial*, 38 CORNELL INT'L L. J. 949, 967 (2005). In an inquisitorial system, there is a provision for mandatory defense counsel. *Id.* However, the ICTY is an adversarial system and there is no such requirement. *Id.* In the inquisitorial system, the accused instructs his advocate about the nature of his defense, but in the adversarial system defense counsel has an obligation to "[put on] a case." *Id.*

<sup>98</sup> See Göran Sluiter, *Karadžić on Trial*, 6 J. INT'L CRIM. JUST. 617, 619-20 (2008) [hereinafter Sluiter, *Karadžić on Trial*]. Sluiter asserts that the ICTY's decision in the *Šešelj* case retracts from the ICTY providing a clear guideline for assignment of counsel to restrain the right of self-representation. *Id.* Sluiter also offers his three factors that need to be considered for a guideline: the accused needs to be informed about the rules of self-representation, the court would have to assess if violation of self-representation rules was in bad-faith and if the court gave the accused a warning about his conduct. *Id.* See also *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) (noting that the ICTY held that "the Chambers possess an inherent power to control the proceedings in such a way as to ensure that justice is done and to deal with conduct which interferes with the Tribunal's administration of justice"); *Prosecutor v. Delalić*, Case No. IT-96-21, Order on the Motion to Withdraw as Counsel Due to Conflict [sic] of Interest, ¶ 8 (June 24, 1999) (noting the ICTY's duty 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[']").

<sup>99</sup> See Wladimiroff, *supra* note 97, at 968. Once a court assigns counsel it would have to decide how involved the defendant would be in his defense. *Id.* The first option is to prohibit the defendant from doing anything, thus preventing his presentation of the case. *Id.* The other approach would be to allow the defendant to make submissions and question witnesses. *Id.* This would ultimately lead to the assigned counsel acting essentially as *amicus curiae*. *Id.*

<sup>100</sup> *Prosecutor v. Milošević*, Case No. IT-02-54-T, Order on the Modalities to be Followed by Court Assigned Counsel (Sept. 3, 2004). In addition, the assigned counsel will prepare and examine witnesses, seek orders from the Court that are necessary to the case, including subpoenas, and discuss the case and listen to the defendant but still determine what route to take the case. *Id.* Furthermore, the accused may be afforded the opportunity, if approved by the Trial Chamber, to participate actively in the case, such as by examining a witness after counsel has already examined the witness. *Id.* See also *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Reasons for Oral Decision Denying Mr. Krajišnik's Request to Proceed Unrepresented by Counsel, ¶ 3 (Aug. 18, 2005) (allowing an exception to its usual rule and allowing Krajišnik to question the witness after his counsel).

established another version of the assignment of counsel in the *Šešelj* case.<sup>101</sup>

The ICTY judges utilized another method, the standby counsel model.<sup>102</sup> This allowed the accused to defend himself with counsel to assist him with the technical aspects of the trial, but not with formulating the arguments.<sup>103</sup> Standby counsel also helped the defendant prepare his defense, remained in the courtroom, addressed the court when the defendant requested, and questioned witnesses if the Trial Chamber ordered it.<sup>104</sup> In addition, standby counsel took over the trial if the

<sup>101</sup> Prosecutor v. *Šešelj*, Case No. IT-03-67, Decision on Prosecution's Motion for Order Appointing Counsel to assist Vojislav *Šešelj* with his Defense (May 9, 2003). Soon after its decision on assignment of counsel for Milošević, the ICTY changed its perspective on the assignment of counsel and opted instead for assignment of standby counsel. *Id.* See also Wladimiroff, *supra* note 97, at 968. (The difference in opinions is based on the composition of judges for each decision. *Id.* The judges in *Šešelj* had "stronger roots in common law jurisdictions," whereas the judges in *Milošević* "had more ties with civil law jurisdictions." *Id.* The common law jurisdiction focuses more on the rights of the accused, whereas civil law jurisdictions emphasize the interest of justice. *Id.*

<sup>102</sup> See *Šešelj*, No. IT-03-67, Decision on Prosecution's Motion for Order Appointing Counsel to assist Vojislav *Šešelj* with his Defense (May 9, 2003) (discussing the new approach of assigning standby counsel).

<sup>103</sup> See Nina H.B. Jørgensen, *The Right of the Accused to Self-Representation Before International Criminal Tribunals*, 98 AM. J. INT'L L. 711, 721 (2004) [hereinafter "Jørgensen, *Right of the Accused*"]. Jørgensen defines standby counsel's role as:

- 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 . . . ;
- 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 defence from the Accused at trial should the Trial Chamber find, following a warning, that the Accused is engaging in disruptive conduct or conduct requiring his removal from the courtroom under Rule 80(B).

*Id.*

<sup>104</sup> See *Šešelj*, No. IT-03-67, Decision on Prosecution's Motion for Order Appointing Counsel to assist Vojislav *Šešelj* with his Defense (May 9, 2003). Other duties of standby

defendant became too disruptive.<sup>105</sup> But, the ICTY also assigned amicus curiae to assist the court.<sup>106</sup>

Thus, the amicus curiae assisted the court.<sup>107</sup> The amicus curiae was not a part of the defense.<sup>108</sup> Rather, the amicus curiae's primary duty was to supply the court with information about defense issues.<sup>109</sup> Moreover, in order to ensure that the judge obtained all essential information to the case, the amicus curiae provided defendants with additional arguments.<sup>110</sup> Moreover, the amicus curiae made submissions

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counsel are to help the accused prepare for the pre-trial proceedings, to receive all materials, such as court documents or filings, and to advise the defendant as counsel sees fit. *Id.* Furthermore, with regard to questioning witnesses when the court orders it, the accused still has the "right to control the content of the examination." *Id.* Also, the counsel is bound in the same way as working with other defendants and communicates freely with those defendants. *Id.*

<sup>105</sup> See *id.* The court will order the standby counsel to take over the cases in exceptional circumstances. *Id.* The court must also issue the accused a warning about his disruptive behavior. *Id.* See also Wladimiroff, *supra* note 97, at 968 (asserting that the ICTR appointed standby counsel in the *Barayagwiza* case after the defendant boycotted and disrupted the trial).

<sup>106</sup> See ICTY R. of P. & Evid. 74. The rule states: "[a] Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber." *Id.* On August 30, 2001, the Trial Chamber ordered the Registrar to assign amicus curiae for Milošević. See also Maury D. Shenk, David S. Lorello & Meredith A. Rathbone, *International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 37 INT'L LAW. 551, 554 n.23 (2003) (citing United Nations, *Case Information Sheet: Milošević Case ("Kosovo, Croatia and Bosnia")*, Jan. 21, 2003, [http://www.icty.org/x/cases/slobodan\\_milosevic/cis/en/cis\\_milosevic\\_slobodan.pdf](http://www.icty.org/x/cases/slobodan_milosevic/cis/en/cis_milosevic_slobodan.pdf)). On September 6, 2001, the Registrar named Steven Kay, Kranislav Tapusković, and Michail Wladimiroff as amici curiae. *Id.* On October 10, 2002, the Trial Chamber removed Michail Wladimiroff as amicus curiae. *Id.* On November 22, 2002, it assigned Timothy McCormack as the third amicus curiae. *Id.*

<sup>107</sup> See Kingsley Chiedu Moghalu, *International Humanitarian Law from Nuremberg to Rome: The Weighty Precedents of the International Criminal Tribunal for Rwanda*, 14 PACE INT'L L. REV. 273, 301 (2002). Amicus curiae is defined as "friend of the court." *Id.* Also, the amicus curiae does not assist the defendant directly. *Id.*

<sup>108</sup> See Jarinde Temminch Tuinstra, *Assisting an Accused to Represent Himself*, 4 J. INT'L CRIM. JUST. 47, 56 (2006). Tuinstra asserts that the ICTY judges emphasized that standby counsel was not the same as amicus curiae. *Id.* Standby counsel works exclusively with the defendant and "should safeguard a fair and expeditious trial to the accused, even if the accused opposes their appointment." *Id.*

<sup>109</sup> *Id.* at 54. In a courtroom it may be hard to decipher who is counsel and who is amicus curiae. *Id.* But, counsel's duty is to adamantly defend the accused. *Id.* This primary function of counsel is extremely different than the role that amicus curiae fulfill. *Id.*

<sup>110</sup> *Id.* at 53. A main reason why amicus curiae may have to articulate other arguments for the defendants is because most of the defendants are not trained as lawyers, and thus, are unable to comprehend all that is required for a judge to make a decision. *Id.* For example, Milošević, even though considered a lawyer, did not meet the standards for Defense Counsel under Rule 44 of the ICTY Rules of Procedure and Evidence. *Id.*

regarding motions, objected to evidence, or pointed out exculpatory or mitigating evidence.<sup>111</sup>

The ICTY utilized these various methods in an attempt to curtail insubordinate defendants.<sup>112</sup> Each method tried to maintain the right to self-representation while still assisting the court.<sup>113</sup> Yet, none of these control mechanisms provided the perfect solution for the ICTY.<sup>114</sup> Even with these control mechanisms, the disruptive defense strategy haunted the ICTY again with Karadžić's threats to use this strategy.<sup>115</sup>

#### *E. Karadžić : His Arrest and Pending Trial*

On July 24, 1995, the ICTY indicted Karadžić for the crimes he committed in Bosnia and Herzegovina between May 13, 1992 until the day of his indictment.<sup>116</sup> Just a few months later, on November 16, 1995,

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<sup>111</sup> See Prosecutor v. Milošević, Case No. IT-02-54-T, Order Inviting Designation of Amicus Curiae (Aug. 30, 2001). In addition, the amicus curiae can act in any other way that the primary counsel deems appropriate in order to guarantee a fair trial. *Id.* See also Prosecutor v. Milošević, Case No. IT-02-54-T, Order Concerning Amici Curiae (Jan. 11, 2002). The amicus curiae also assists the court by illustrating to the Trial Chamber any defenses that are available to the defendant. *Id.* Furthermore, amicus curiae can make submissions about relevance. *Id.*

<sup>112</sup> See *supra* notes 98–111 (discussing the assignment of standby counsel, assignment of counsel, and assignment of amicus curiae).

<sup>113</sup> See Prosecutor v. Milošević, Case No. IT-02-54-T, Order Inviting Designation of Amicus Curiae (Aug. 30, 2001) (noting that the ICTY needed to take into consideration the fact that defendants had a right of self-representation). *Id.* See also 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) (illustrating that when assigning standby counsel to Norman, the court took into consideration the fact that he requested self-representation late into his trial). The ICTY held:

We have to act in accordance with the Statute and our Rules which, in any event, reflect the position under customary international law, which is that the accused has a right to counsel, but he also has a right not to have counsel. He has a right to defend himself, and it is quite clear that he has chosen to defend himself.

Prosecutor v. Milosevic, Case No. IT-02-54, Transcript at 18 (Aug. 30, 2001).

<sup>114</sup> See *infra* Part III.C (discussing the flaws and perfections of each control mechanism and the ICTY's treatment of self-representation).

<sup>115</sup> See *infra* Part II.E (discussing how the ICTY will again struggle with trying to control self-represented defendants if Karadžić uses the tactics displayed in previous cases).

<sup>116</sup> Prosecutor v. Karadžić, Case No. IT-95-5-I, Indictment (July 24, 1995). ICTY charged Karadžić with Genocide, Crimes against Humanity, such as detention facilities, targeting of political leaders, intellectuals, and professionals, deportation, shelling of civilian gatherings, appropriation and plunder of property, destruction of property, destruction of sacred sites, unlawful confinement of civilians as a grave breach of the Geneva Convention of 1949, outrages upon personal dignity as a violation of the laws or customs of war, shelling of civilian gatherings as a violation of the laws or customs of war, destruction of sacred sites as a violation of the laws or customs of war, extensive destruction or property

the ICTY indicted Karadžić and Ratko Mladić (“Mladić”) for the massacre at Srebrenica.<sup>117</sup> Karadžić and Mladić planned the ethnic cleansing of the town of Srebrenica, and their troops killed between 7000 and 8000 men and boys.<sup>118</sup> In addition, these indictments served the important purpose of making peace possible in the Balkan region.<sup>119</sup>

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as a grave breach of the Geneva Conventions of 1949, appropriation and plunder of property as a grave breach of the Geneva Convention of 1949 and as a violation of the laws or customs of war, Sarajevo sniping as a violation of the laws or customs of war, hostages as a grave breach of the Geneva Convention of 1949 and as a violation of the laws or customs of war, and human shields as a grave breach of the Geneva Convention of 1949 and as a violation of the laws or customs of war. *Id.*

<sup>117</sup> See Prosecutor v. Karadžić and Mladić, Case No. IT-95-5/18, Indictment (Nov. 16, 1995) (indicting Karadžić and Mladić for Srebrenica). See also Prosecutor v. Krstić, Case No. IT-98-33, Judgement, ¶ 2 (Apr. 19, 2004) (stating that Srebrenica is located in eastern Bosnia-Herzegovina and the United Nations designated it a safe area during the conflict); Nancy G. Abudu et al., *Human Rights*, 42 INT’L LAW. 755, 765 (2008) (noting that these 7000 to 8000 men died all in one day); Claus Kreß, *The International Court of Justice and the Elements of the Crime of Genocide*, 18 EUR. J. INT’L L. 619, 628 (2007) (explaining that there was a total of 40,000 Bosnian Muslims in Srebrenica before the slaughter); Daryl Mundis, Introductory Note to ICTY: Prosecutor v. Krstić, 40 I.L.M. 1343 (Nov. 2001) (explaining that the purpose of the massacre was to destroy the Bosnian Muslim community in Srebrenica and eliminate the possibility of the populations reestablishing itself); Solomon Shinerock, *United Nations Update*, 14 NO. 3 HUM. RTS. BRIEF 51, 51 (2007) (“The U.N.’s International Court of Justice . . . recently acquitted the Serbian government of complicity in the 1995 massacre of 8,000 Muslim Bosnians in Srebrenica.”); Meg Bortin, *Taking Up a Shovel to Expose Genocide in Bosnia*, N.Y. TIMES, Aug. 9, 2008, at A8 (describing the genocide at Srebrenica as “the worst massacre in Europe since World War II”).

<sup>118</sup> See Katherine G. Southwick, *Srebrenica as Genocide? The Krstić Decision and the Language of the Unspeakable*, 8 YALE HUM. RTS. & DEV. L.J. 188, 193-94 (2005). Karadžić issued a directive to his

forces to “complete the physical separation of Srebrenica from Zepa as soon as possible, preventing even communication between individuals in the two enclaves. By planned and well-thought out combat operations, create an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica.”

*Id.* The massacre followed a systematic plan. See also Prosecutor v. Krstić, Case No. IT-98-33-T, Trial Judgment, ¶ 84 (Aug. 2, 2001). The ICTY describes one specific instance:

The men were first taken to empty schools or warehouses. After being detained there for some hours, they were loaded onto buses or trucks and taken to another site for execution. Usually, the execution fields were in isolated locations. The prisoners were unarmed and, in many cases, steps had been taken to minimise resistance, such as blindfolding them, binding their wrists behind their backs with ligatures or removing their shoes. Once at the killing fields, the men were taken off the trucks in small groups, lined up and shot. Those who survived the initial round of gunfire were individually shot with an extra round, though sometimes only after they had been left to suffer for a time. Immediately afterwards, and sometimes even during the executions, earth moving equipment arrived and the bodies were

In 1998, after the conflict ended in Bosnia, Karadžić disappeared until July 21, 2008, the day of his arrest.<sup>120</sup> At the time of his arrest, Karadžić was at the top of the ICTY's most-wanted list.<sup>121</sup> On July 30, 2008, agents transferred Karadžić to the ICTY.<sup>122</sup> As anticipated, the ICTY encountered challenges with the efficiency of his proceedings.<sup>123</sup>

Before Karadžić's move to the ICTY, he attempted an appeal, thus delaying his transfer.<sup>124</sup> Also, Karadžić employed another stall tactic at his initial hearing on July 31, 2008 by exercising his right to use a thirty-day delay before entering his plea.<sup>125</sup> Moreover, during Karadžić's

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buried, either in the spot where they were killed or in another nearby location.

*Id.*

<sup>119</sup> See Richard Goldstone, Former Prosecutor, ICTY, Address at Valparaiso University School of Law: The Current State of International Criminal Law (Sept. 24, 2008). Goldstone said that the indictments stopped Karadžić from attending the Dayton Accords because Bosnia would not have gone to Dayton and sat in the same room with him. *Id.* Thus, the parties that did attend the Dayton Accords eventually agreed on a peace resolution. *Id.*

<sup>120</sup> See Radovan Karadžić's 'Novel' Idea for Disguise, STATESMAN, July 31, 2008. Karadžić was in hiding for thirteen years before his arrest. *Id.* The author asserts that Karadžić may have stolen the idea for his disguise from a book about him written by Mirjana Djurdjevic. *Id.* Karadžić disguised himself as a psychiatrist working in Belgrade, changed his name, and grew a long white beard. *Id.* In addition, Mladic is still at large. *Id.* See also Dan Bilefsky & Marlise Simons, *Top Bosnian War Figure Held Serb Leader Karadzic Arrested After 13 Years on the Run*, CHI. TRIB., July 22, 2008, at 6 (discussing how Karadžić was "one of the world's most-wanted war criminals" and that his arrest is an important occasion for the victims).

<sup>121</sup> See Warren Zimmerman, *Impressions of Karadžić*, Frontline Online: The World's Most Wanted Man, <http://www.pbs.org/wgbh/pages/frontline/shows/Karadzic/radovan/imppressions.html>. Zimmerman, the last U.S. ambassador to Yugoslavia, describes Karadžić as "a man obsessed by the imagery of violence," who is mad, and "seemed to [be] a man who needed psychiatric care, a person without moral compass or restraint." *Id.* The second highest ranking official who is still at large is Ratko Mladić. *Id.* See also Frontline Online: The World's Most Wanted Man, *Indicting the Top Leaders*, <http://www.pbs.org/wgbh/pages/frontline/shows/Karadzic/trial/indicted.html> (indicating that Mladić was Karadžić's military commander and the ICTY considered them its most wanted criminals).

<sup>122</sup> See Peter Finn, *Serbs Send Karadžić to War Crimes Tribunal*, WASH. POST, July 30, 2008. On the night of his transfer, masked secret service agents took Karadžić. *Id.* Karadžić's arrest sparked controversy in Serbia and rallies gathered. *Id.* It was estimated that about 15,000 people fled to the streets. *Id.* See also Bruno Waterfield, *Momentous Day as Karadžić Faces Court*, DAILY TELEGRAPH, July 30, 2008, at 15 (stating that on July 31, 2008, Karadžić appeared in the ICTY for his initial appearance).

<sup>123</sup> See *infra* notes 124-26 (discussing Karadžić's delay of his transfer to the Hague, filing an extension before entering his plea, and refusal to enter a plea).

<sup>124</sup> See *Karadzic Appeal Delays Trial Transfer*, 7 DAYS, July 29, 2008. Karadžić planned to appeal his transfer. *Id.* He said that he mailed his appeal from a remote post office just before the deadline. *Id.* It was also alleged that Karadžić ordered his legal team to delay his transfer to the Hague for as long as possible. *Id.* But, the appeal never arrived. *Id.*

<sup>125</sup> Prosecutor v. Karadžić, Case No. IT-95-5, Initial Appearance Transcript (July 31, 2008). Karadžić preferred not to enter a plea at his initial appearance, but wanted to see what happened in the next thirty days. *Id.* The wait-and-see was a response to the amended

second appearance, he refused to enter a plea.<sup>126</sup> Finally, Karadžić decided to represent himself and began his defense by filing various motions contesting the appointment of the judges.<sup>127</sup>

As early as his initial appearances, Karadžić used the ICTY as a forum to make his viewpoints known by opining about past unfair trials.<sup>128</sup> Moreover, during his second appearance, he acted defiantly and made derogatory comments about the ICTY.<sup>129</sup> Karadžić also made ridiculous accusations against a former prosecutor of the ICTY, Richard Goldstone, and a former United States Secretary of State, Madeleine Albright, alleging that they told him they would not arrest him if he disappeared.<sup>130</sup>

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indictment and Karadžić was notified that after the thirty days he would have to enter a plea on either the operative indictment or the amended one. *Id.* Karadžić agreed to a second appearance scheduled for August 29, 2008. *Id.*

<sup>126</sup> See Ed Harris, *Karadžić Refused to Enter Plea*, EVENING STANDARD, August 29, 2008, at 30 (noting that Karadžić did not enter a plea for his eleven counts and that the tribunal judge followed court rules and entered a plea of not guilty on Karadžić's behalf).

<sup>127</sup> See Peter Finn, *Karadzic Vows Vigorous Defense*, WASH. POST, July 31, 2008. Finn reported that Karadžić vowed to defend himself "as I would defend myself against any natural catastrophe." *Id.* Karadžić attacked the appointment of the judges and accused Judge Alphons Orié of having "'a personal interest' in convicting him." See also *Karadzic Wants Judge Dismissed*, ALJAZEERA.NET, Aug. 22, 2008. Karadžić also accused the ICTY of being incapable of giving him an impartial trial. *Id.* Finally, Karadžić listed a number of cases that Judge Orié had been involved with, including setting the sentence of twenty-seven years for Momčilo Krajišnik and being the judge at the ongoing trial of Šešelj. *Id.*

<sup>128</sup> See *Radovan Karadzic to Face New War Crimes Charges Soon*, U.S. FED. NEWS, Sept. 17, 2008. Karadžić said that he refused to be a passive object in court and that "he's not just defending himself, but everyone who suffered in the former Yugoslavia as well as the leaders of small nations who may one day find themselves similarly judged." *Id.* Karadžić proceeded to opine about the ICTY's previous trials by saying:

I cannot allow such a major trial, you've never had a trial like this and never will have, that this be an opportunity to just make it look like a fair trial. . . . And just as a human cannot be half girl, half mermaid, or half fish, this either has to be a fair trial or no trial at all.

*Id.*

<sup>129</sup> See Mike Corder, *Karadžić Still Defiant*, SUNDAY MAIL, Aug. 31, 2008, at 54. A specific derogatory comment Karadžić said was that the ICTY "is representing itself falsely as a court of the international community, whereas it is in fact a court of NATO whose aim is to liquidate me." *Id.* See also *Radovan Refuses to Answer to War Crimes Charges*, THAI PRESS REPORTS, Sept. 1, 2008 (noting that once the judge entered the not guilty plea, Karadžić asked if he could hold the judge to his word of not guilty).

<sup>130</sup> See Richard Holbrooke, *The Night I Pushed Karadzic for Peace*, AUSTRALIAN, Aug. 11, 2008, at 22 (noting that Karadžić is making up rumors about a deal being struck between Karadžić and Madeleine Albright agreeing, in exchange for his disappearance, that NATO would not seek to arrest him). See also *Karadžić Wants Holbrooke Called*, INDEP., Aug. 7, 2008, at 30 (discussing how Karadžić applied to the ICTY to have Richard Holbrooke summoned to the tribunal to testify about the secret 1996 deal that Karadžić would never stand trial for war crimes if he left politics); Marlise Simons, *Karadžić Makes Claims of Poor Treatment and a U.S. Deal to Avoid Trial*, N.Y. TIMES, Aug. 2, 2008, at A8 (explaining that Karadžić contended

Karadžić's arrest symbolized an achievement for the ICTY.<sup>131</sup> But, Karadžić demonstrated various disruptive techniques in his appearances at the ICTY.<sup>132</sup> These tactics mimicked those of past self-represented defendants and presented the same issues the ICTY dealt with in those trials.<sup>133</sup> Therefore, Karadžić forced the ICTY to confront these problems again.<sup>134</sup> In addition to the ICTY's major undertaking of reconciling the Balkan region, defendants' and Karadžić's tactics placed another burden on the tribunal.<sup>135</sup>

The ICTY developed from a gruesome war and it conducted high profile trials.<sup>136</sup> Various defendants in these cases established a way to manipulate the right of self-representation and the mechanisms used to control it.<sup>137</sup> Accordingly, Part III of this Note analyzes why defendants opt for this defense, why the ICTY needs to control these defendants, why the current control mechanisms are deficient, and what implications may arise if this problem is not resolved in Karadžić's trial.<sup>138</sup>

### III. ANALYSIS

Part III suggests that the ICTY needs a new mechanism for controlling its disruptive, self-represented defendants.<sup>139</sup> Part III.A explains why the defendants use the strategy of self-representation.<sup>140</sup> Part III.A also focuses on a defendant's goal of delaying trials, making a

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that the U.S. State Department urged the Tribunal's chief prosecutor, Richard Goldstone, to refrain from looking for Karadžić and to withdraw the indictment; Albright, Holbrooke, and Goldstone deny all these deals and allegations).

<sup>131</sup> See *supra* notes 120-21 (discussing Karadžić's thirteen years at large and his position atop the ICTY's most wanted list).

<sup>132</sup> See *supra* notes 124-28 (discussing how Karadžić emulated disruptive tactics used by previous self-represented defendants).

<sup>133</sup> See *supra* notes 124-26 (discussing Karadžić's delay of his extradition and refusal to enter a plea).

<sup>134</sup> See *supra* notes 124-30 (discussing the situations where the ICTY had to handle Karadžić's antics).

<sup>135</sup> See *supra* notes 40-42, 64-65, 89, 91 (discussing the reasons why the United Nations established the ICTY and how defendants manipulate the right to undermine the tribunal).

<sup>136</sup> See *supra* Part II.A.1 (describing the history that led to the establishment of the ICTY).

<sup>137</sup> See *supra* Parts II.C-D (explaining self-representation and the mechanisms used to control defendants who abuse the right of self-representation).

<sup>138</sup> See *infra* Part III (discussing why defendant's use self-representation, why the ICTY needs to control these defendants, the strengths and weaknesses of each attempt, and the implication if self-represented defendants are not controlled).

<sup>139</sup> See *infra* Parts III.A-D (demonstrating why defendants abuse their self-representation rights, why the ICTY needs to control them, why the ICTY's current control mechanisms are deficient, and what the future implications could be if the problem is not addressed in the upcoming Karadžić trial).

<sup>140</sup> See *infra* Part III.A (discussing the advantages gained by the defendant if he represents himself).

mockery of the ICTY, and criticizing the illegitimacy of the ICTY.<sup>141</sup> Next, Part III.B evaluates why it is crucial for the ICTY to restrain the right to self-representation by centering on the need for efficiency, fairness, and effectiveness.<sup>142</sup> Further, Part III.B discusses the policy behind the balance of self-representation and the court's right to have a non-disruptive trial.<sup>143</sup> Part III.C then analyzes the strengths and weaknesses of the ICTY's treatment of self-representation and its control mechanisms.<sup>144</sup> Finally, Part III.D discusses the implications for future regional criminal tribunals if an appropriate procedure is not finalized during the Karadžić trial.<sup>145</sup>

#### A. Reasons ICTY Defendants Opt to Self-Represent

Many high profile defendants, including ICTY defendants, redefine self-representation when they incorporate it into their defense strategies.<sup>146</sup> One of the purposes is to delay the trial by filing

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<sup>141</sup> See *infra* Part III.A (analyzing the underlying reasons why defendants opt for self-representation).

<sup>142</sup> See *infra* Part III.B (discussing why the ICTY needs to control the self-represented defendant, mainly to ensure efficiency, fairness, and effectiveness).

<sup>143</sup> See *infra* Part III.B (analyzing the public policy behind the balancing of interests of defendants and the tribunal).

<sup>144</sup> See *infra* Part III.C (analyzing the ICTY's treatment of self-representation and the strengths and weaknesses of each control mechanism, such as assignment of standby counsel, assignment of counsel, and assignment of amicus curiae).

<sup>145</sup> See *infra* Part III.D (discussing what could happen if Karadžić is not controlled in his trial).

<sup>146</sup> See *Prosecutor v. Šešelj*, Case No. IT-03-67, Initial Appearance Transcript at 6, ¶ 1-4 (Feb. 26, 2003). Šešelj said: "It is possible that I will engage an assistant and a legal advisor who will never appear on my behalf in this courtroom. They will never appear in this courtroom. I retain this exclusivity of appearing in the courtroom on the side of the accused." *Id.* See also *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Decision on Prosecution's Motion for Clarification and Reconsideration of the Decision of 28 February 2008, ¶ 7-9 (Mar. 11, 2008) (explaining that Krajišnik, although representing himself, can be assisted by counsel; but the Appeals Chambers clarified that their arguments must be consistent); *Prosecutor v. Milošević*, Case No. IT-99-37-I-PT, Transcript at 5, ¶ 6-8 (July 3, 2001) (noting that the court explained to Milošević that an initial appearance is not the place to start his defense, but that he would have ample opportunity to defend himself); Kristina Dell, *Why Karadžić Wants No Lawyer*, TIME, July 29, 2008, <http://www.time.com/time/world/article/0,8599,1827424,00.html> (noting that Mahatma Gandhi, Nelson Mandela, Fidel Castro, Slobodan Milošević, Charles Taylor, Vojislav Šešelj, and Khalid Sheikh Mohammed all represented themselves And that Karadžić is representing himself just to "enter into history"). Other reasons why defendants represent themselves is to reject the court, tell their stories (better than anyone else), to play a hero to supporters, to delay and disrupt the proceedings, and to avoid legal procedure. *Id.* See also *Karadžić to Conduct his Own Defense*, CHINA DAILY, July 24, 2008 (explaining that although Karadžić will represent himself, he will have legal counsel in Serbia helping him).

unnecessary motions.<sup>147</sup> In addition, self-representation gives defendants an opportunity to manipulate the ICTY in order to fulfill self-serving goals.<sup>148</sup> Finally, the defendants use self-representation in an attempt to criticize or embarrass the ICTY.<sup>149</sup>

First, defendants use self-representation to delay and disrupt trials because the legal procedures in place at the ICTY compliment their motives.<sup>150</sup> A defendant's motive for filing various motions is to delay trials, but also to frustrate the prosecution as well as disrupt the momentum of the prosecution's case.<sup>151</sup> The wait between the filing of a motion and the rendering of a decision essentially acts as a time-out from the trial, thus allowing defendants to distract the prosecution from the pending case.<sup>152</sup> Once the Chamber decides, it also has the effect of

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<sup>147</sup> See Eleanor Hall, *Concern over Karadzic's Plan to Represent Himself*, WORLD TODAY, July 24, 2008. This article interviews Gideon Boas, former ICTY senior legal officer; he explained how Milošević's trial lasted so long. *Id.* He explained that Milošević's case was so complicated that one person could not handle it. *Id.* Karadžić will be able to obstruct a fair and expeditious process by complaining "that he's at a significant disadvantage vis-à-vis a prosecution office with tens of millions of dollars behind them and all sorts of resources." *Id.* Boas explained that this type of complaint is a big risk to the ICTY. *Id.*

<sup>148</sup> See Adam M. Smith, *From Nuremberg to the Hague: The Future of International Criminal Justice*, 45 HARV. INT'L L. J. 563, 571 (2004) (giving an example that the ICTY's defendant Dusko Tadic hindered the prosecution's case because he failed to recognize the ICTY's authority). See also *Prosecutor v. Milošević*, Case No. IT-02-54-T, Transcript at 2806, ¶ 2-3 (Apr. 10, 2002) (noting that Milošević said: "I cannot appoint a lawyer, an attorney for myself, in front of an institution that I don't recognise.").

<sup>149</sup> See Eileen Simpson, *Stop to the Hague: Internal Versus External Factors Suppressing the Advancement of the Rule of Law in Serbia*, 36 GEO. J. INT'L L. 1255, 1276-77 (2005). Milošević somewhat succeeded in reducing confidence of the ICTY by challenging its legitimacy. *Id.* Milošević also converted the idea of justice into injustice because of his consistent degrading. *Id.* Furthermore, the ICTY never countered these assertions, furthering a lack of support. *Id.*

<sup>150</sup> See *infra* notes 151-54 (discussing how the ICTY's procedures helped the defendants delay their trials).

<sup>151</sup> Cf. Mark C. Fleming, *Appellate Review in International Criminal Tribunals*, 37 TEX. INT'L L.J. 111, 144 (2002) (discussing how interlocutory appeals disrupt the momentum of the case). The filing of excessive motions can be analogized to interlocutory appeals because both disrupt the case. *Id.*

<sup>152</sup> Cf. Robert A. Creamer, *Lateral Screening After Ethics 2000*, 787 PRACTISING L. INST. 111, 123 (2008). This article discusses motions dealing with screening and disqualifying attorneys. *Id.* It notes, however, that the lawyers and judges waste a great deal of time when resolving motions that do not pertain to the merits of the case. *Id.* Moreover, the article addresses that dealing with motions inevitably delays the conclusion of pending issues. *Id.* Therefore, the filing of excessive or unfounded motions accomplishes the same negative results of delay and a waste of time. *Id.* Paul L. Friedman, *Proposed Revisions to Rule Federal Rule of Civil Procedure 56*, SM090 A.L.I.-A.B.A 1151 (2007). This article discusses that many unfounded motions are filed in order to burden the opposing side and delay the proceeding. *Id.* Again, motions filed in the ICTY can be analogized to motions filed under Federal Rules of Civil Procedure because the same bad motives stimulate the filing. *Id.*

increasing the prosecution's workload because it must abide or respond to the Chamber's recommendation.<sup>153</sup> Ultimately, some of the ICTY's procedures allow for delays that preoccupy the prosecution, distract it from the case at issue, and satisfy the defendant's desire to disrupt the trial.<sup>154</sup> A defendant's right of self-representation, however, not only allows him to delay the trial, it also produces additional benefits.<sup>155</sup>

The benefits and advantages defendants gain through representing themselves prompts them to exercise this right.<sup>156</sup> First, the right of self-representation allows defendants to hinder the exposure of the truth by twisting the facts.<sup>157</sup> Therefore, if the defendant succeeds in altering the truth, then it could curtail the victims' rehabilitation.<sup>158</sup> This is mainly

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<sup>153</sup> See generally *Milošević, Slobodan (IT-02-54) Kosovo, Croatia and Bosnia*, [http://www.icty.org/case/slobodan\\_milosevic/4](http://www.icty.org/case/slobodan_milosevic/4) (last visited Feb. 11, 2010). During the Milošević trial the Trial Chamber made nineteen orders during 2006, forty-five in 2005, fifty-two in 2004, thirty-one in 2003, forty in 2002, and twenty-three in 2001. *Id.* With regard to decisions, there were ten in 2006, twenty-seven in 2005, forty-three in 2004, ninety-seven in 2003, fifty-one in 2002, and five in 2001. *Id.* See also *Šešelj (IT-03-67)* <http://www.icty.org/case/Šešelj/4> (last visited Feb. 26, 2009). In the Šešelj trial, the Trial Chambers made thirty-one orders in 2008, twenty-three in 2007, twenty-one in 2006, twenty-seven in 2005, eight in 2004, and nine in 2003. *Id.* The trial Chamber made thirty-one decisions in 2008, twenty-three in 2007, twenty-one in 2006, twenty-seven in 2005, eight in 2004, and nine in 2003. *Id.*

<sup>154</sup> Cf. Alain Frécon, *Delaying Tactics in Arbitration*, 59 DISP. RESOL. J. 40, 49 (Jan. 2005) (discussing how motions distract the arbitrator). The filing of motions during arbitration can be analogized to filing motions in a case because both distract from the issue at hand. *Id.* See also Jeremy D. Spector, *Awarding Attorney's Fees to Pro Se Litigants under Rule 11*, 95 MICH. L. REV. 2308, 2322 (1997) (discussing how unwarranted Rule 11 motions detract attention from the case). The filing of unwarranted Rule 11 motions can be analogized to filing unwarranted motions in the ICTY because both disrupt the underlying cause of action. *Id.*

<sup>155</sup> See *infra* notes 157-64, 166-70 (discussing the various advantages defendants gain when they exercise their right of self-representation).

<sup>156</sup> See *infra* notes 157-60, 162, 166 (noting some of these advantages as hindering the truth, establishing an inaccurate record, categorizing themselves as the victim, arguing politics, and criticizing the ICTY).

<sup>157</sup> See generally *Prosecutor v. Blaškić, Case No. IT-95-14, Transcript (Sept. 24, 1997)*. Tihomir Blaškić, a Bosnian Croat army officer, delayed his trial and his verdict, and thus he succeeded in delaying the exposure of the truth. *Id.* The ICTY showed its disapproval of defendants bringing up extraneous topics because it wasted the court's time, delayed justice, and distorted the truth. *Id.* The tribunal reinforced that the purpose of the trials was to expose the truth. *Id.*

<sup>158</sup> See Claudio Grossman, Gabrielle Kirk McDonald, Arlen Specter & Steven Weinstein, *International Support for International Criminal Tribunals and an International Criminal Court*, 13 AM. U. INT'L L. REV. 1413, 1436 (2001). The article discusses that the victims cannot seek reconciliation when the people responsible "flout the rule of law." *Id.* Ivkovic asserts that one of the purposes of the ICTY is to "preserve the stories and memories of the individuals who themselves did not survive." See also Sanja Kutnjak Ivkovic, *Justice by the International Criminal Tribunal for the Former Yugoslavia*, 37 STAN. J. INT'L L. 255, 265 (2001) (quoting Margaret Vandiver, Presentation at the 1997 Annual Meeting of the Academy of Criminal

because recording inaccurate stories diminishes the victims' suffering and trivializes the horror of the atrocities.<sup>159</sup>

Second, self-representation allows the accused to position themselves as the victims and gain sympathy around the world.<sup>160</sup> This could leave the Bosnian people feeling victimized again or the world disbelieving the victims' stories. By allowing this categorization, the ICTY also gives the defendant an opportunity to gain support from his country, motivating him to stay on trial.<sup>161</sup> Third, self-representation gives defendants the opportunity to argue politics and to state their opinions.<sup>162</sup> Because most self-represented defendants are high-ranking government or military officials, self-representation gives them the

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Justice Sciences, *Will Somebody Please Arrest These Guys?, The Work of the International Criminal Tribunal for the Former Yugoslavia in 1996*, (Mar. 1997) (on file with the *Stanford Journal of International Law*).

<sup>159</sup> See Grossman, McDonald, Specter, & Weinstein, *supra* note 158, at 1436. The authors assert that a record of what happened assures that death and torture do not disappear or only remain with the victims. *Id.* During the Nuremberg trials, the Chief of Counsel for the prosecution demanded that "the ideas and motives, which moved these defendants to treat their fellow men as less than beasts[]" must be disclosed. See also Louise Arbour, *Friedmann Award Address Litigation Before the ICC: Not If and When, But How?*, 40 COLUM. J. TRANSNAT'L L. 1, 8 (2001) (quoting GEORGE J. ANNAS & MICHAEL A. GRONDIN, *THE NAZI DOCTORS AND THE NUREMBERG CODE, HUMAN RIGHTS AND HUMAN EXPERIMENTATION* 66-68 (1992)). Further, the stories and concepts from those atrocities could not be forgotten. *Id.*

<sup>160</sup> See Milošević, *Calling Himself a Victim, Asks to be Freed by Court*, N.Y. TIMES, Jan. 31, 2002, at A11 (acknowledging that Milošević, calling himself the victim, claimed that forcing him to stand trial was the United Nations' attempt to convert the victim into the culprit). *Id.* See also Sebastian Rotella, *Milošević Says He's the Victim*, L.A. TIMES, Feb. 15, 2002, at A-1, available at <http://articles.latimes.com/2002/feb/15/news/mn-28153>. Milošević portrayed himself as the victim through showing pictures "of dismembered, decapitated, and charred corpses of civilians who he said were killed by [NATO.]" *Id.* This benefited him because NATO took responsibility for the deaths, thus leaving doubt that Milošević may not have been the perpetrator. *Id.*

<sup>161</sup> See Scharf, *Chaos in the Courtroom*, *supra* note 71, at 161. Scharf asserts that "[Milošević's] approval rating in Serbia doubled during the first weeks of the trial, and two years into the trial he easily won a seat in the Serb parliament in a nationwide election." *Id.* Serbs "cheer when [Milošević] outsmarts the prosecutors. When he's defending himself all alone against the world." Scharf, *The Legacy*, *supra* note 65, at 917. Milošević's trial was so powerful that it gained support from his Serbian Radical Party and they forced Serbia to televise his trial. *Recent Publications*, *supra* note 69, at 514-15.

<sup>162</sup> See McClelland, *supra* note 64, at 36. Milošević took advantage of his opportunities on cross-examination to present "lengthy political discourses." *Id.* See also Jenia Iontcheva Turner, *Defense Perspectives on Law and Politics in International Criminal Trials*, 48 VA. J. INT'L L. 529, 573 (2008) (suggesting that Milošević and Šešelj argued more politics rather than attempting to attack legal issues); Matthew Kaminski, *Milošević's Strategy to Center on Politics*, N.Y. TIMES, July 5, 2001, at A9 (noting that Milošević also fought a battle of politics).

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continual belief that they are still influential people in the world.<sup>163</sup> Furthermore, defendants have an unrestricted opportunity to voice opinions, thus incurring more attention, because no attorneys speak on behalf of the self-represented defendants.<sup>164</sup> In addition to these advantages of self-representation, defendants are also able to criticize and embarrass the ICTY.<sup>165</sup>

Last, the defendants want to use self-representation because it guarantees them time to attack the legitimacy and showcase their disapproval of the tribunal during their defense.<sup>166</sup> Unfortunately, the

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<sup>163</sup> See Jane E. Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT'L L. 251, 274 (2007). Milošević used his trial as a platform to influence public opinion. *Id.* See also Turner, *supra* note 162, at 573. Saddam Hussein used a defense that incorporated political arguments which received much media attention. *Id.*

<sup>164</sup> See Prosecutor v. Milošević, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, ¶ 4 (Nov. 1, 2004). On August 31, 2004, Milošević made a two-day opening statement. *Id.* Milošević's speeches helped because one "can't help falling under his spell . . . [h]e's very sharp and he's funny." *Id.* See also Scharf, *The Legacy*, *supra* note 65, at 919. The Iraqi Governing Council established the Iraqi Special Tribunal and Saddam Hussein mirrored his defense after Milošević's by using his trial to make speeches and political arguments unrelated to his charges. See also Michael P. Scharf & Ahran Kang, *Errors and Missteps: Key Lessons the Iraqi Tribunal Can Learn from the ICTY, ICTR, and SCSL*, 38 CORNELL INT'L L. J. 911, 911-12, 930 (2005). ICTY defendants, such Šešelj and Milošević, were able to give their opinion because they "did not feel as constrained by profession norms as their advocates might have been." Scharf, *The Legacy*, *supra* note 65, at 930 n.83. See also Turner, *supra* note 162, at 583. See also Marlise Simons, *The Hand That Feeds Milosevic's Defense*, N.Y. TIMES, Nov. 10, 2002, at 10 (quoting Milošević as saying, "[t]he only reason I agreed to participate in this case of yours is because I want to be able to address the public").

<sup>165</sup> See *supra* notes 147-52 (discussing defendants who criticize the legitimacy of the ICTY).

<sup>166</sup> See generally Prosecutor v. Šešelj, Case No. IT-03-67-PT, Decision on the Request of the Accused for an Opinion of Trial Chamber II on Professional Argument Challenging the Legitimacy of the International Tribunal (May 13, 2005). Šešelj challenged the lawfulness of the ICTY. *Id.* Milošević consistently reiterated that he did not recognize the ICTY as a legitimate institution. Groome, *supra* note 54, at 965. "Milošević accused the ICTY of 'victor's justice.'" Williams, *supra* note 63, at 581. See also *Slobodan Milošević: Key Quotes*, Feb. 11, 2002, <http://archives.cnn.com/2002/WORLD/europe/02/11/milosevic.quotes/index.html>. Milošević's quotes include:

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 (an) illegal organ. . . . I would never commit suicide because I must struggle here to topple this tribunal and this farce of a trial and the masterminds behind it who are using it against people who are fighting for freedom in the world. . . . Look at this court. Courts should be impartial. This indictment has been raised according to what the British intelligence service has said.

court cannot hide from the unfavorable comments because the ICTY transcribes all speech within the court and makes them available to the public.<sup>167</sup> Ultimately, these disparaging comments accomplish defendants' goals because the comments damage the ICTY's reputation and cast doubt over its legitimacy.<sup>168</sup> Further, self-representation allows defendants to attempt to humiliate the ICTY by showing it as a biased institution.<sup>169</sup> Therefore, defendants seek to emphasize these points in

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*Id.*; *Vojislav Šešelj in His Own Words*, <http://news.bbc.co.uk/2/hi/europe/2793899.stm>.  
Quotes include:

I don't know when I'll be back but I won't be wasting time in The Hague; I will unmask the anti-Serb plot that is going on there. . . . With their stupid charges against me they have come up against the greatest living Serb mind. I shall blast them to pieces.

*Id.*

<sup>167</sup> See *Prosecutor v. Šešelj*, Case No. IT-03-67, Transcript, 1857 ¶ 5-6 (Nov. 8, 2007). Šešelj asserted that he was being "tried by an illegal and illegitimate court." *Id.* Šešelj said that "[y]ou, all you members of The Hague Tribunal Registry, can only accept to suck my cock[]" in his February 7, 2005 submission, where Šešelj agreed to accept someone as his legal adviser. *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Decision on Assignment of Counsel, ¶ 48 (Aug. 21, 2006). Milošević called his trial a farce. *Prosecutor v. Milošević*, Case No. IT-02-54, Transcript 67 ¶ 4-7 (Oct. 30, 2001). Milošević said "I consider this Tribunal a false Tribunal and the indictment a false indictment." *Prosecutor v. Milošević*, Case No. IT-02-54, Transcript, 2 ¶ 3-4 (July 3, 2001). Milošević attempted an initial defense strategy of "discredit[ing] the Yugoslavia Tribunal's legitimacy and impartiality." Michael P. Scharf, *The International Trial of Slobodan Milošević: Real Justice or Realpolitik?*, 8 ILSA J. INT'L & COMP. L. 389, 389 (2002). He based this strategy on the fact that it has been commonly accepted that the Nuremberg Trials were "tainted by 'victor's justice.'" *Id.* The ICTY also documented Milošević saying "[y]ou are not a judicial institution; you are a political tool." *Id.*

<sup>168</sup> See Julian A. Cook, *Plea Bargaining at the Hague*, 30 YALE J. INT'L L. 473, 506 (2005). Public comments from defendants were not the only reasons why the ICTY had a poor reputation. *Id.* Procedural decisions also jeopardized the ICTY's reputation. *Id.* Critics made comments such as:

[w]ith the credibility of the ICTY already in tatters among segments of the Balkan population, the Tribunal must not continue to employ plea procedures that may further damage its already frayed reputation, tarnish its standing in the larger world, and serve as an unfortunate precedent for future international criminal courts.

*Id.* See also Patricia M. Wald, To "Establish Incredible Events by Credible Evidence": *The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 HARV. INT'L L. J. 535, 553 (2001) (noting that the Tribunal's reputation was fragile); Danielle Tarin, Note, *Prosecuting Saddam and Bungling Transitional Justice in Iraq*, 45 VA. J. INT'L L. 467, 503 (2005) (asserting that Milošević's political rants threatened the ICTY's reputation).

<sup>169</sup> See *Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, *supra* note 40, at 132. The author asserts that:

Many participants expressed the view that the ICTY was biased against the Serb people. Six Bosnian Serb participants stated that the ICTY only targets Serbs or that the actions of the ICTY are only focused on "one people." As one participant described: "There are some rules created in [the] world that only Serbs are criminals." In addition, two

their defense in hopes of receiving an acquittal or convincing the judge to dismiss the case.<sup>170</sup>

Moreover, some Serbian defendants opt for self-representation because they believe it gives them certain advantages throughout the trials.<sup>171</sup> Delays, humiliation, and politics are apparent throughout the cases of self-represented defendants, which emphasize the ICTY's need

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specifically mentioned that, during the course of a NATO Stability Force (hereinafter SFOR) action to arrest the former Prijedor police chief, he was killed. They described the SFOR arrest as a kidnapping and they saw this as a flagrant disregard of the judicial process. Three felt that there was "no justice" or "no righteousness" in the ICTY. Another participant raised the example of the linkage between economic assistance and cooperation with the ICTY as additional evidence for the politicization of the ICTY. Paradoxically, while all but one of the Bosnian Serb legal professionals criticized the ICTY as unfair, only two believed that it should be abolished.

*Id.* See also Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT'L & COMP. L. 347, 423 (2006). The author asserts that:

Some observers believe that the ICTY's actions are actually counterproductive because the indictments have hardened Serbs' opposition to the peace treaty. Most Bosnian Serbs complain that the tribunal is biased because it has selectively prosecuted more Serbs than Croats or Moslems, even though atrocities were committed by all sides . . . . Many Moslems, meanwhile, argue that indictments of Moslems have been undertaken simply to counter Serbs' bias charges. Regardless of the reasons, both Serbs and Moslems have so far been reluctant to hand over indicted suspects.

*Id.* At one point the ICTY indicted seventy-six individuals and seventy were Serbian. Damjan Panovski, Note, *Some War Crimes are not Better than Others: The Failure of the International Criminal Tribunal for the Former Yugoslavia to Prosecute War Crimes in Macedonia*, 98 NW. U. L. REV. 623, 635 (2004).

In addition, to the lenient indictment, the ICTY received complaints about refusing to charge NATO for its involvement in the bombing of Serbia. Turner, *supra* note 162, at 579. Some thought NATO should have been charged with war crimes as well. *Id.*

<sup>170</sup> See Prosecutor v. Šešelj, Case No. IT-03-67-PT, Decision on Motion for Disqualification, ¶¶ 19, 27 (Feb. 16, 2007). Šešelj filed a motion to disqualify his judge alleging partiality. *Id.* The President described the motion as "numerous unfounded allegation[s]" and he dismissed the motion after reiterating that the judge was not biased because there was a disagreement between the judge and the accused. *Id.* The Chambers decided against Milošević's motion to dismiss due to his allegations of the ICTY being biased. Prosecutor v. Milošević, Case No. IT-99-37-PT, Decision on Preliminary Motions, ¶¶ 18-22 (Nov. 8, 2001) The Appeals Chamber held there were three ways in which bias on the part of a judge could be determined. Prosecutor v. Furundžija, Case No. IT-95-17/1, Judgement (July 21, 2000). The first was actual proof, the second was if the judge has some interest in the matter, and the third was if a reasonable person would perceive bias. *Id.*

<sup>171</sup> See *supra* notes 160-61 (discussing various advantages such as gaining sympathy and support).

to control the courtroom in order to contain defendants' exploitation of the court.<sup>172</sup>

*B. ICTY's Crucial Need to Control the Courtroom*

A fundamental right throughout jurisprudence is the right to self-representation.<sup>173</sup> But, this right is not absolute, and courts should control the defendant in order to ensure efficiency, fairness, and effectiveness in pursuing justice.<sup>174</sup>

The first reason for controlling defiant, self-represented defendants is to ensure efficient trials.<sup>175</sup> The ICTY needs to control defense tactics of self-representation because it owes a duty to the defendant to provide him with the right of a speedy trial.<sup>176</sup> Public policy suggests, however, that the ICTY cannot isolate its own interests or those of the defendants. It also needs to consider the public's interest of learning the truth.<sup>177</sup> Aside from a quick conclusion, efficiency ensures that evidence remains undestroyed and witnesses' memories are not diminished.<sup>178</sup> Also, because of the countless atrocities, the ICTY should focus on indicting

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<sup>172</sup> See *infra* Part III.B (discussing that disruptive, self-represented defendants accentuates the ICTY's need to control them).

<sup>173</sup> See *supra* Part II.C (discussing the origins and facets of self-representation).

<sup>174</sup> See *supra* notes 79–80 (discussing how the right of self-representation is a qualified right).

<sup>175</sup> See *infra* notes 176–79 (discussing that efficiency encompasses such facets as the right to a speedy trial, public interest, and prosecutorial workload).

<sup>176</sup> See International Tribunal Statute, *supra* note 43, at arts. 20(1), 21(4)(c). Article 20(1) mandates the ICTY to conduct its trial proceedings in a fair and expeditious manner. *Id.* at art. 20(1). Article 21(4)(c) states that the accused is guaranteed a right of a trial without undue delay. *Id.* at art. 21(4)(c).

<sup>177</sup> See *id.* at art. 20(1). Article 20(1) states that the ICTY must take into consideration the protection of witnesses and victims when conducting a fair and expeditious trial proceeding. *Id.* Judge Shahabuddeen asserted that the prosecution represents the public interest, that the prosecutor has to take the public's interest into account, and that the Prosecutor must act objectively and fair. See also *Prosecutor v. Milošević*, Case No. IT-02-54, Decision in the Appeals Chamber on Admissibility of Prosecution Investigator's Evidence, ¶ 18 (Sept. 30, 2002) (Shahabuddeen, J., dissenting). The Office of the Prosecution issued Standards of Professional Conduct for Prosecution in 1999 and one of the standards is to protect the public interest. Judith A. McMorrow, *Creating Norms of Attorney Conduct in International Tribunals: A Case Study of the ICTY*, 30 B.C. INT'L & COMP. L. REV. 139, 162 (2007).

<sup>178</sup> See Williams, *supra* note 63, at 572. The ICTY needed prompt trials to prevent the accused from being incarcerated too long, to curtail apprehensions, and to ensure that the defense's case was not disrupted. *Id.* Pretrial incarceration of the accused is particularly important. *Id.* Due to the ICTY's tremendous workload, it was inevitable that defendants would be incarcerated for extensive amounts of time, even before their trial started. *Id.*

the most egregious offenders in order to avoid an unrealistic caseload.<sup>179</sup> This need for efficiency encompasses a variety of facets, such as the right to a speedy trial, the public interest, and the avoidance of an overwhelming prosecutorial workload.<sup>180</sup> In addition to conducting efficient trials, the ICTY also needs to control its proceedings in order to ensure fair trials.<sup>181</sup>

The second reason for curtailing defendants is that fairness is an essential factor in any judicial process, including the ICTY. The ICTY must control defendants while still conducting fair trials in order to combat the criticism that it is not a legitimate tribunal.<sup>182</sup> Due to comments about the illegitimacy of the tribunal made during high profile cases, the ICTY needs to ensure legitimacy for the victims in the former Yugoslavia.<sup>183</sup> By fairly preventing the defendants from making

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<sup>179</sup> See *General Assembly Hears Appeals by Tribunal Judges to 'Keep Doors Open' Until all War Criminals in Rwanda, Balkans are Brought to Justice*, U.S. FEDERAL NEWS, Oct. 9, 2006. The article states:

PAVLE JEVREMOVIC (Serbia) said his Government had expressed full determination and political commitment to ensuring that all individuals indicted for the most serious violations of international law during the conflicts in the territory of the Former Yugoslavia be brought to justice[] . . . . In that regard, since 2004, Serbia had invested considerable efforts in apprehending and transferring to The Hague 16 indictees, mostly high-ranking military and police officers. In July, the Government had adopted an action plan on further cooperation with the Tribunal, and thus far, appropriate institutional mechanisms had been put in place with a single purpose: to locate, arrest and transfer Ratko Mladic and other remaining fugitives.

*Id.* See also Jouet, *supra* note 64, at 286. Jouet asserts that the ICTY prosecutors focus most of their time and resources on the most egregious perpetrators who committed the most widespread crimes. *Id.*

<sup>180</sup> See *supra* notes 176-79 (discussing the right to a speedy trial, public interest, and prosecutorial workload).

<sup>181</sup> See *infra* notes 182-89 (discussing the ICTY's obligation to ensure fair trials).

<sup>182</sup> See Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT'L L. 111, 114 (2002) (noting that unfair trials give off the appearance that international tribunals are illegitimate). See also Andrew N. Keller, *Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and ICTR*, 12 IND. INT'L & COMP. L. REV. 53, 73 (2001). The ICTY has a separate sentencing phase. *Id.* Keller asserts that people only see the ICTY as legitimate if its proceedings are fair. *Id.* Therefore, "the elimination of a separate sentencing hearing jeopardizes the perception of fairness at the Tribunals in return for mere marginal increases in operating efficiency." *Id.* Fair trials often determine if a tribunal is considered credible or legitimate. Tuinstra, *supra* note 108, at 62-63.

<sup>183</sup> See Mark Thieroff & Edward A. Amlyer, Jr., *Proceeding to Justice and Accountability in the Balkans: The International Criminal Tribunal for the Former Yugoslavia and Rule 61*, 23 YALE J. INT'L L. 231, 249 (1998). Those people who are accused of violations give ICTY little legitimacy, which may undercut the ICTY's ability to lessen victims' pain and suffering. *Id.* See also Marieke Wierda, Habib Nassar, & Lynn Maalouf, *Early Reflection on Local*

such comments, it helps victims ease their pain because it pronounces the perpetrators responsible.<sup>184</sup> Moreover, with fair trials comes predictability and certainty, which are other facets the ICTY defendants deserve to have in their proceedings.<sup>185</sup> Also, mandating fair trials allows the ICTY to attempt to silence the critics' contentions that the ICTY caters only to powerful organizations and countries.<sup>186</sup>

Another reason for fair trials is that if one tribunal conducts unfair trials, then it could potentially have long-lasting, negative impacts on other future regional criminal tribunals.<sup>187</sup> Because the ICTY uses frameworks from other international proceedings, specifically the Nuremberg Trials, it is inevitable that future tribunals will look at the

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*Perceptions, Legitimacy and Legacy of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1065, 1072 (2007). Tribunals gain legitimacy by their ability to represent and act in the interests of the victims. *Id.* For the ICTY, a "population[] with a high number of victims such as Bosnian Muslims have shown higher levels of support for the Tribunal than Bosnian Serbs or Croats." *Id.*

<sup>184</sup> See Thieroff & Amlyer, *supra* note 183, at 249. The authors assert that because the accused do not regard the ICTY as legitimate, it impedes on the ICTY's ability to help reconcile the victims' pain. *Id.* See also Neil Boister, *Failing to get to the Heart of the Matter in Sierra Leone?*, 2 J. INT'L CRIM. JUST. 1100, 1104-05 (2004). The Truth and Reconciliation Commission of Sierra Leone recognizes that a legitimate tribunal encompasses the "victims' right to know the truth." *Id.*

<sup>185</sup> See Prosecutor v. Delalić, Case No. IT-96-21-A, Judgment, ¶ 24 (Feb. 20, 2001). The Appeals Chambers argued that the essential features of a trial of consistency, stability, and predictability were applied to the ICTY. *Id.* See also Asa W. Markel, *The Future of State Secrets in War Crimes Prosecutions*, 16 MICH. ST. J. INT'L L. 411, 427 (2007) (discussing that the requirements of a fair trial are encompassed in the stare decisis principle and the results are "certainty and predictability").

<sup>186</sup> See Robert M. Hayden, *Biased "Justice": Humanrightsism and the International Criminal Tribunal for the Former Yugoslavia*, 47 CLEV. ST. L. REV. 549, 551-52 (1999). Hayden asserts that the ICTY refused to charge NATO workers for their actions that are arguably comparable to the Yugoslavs indicted. *Id.* The ICTY also refused to indict NATO worker with charges of war crimes. *Id.* Hayden also asserts that the ICTY only indicts those whom the Americans want prosecuted. *Id.* Critics argued that the ICTY was "designed in a biased and unfair manner, serving the interests of powerful western states and international organizations at the expense of local interests." Simpson, *supra* note 149, at 1275-76.

<sup>187</sup> See Cogan, *supra* note 182, at 114. Cogan asserts that "[w]orse still, the entire enterprise of justice for these types of heinous crimes, whether in international courts, domestic courts, or otherwise, might be dealt a serious blow." *Id.* The ICTY's development of substance and procedure will have an impact on the establishment of a permanent international criminal court. See also Susan Tiefenbrun, *Peace with Justice*, 3 HOFSTRA L. & POL'Y SYMP. 1, 4 (1999). The International Criminal Court also needs to guarantee fair trials to legitimize its jurisdiction, and this is analogous to the ICTY and how it can legitimize itself through fair proceedings. Sara Stapleton, Note, *Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation*, 31 N. Y. U. J. INT'L L. & POL. 535, 547 (1999).

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ICTY for guidance on how to conduct trials at the global level.<sup>188</sup> If the ICTY's trials are unfair or appear unfair, then the future tribunals that look to the ICTY for direction could suffer from criticism of unfairness.<sup>189</sup> But, the ICTY must also be effective, not simply conduct fair trials.<sup>190</sup>

The last rationale for the ICTY asserting more control is to ensure its effectiveness.<sup>191</sup> The ICTY needs to control defendants in order to effectively deter future defendants from exercising the right of self-representation inappropriately.<sup>192</sup> In addition, the ICTY could make an impression and potentially prevent future crimes by demonstrating an effective punishment for perpetrators.<sup>193</sup> Further, without self-represented defendants creating chaos, the ICTY can focus on the merits

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<sup>188</sup> See *supra* note 43 (discussing how the ICTY looked to the Nuremberg trials for guidance). Initially, the hope for the ICTY was to advance the international law introduced at Nuremberg. Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV. 321, 336 (1999). Also, the ICTY provided hope that "advancements in the enforcement of international law[]" would be created. *Id.* (quoting Tina Rosenberg, *Conference Convocation*, 13 AM. U. INT'L L. REV. 1383, 1407 (1998)).

<sup>189</sup> Kate Kerr, *Fair Trials at International Criminal Tribunals: Examining the Parameters of the International Right to Counsel*, 36 GEO. J. INT'L L. 1227, 1253-54 (2005). It is important for the ICTY to set a good example for future tribunals because its decisions will be followed as precedent. *Id.* For example, the Special Panel for Serious Crimes Unit in East Timor did not follow international precedent about the right to counsel and, therefore, the international community criticized its proceedings. *Id.*

<sup>190</sup> See *infra* notes 192-96 (discussing the need for the ICTY to be effective).

<sup>191</sup> See James Paul Benoit, *The Evolution of Universal Jurisdiction Over War Crimes*, 53 NAVAL L. REV. 259, 286-87 (2006). Other criticisms of the ICTY's effectiveness are based on the fact that the Tribunal is located so far away from where the crimes took place and where the victims live. *Id.* Furthermore, Benoit asserts that the Tribunal is ineffective because it is temporary. *Id.* One specific ineffective instance was that many criminals committed their horrific crimes after the establishment of the ICTY, leading critics to the conclusion that the ICTY is not an effective deterrent. *Id.* Serbia criticized the ICTY for not providing clear information about the operations or purposes of the ICTY. See also Stromseth, *supra* note 163, at 274. This led to Serbs perceiving the ICTY negatively and skeptically. *Id.* See also *infra* notes 192-96 (discussing some of ineffective instances that challenged the ICTY).

<sup>192</sup> See *supra* note 71 (demonstrating that Šešelj and Krajišnik decided to emulate Milošević's defense of self-representation during their trials and thus it can be inferred that if the ICTY properly controlled Milošević's antics, Šešelj and Krajišnik would have had no incentive to use that defense strategy).

<sup>193</sup> See Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777, 780-81 (2006). The authors assert that "the higher frequency of humanitarian atrocities in weak or failed states may be due to the lack of credible institutions and mechanisms within those states that can constrain likely perpetrators of such atrocities." *Id.* Therefore, if those types of institutions could effectively punish, it may lead to less crime. See *id.* But see Mirjan Damaska, *What is the Point of International Criminal Justice?*, 83 CHI-KENT L. REV. 329, 339 (2008). Damaska asserts that the threats of punishment failed to prevent future crimes. *Id.* Therefore, optimism about deterrence as a major role in international criminal law has faded. *Id.*

of the case and attempt to reconcile the Balkan region.<sup>194</sup> Also, if the ICTY conducts effective trials, then this could also help justify its existence and gain support.<sup>195</sup> Last, effective trials enable the ICTY to expand and develop international criminal law.<sup>196</sup> Although the ICTY endures criticism about the behavior of its defendants, its treatment and control mechanisms have certain strengths and weaknesses when restraining the stall tactics and delays of self-representation.<sup>197</sup>

C. *Strengths and Weaknesses of the ICTY's Treatment and Control of Self-Representation*

When defendants substantially delay the ICTY through their self-representation antics, the tribunal needs to respond.<sup>198</sup> The ICTY

<sup>194</sup> See Brady Hall, *Using Hybrid Tribunals As Trivias: Furthering the Goals of Post-Conflict Justice While Transferring Cases from the ICTY to Serbia's Domestic War Crimes Tribunal*, 13 MICH. ST. J. INT'L L. 39, 49-50 (2005). The principle of justice is the basis for the ICTY's inability to reconcile the Balkan region. *Id.* One reason for this inability is that justice does not always yield reconciliation. *Id.*

<sup>195</sup> See Markovic, *supra* note 63, at 954. Markovic asserts that in order for the ICTY to be accepted as an effective tribunal, everyone in the Balkan region would have to perceive its rulings as legitimate. *Id.* For example, the ICTY's decision to impose counsel onto Milošević caused controversy. *Id.* In addition, it reinforced Serbia's doubts that the ICTY attempted to achieve peace and restore the Balkan region. *Id.* Finally, it fueled the Serbs' suspicions that the tribunal had biases or prejudices against Serbia. *Id.* Unfortunately, accused criminals jeopardize the ICTY's ineffectiveness of its prosecutorial duties by holding public office and living a high profile life. Dean Adams, *The Prohibition of Widespread Rape as a Jus Cogens*, 6 SAN DIEGO INT'L L.J. 357, 384 (2005). Peter Cancar, Vojislav Maksimovic, and Velibor Ostojic are accused of being responsible for the widespread rape throughout the Yugoslavia Conflict. *Id.* These men hold "public offices and maintain[] otherwise high profile positions in the municipality of Foca." *Id.*

<sup>196</sup> Developing International Law, <http://www.icty.org/sid/324#developing> (last visited Feb. 11, 2010). One of the major goals of the ICTY was to expand international law. *Id.* The ICTY succeeded in developing substantive and procedural law, such as prohibiting torture in international law, punishment of sexual violence, protective measures, for witnesses, and duress as a defense. *Id.* Yet, more can still be done if the ICTY remains effective. *See id.*

<sup>197</sup> *See infra* Part III.C (discussing strengths and weaknesses of control mechanisms and treatment of self-representation).

<sup>198</sup> *See* Prosecutor v. Šešelj, Case No. IT-03-67-PT, Decision on Assignment of Counsel (Aug. 21, 2006). *See also* Göran Sluiter, *Compromising the Authority of International Criminal Justice. How Vojislav Šešelj Runs His Trial*, 5 J. INT'L CRIM. JUST. 529, 530 (2007) [hereinafter "Sluiter, *Compromising the Authority*"]. Sluiter describes the ICTY's assignment of counsel as:

[A]n accused at the ICTY may, in exceptional circumstances, also be assigned counsel who will then be in charge of the defence, in which case the accused will generally play a marginal role in his own defence, or presentation thereof. The ICTY Trial Chamber took this drastic measure on 21 August 2006, because the conduct of the accused led "the Chamber to conclude that there is a strong indication that his

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attempts to address disruptive defendants in order to regain control of the courtroom.<sup>199</sup> Various approaches to disruptions caused by self-represented defendants include abstaining from controlling the defendant, assigning counsel, assigning amicus curiae, and assigning standby counsel.<sup>200</sup> Each approach has certain strengths and weaknesses.<sup>201</sup>

The first approach is to refuse to disrupt the defendant's right to self-representation. The ICTY realizes that a defendant's approach includes delaying trials, and this sometimes prompts the prosecution to submit a motion for the tribunal to assign counsel to the disruptive defendant.<sup>202</sup> However, when the ICTY denies the request, it allows the defendant to continue using the courtroom to abuse witnesses, the prosecution, and

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self-representation may substantially and persistently obstruct the proper and expeditious conduct of a fair trial."

*Id.* Williams asserts that the court needed to respond in order to maintain the Tribunal's due process interest in conducting a fair trial. *See also* Williams, *supra* note 63, at 555.

<sup>199</sup> *See* Prosecutor v. Milošević, Case No. IT-02-54, Transcript, at 5, ¶ 5-8 (July 3, 2001). Judge May attempted to control Milošević during his initial appearance. *Id.* Milošević tried to make a speech and Judge May interrupted him and assured him that he would have his time to defend himself. *Id.* The Trial Chamber indicated that counsel would take over Šešelj's case if he became disruptive. Prosecutor v. Šešelj, Case No. IT-03-67, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with His Defense (May 9, 2003). The Court assigned amicus curiae to Krajišnik. Prosecutor v. Krajišnik, Case No. IT-00-39-A, Decision on Momcilo Karjisić's Request to Self-Represent, on Counsel's Motion to Appointment of Amicus Curiae, and on the Prosecution Motion of 16 February 2007, ¶ 34 (May 11, 2007). The Trial Chamber has the "inherent power[], to control its own proceedings and, in the interests of justice, to appoint a 'duty counsel' to assist the accused." Jørgensen, *The Problem of Self-Representation*, *supra* note 86, at 67.

<sup>200</sup> *See supra* Part II.D (discussing the options that the ICTY has when dealing with self-represented defendants).

<sup>201</sup> *See infra* notes 203-04, 206-07, 210-11, 213-16, 218-20, 222-23, 227-32 (analyzing the strengths and weaknesses of each approach to self-representation).

<sup>202</sup> *See* Prosecutor v. Šešelj, Case No. IT-03-67, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defense, ¶ 1 (May 9, 2003). The Prosecutor requested counsel for Šešelj for various reasons. *Id.* These reasons include the following: because the case was so complicated, because Šešelj intended to harm the ICTY and intended to use the ICTY to promote Serb national interest, because of the possibility of being disruptive, and because of the need to safeguard justice and promote peace in Yugoslavia. *Id.* The Prosecution wanted to assign counsel to Milošević because of his obstructionist and disruptive behavior. Prosecutor v. Milošević, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, ¶ 18 n.55 (Nov. 1, 2004). Furthermore, the Prosecution alleged that Milošević did not take his medicine correctly, which led to more health delays. *Id.* The Prosecution insisted on counsel for Milošević because of the complexity of the case. Prosecutor v. Milošević, Case No. IT-02-54, Transcript, at 15-18 (Aug. 30, 2001). However, the Tribunal stressed that the accused still had the right to defend himself and that the appointment of amicus curiae would help him with the complexity of the case. *Id.* The ICTY (May, J.) said "it would not be practical to impose counsel on an accused who wished to represent himself." *Id.* at 18.

the judges.<sup>203</sup> Further, another weakness is that the tribunal cannot use its usual threats of fines, jail time, suspension, or disbarment to control a defendant who acts as his own counsel.<sup>204</sup> These penalties would not control the defendant because suspension and disbarment do not apply, the defendant is already in jail, and a high-ranking defendant has the money to pay the fine. However, there are certain strengths in allowing a defendant to continue to use self-representation.<sup>205</sup>

Allowing a defendant to continue with self-representation creates the assurance that the judges give more attention to conducting a fair trial.<sup>206</sup> Moreover, the ICTY should embrace this opportunity and showcase its reluctance to trammel the defendant's rights, thus hoping "to bolster its own legitimacy and positively influence the acceptance of present and future international tribunals."<sup>207</sup> However, the ICTY needs to balance the defendant's interest in his right to self-representation with

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<sup>203</sup> See Prosecutor v. Šešelj, Case No. IT-03-67-AR73.3, Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel (Oct. 20, 2006) (finding Šešelj intimidated witnesses). The ICTY would not have allowed this mistreatment if a traditional defense counsel did this in the courtroom. Scharf & Kang, *supra* note 164, at 926. Scharf and Rassi assert that:

An even more significant ramification of the Trial Chamber's ruling is that it has given Milosević the chance to make unfettered speeches throughout the trial. In contrast, a defendant is ordinarily able to address the court only when he takes the stand to give testimony during the defense's case-in-chief, and in the usual case, the defendant is limited to giving evidence that is relevant to the charges, and he is subject to cross-examination by the prosecution. By acting as his own counsel, Milosević has been able to begin each stage of the trial with hours of opening arguments, which have included Hollywood-quality video and slide-show presentations showing the destruction wrought by the 1999 NATO bombing campaign.

Michael P. Scharf & Christopher M. Rassi, *Do Former Leaders Have an International Right to Self-Representation in War Crimes Trials?*, 20 OHIO ST. J. DISP. RESOL. 3, 4 (2005).

<sup>204</sup> Scharf, *Chaos in the Courtroom*, *supra* note 71, at 161. Scharf asserts that there is basically nothing a judge can do to control an unruly defendant who uses self-representation. *Id.* Scharf and Kang assert that a judge can usually control behavior through expelling disruptive individuals from the courtroom, imposing prison time or fines, or suspending an attorney's license. Scharf & Kang, *supra* note 164, at 930. However, a case where defendants represent themselves is not considered an "ordinary case." *Id.*

<sup>205</sup> See *infra* text accompanying notes 206–07 (discussing some strengths of allowing the defendant to continue to represent himself).

<sup>206</sup> See Jørgensen, *Right of the Accused*, *supra* note 103, at 720 (noting that when a defendant uses self-representation, he forgoes various advantages from counsel, thus making courts concerned about fairness).

<sup>207</sup> Constantinos Hotis, *A "Fair and Expeditious" Trial: A Reappraisal of Slobodan Milosević's Right to Self-Representation Before the International Criminal Tribunal for the Former Yugoslavia*, 6 CHI. J. INT'L L. 775, 777 (2006) (asserting that if a defendant's right to self-representation is trammled, then it would impede on the fairness of trials that the ICTY wishes to achieve).

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its own interest in conducting a speedy and unimpaired trial in order to reveal the full truth and achieve justice for victims.<sup>208</sup>

The next approach is the assignment of counsel through a balancing test, which also produces strengths and weaknesses.<sup>209</sup> A major strength of this approach is placing the defendant on notice that his right to self-representation is not absolute and that if he interferes with the fairness or expeditious progress of the trial, his right could be retracted.<sup>210</sup> Although this approach may result in the accused losing his right to self-representation, the entire trial is fair.<sup>211</sup> However, the ICTY's balancing approach for deciding if it will assign counsel also produces significant difficulties.<sup>212</sup>

The ICTY sometimes remains reluctant to assign counsel, which becomes another weakness.<sup>213</sup> Therefore, an unruly defendant is not restricted when the ICTY announces that his right cannot be infringed even if the notions of a fair and expeditious trial could be jeopardized.<sup>214</sup> However, when the ICTY decides the principle of fairness outweighs the right of self-representation, it could produce criticism that the decision unfavorably disadvantages the defendant.<sup>215</sup> Finally, the balancing

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<sup>208</sup> See Mark S. Ellis, *The Saddam Trial: Challenges to Meeting International Standards of Fairness with Regard to the Defense*, 39 CASE W. RES. J. INT'L L. 171, 183 (2006). For example, if a defendant continuously disrupted the trial, in the interest of justice the balance would tip toward relinquishment of the right to self-representation. *Id.*

<sup>209</sup> See *infra* notes 210-11, 213-16 (discussing the strengths and weaknesses of the assignment-of-counsel balancing test).

<sup>210</sup> See *Prosecutor v. Šešelj*, Case No. IT-03-67-AR73.4, Decision on Appeal against the Trial Chamber's Decision (No. 2) on Assignment of Counsel (Dec. 8, 2006) (deciding not to use the balancing test). See also Hotis, *supra* note 207, at 781. The Milošević case is the primary example of this balancing test. *Id.* The ultimate goal was to limit the defendant's rights in order to guarantee that fairness and justice would not be sacrificed. *Id.*

<sup>211</sup> See Jørgensen, *The Problem of Self-Representation*, *supra* note 86, at 70. Some criticized the ICTY for focusing only on the limits that should be imposed on the accused in order to have a fair trial. *Id.* However, others have argued in rebuttal that even though an interest such as the right to self-representation might be limited, the result is that the trial has overall fairness. *Id.*

<sup>212</sup> See *infra* notes 213-16 (discussing the weaknesses involved in the ICTY's refusal to assign counsel).

<sup>213</sup> See Jørgensen, *Right of the Accused*, *supra* note 103, at 726 (noting that the Milošević case primarily displayed this reluctance); see also Sluiter, *Karadžić on Trial*, *supra* note 98, at 620 (asserting that the ICTY extended the right of self-representation to individuals who abuse the right and the trial).

<sup>214</sup> See *Prosecutor v. Milošević*, Case No. IT-02-54, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, ¶ 41 (Apr. 4, 2003) (acknowledging that Article 20(1) of the ICTY Statute mandates that the tribunal ensure fair trials, but holding that the rights of the accused cannot be infringed in order to accomplish that goal).

<sup>215</sup> See Göran Sluiter, *Fairness and the Interest of Justice*, 3 J. INT'L CRIM. JUST. 9, 19 (2005). This reaction came as a result of the ICTY assigning counsel to Milošević due to his health

approach for assigning counsel is too stringent because it forces the tribunal to find that the defendant's behavior reaches a level that is "substantial and persistent."<sup>216</sup>

Another control mechanism the ICTY has is the assignment of amicus curiae.<sup>217</sup> One of the major strengths of this approach is that the amicus curiae assists the defense and ensures a fair trial for the defendant because the amicus curiae understands how to properly administer a defense in the tribunal.<sup>218</sup> Additionally, because the amicus curiae does not represent the defendant, it does not disturb his right to self-representation.<sup>219</sup> Moreover, because the amicus curiae is not part of the defense, the amicus curiae does not have to follow the defendant's suggestions.<sup>220</sup> However, flaws also arise from assignment of amicus curiae.<sup>221</sup>

The amicus curiae approach is weak because the "amicus counsel is not a party in the trial and [it] may disturb the adversarial nature of the proceeding."<sup>222</sup> Additionally, when a defendant does not take advantage

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problems. *Id.* Critics disapproved of this decision and thought it "further contributes to the Tribunal's negative image in parts of the former Yugoslavia." *Id.*

<sup>216</sup> Scharf argues that the formula adopted by the Appeals Chamber would be hard to justify when the right of self-representation should yield to the notions of fairness. *Self-Representation Versus Assignment*, *supra* note 64, at 45.

<sup>217</sup> See *infra* notes 218-20, 222-23 (discussing the strengths and weaknesses of amicus curiae).

<sup>218</sup> See *Prosecutor v. Milošević*, Case No. IT-02-54, Transcript, at 7 (Aug. 30, 2001). For example, the amicus curiae would know when to object to evidence or during cross examination. *Id.* Furthermore, it understands mitigating and exculpatory evidence and can bring it to the attention of the tribunal. *Id.* The Tribunal said that amicus curiae would act in a way to ensure a fair trial, just as counsel would secure a fair trial. *Id.*

<sup>219</sup> See Scharf & Kang, *supra* note 164, at 926. The ICTY made it abundantly clear that the amicus curiae would not put forth a positive defense because that is the responsibility of defense counsel or, as in the Milošević case, the responsibility of the accused. *Id.* The assignment of amicus curiae does not disturb the defendant's right to self-representation because it does not replace the defendant as his own counsel. *Recent Publications*, *supra* note 69, at 514.

<sup>220</sup> See Tuinstra, *supra* note 108, at 53-54. The amicus curiae can act independently of the accused because he does not have to follow his instructions or accede to his strategy. *Id.* Furthermore, the amicus curiae is not even required to speak with the defendant. *Id.* Therefore, the amicus curiae can assist the court "without having to breach their professional obligations." *Id.*

<sup>221</sup> See *infra* notes 222-23 (discussing weaknesses of the assignment of amicus curiae).

<sup>222</sup> Simon Meisenberg, *The Right to Self Representation before the Special Court for Sierra Leone*, BOFAXE June 19, 2004, available at <http://www.ifhv.rub.de/imperia/md/content/publications/bofaxe/2004/x273e.pdf>. The author gave example of the *Ntahobali* case of the ICTR, in which judges imposed amicus curiae counsel because they were nervous about the accused cross-examining his rape victims. *Id.* Jørgensen, *Right of the Accused*, *supra* note 103, at 724 (suggesting that amicus curiae disturbs the adversarial nature of trial because it cannot perform an "examination of charges through confrontation between two adverse parties").

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of his amicus counsel, the assignment does not help the trial.<sup>223</sup> Therefore, the ICTY attempted another solution during the Šešelj trial with the assignment of standby counsel.<sup>224</sup>

The last control mechanism available to the ICTY is the assignment of standby counsel.<sup>225</sup> This approach also has its advantages and disadvantages.<sup>226</sup> This approach aims to preserve the rights of defendants and maintain their interest in a fair trial.<sup>227</sup> In addition, standby counsel ensures that the trial continues expeditiously and attempts to free the trial of interruptions, adjournments, or disruptions.<sup>228</sup> Conversely, the assignment of standby counsel revokes a defendant's long-standing, fundamental right to self-representation.<sup>229</sup> Moreover, this control mechanism places an additional burden on the Trial Chambers because it needs to give disruptive defendants an explicit warning about their behavior.<sup>230</sup> Also, the tribunal may have to

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<sup>223</sup> See Scharf & Kang, *supra* note 164, at 926 (suggesting Milošević's amicus counsel did not affect his trial because he used his trial to "play on Serbia's psychological vulnerabilities and continued Serb resentment of the 1999 NATO bombing"). Milošević refused to cooperate with the amicus curiae, leading to the conclusion that it could not help the Tribunal. Markovic, *supra* note 63, at 948.

<sup>224</sup> See *supra* text accompanying notes 101-02 (discussing the establishment of assignment of standby counsel during the Šešelj trial).

<sup>225</sup> See *supra* text accompanying notes 103-05 (discussing the control mechanism option of standby counsel).

<sup>226</sup> See *infra* notes 227-32 (discussing the strengths and weaknesses of assignment of standby counsel).

<sup>227</sup> See, e.g., Prosecutor v. Šešelj, Case No. IT-03-67-PT, Order Concerning Appointment of Standby Counsel and Delayed Commencement of Trial, Decision on Assignment of Counsel (Oct. 25, 2006); Prosecutor v. Šešelj, Case No. IT-03-67-PT, Decision on Assignment of Counsel (Aug. 21, 2006) [hereinafter *Šešelj*, IT-03-67-PT Decision on Assignment]; Prosecutor v. Šešelj, Case No. IT-03-67-PT, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defense (Mar. 1, 2005).

<sup>228</sup> See Williams, *supra* note 63, at 578. This approach was also used in the trial of Prlić, where the Tribunal said "it is the duty of the Trial Chamber to make sure that the proceedings would not be halted by foreseeable, and therefore avoidable, risks." *Id.*

<sup>229</sup> See *Šešelj*, IT-03-67-PT, Decision on Assignment, at ¶ 77. The court held that:

While it is clear that the conduct of the Accused brings into question his willingness to follow the "ground rules" of the proceedings and to respect the decorum of the Court, more fundamentally, in the Chamber's view, this behaviour compromises the dignity of the tribunal and jeopardises the very foundations upon which its proper functioning is based.

*Id.*

<sup>230</sup> See Prosecutor v. Šešelj, Case No. IT-03-67-AR73.3, Decision on Appeal against the Trial Chamber's Decision on Assignment of Counsel, ¶¶ 22-26 (Oct. 20, 2006). The Appeals Tribunal focused on Article 21(4)(d), Article 21(4), and Rule 80(B) when it rendered its decision. *Id.* It stated that "an accused should be duly warned before restricting those rights." *Id.* Therefore "[i]n this way, an accused is fully and fairly informed and is afforded the opportunity to change the disruptive circumstances, whether

demonstrate that the defendant is displaying a deliberate obstructionist behavior or extreme conduct, not merely having an intention to obstruct proceedings.<sup>231</sup> Another drawback is that the ICTY faces serious objections when it revokes rights of defendants, such as Šešelj, who began a hunger strike until full reinstatement of his self-representation right.<sup>232</sup> As evidenced by the above, if the ICTY does not develop a solution in the Karadžić trial that accedes to everyone's demands, there may be serious implications.<sup>233</sup>

*D. The Implications if Self-Representation is Not Controlled in Karadžić Trial*

Maintaining or restricting fundamental rights at trials is a difficult task for the ICTY.<sup>234</sup> Current solutions pose threats to justice and fairness.<sup>235</sup> Now, the ICTY has another opportunity to attempt to control a high-profile defendant, Karadžić, who plans to use the defense strategy of self-representation.<sup>236</sup> However, if the ICTY does not solidify a proper mechanism, it could have serious implications.<sup>237</sup>

The first major implication of not controlling defendants is that criminals in future criminal or special tribunals would have an incentive to be disruptive.<sup>238</sup> Specifically, future war criminals could look to ICTY defendants as models and realize that it would be difficult for tribunals to control them.<sup>239</sup> Continued use of these antics could jeopardize the

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resulting from deliberate misconduct or unintentional factors, so as to avoid surrendering those rights." *Id.* at ¶ 23 (citations omitted).

<sup>231</sup> See Williams, *supra* note 63, at 579–80 (translating the opinion of dissenting judge Antonneti, who thought the standard rose to a level of deliberate obstructionist behavior: "La Chambre ne peut pas . . . limiter le droit de l'Accusé à assurer personnellement sa défense en se fondant sur des «intentions» obstructionnistes." [roughly translated as "The Chamber may not limit . . . the right of the Defendant to personally ensure his defense because it is based on obstructionist intentions."]).

<sup>232</sup> See Sluiter, *Compromising the Authority supra* note 198, at 529, 533. Šešelj's meaning of full reinstatement of his right of self-representation was that the standby counsel needed to be dismissed. *Id.* Šešelj began his hunger strike on November 10, 2006. *Id.* Šešelj ended his hunger strike on December 6, 2006 when the ICTY fully restored his right to self-representation. *Id.*

<sup>233</sup> See *infra* Part III.D (discussing the implications on future trials if Karadžić's defense by self-representation is not controlled).

<sup>234</sup> See *supra* Part III.C (discussing the strengths and weaknesses of the control mechanisms of the ICTY in an attempt to control defiant self-represented defendants).

<sup>235</sup> See *supra* Part III.C (discussing the flaws in present control mechanisms).

<sup>236</sup> See *supra* Part II.E (discussing Karadžić's arrest and his upcoming trial in the ICTY).

<sup>237</sup> See *infra* notes 238–44 (discussing major implications of not creating a perfect control mechanism in the Karadžić trial).

<sup>238</sup> See *infra* notes 239–40 (discussing the incentive to be disruptive).

<sup>239</sup> See Michael A. Newton, *A Near Term Retrospective on the Al-Dujail Trial & the Death of Saddam Hussein*, 17 *TRANSNAT'L L. & CONTEMP. PROBS.* 31, 43 (2008) (asserting that Saddam

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integrity of future tribunals.<sup>240</sup> Further, if a solution is not proposed in the Karadžić trial, the opportunity to finalize fair standards for self-representation may be lost.<sup>241</sup> Without the ICTY establishing a guiding principle, future tribunals will likely struggle with attempting to establish an effective standard for controlling disruptive, self-represented defendants.<sup>242</sup> This would lead to future tribunals focusing more time and resources on a problem that could have been resolved. Because there have been many ad hoc institutions since Nuremberg, it is likely that future tribunals will be created and deal with similar situations.<sup>243</sup> In other words, this problem of uncontrollable, self-represented defendants will not conclude once the ICTY's doors close.<sup>244</sup> The ICTY should be cognizant of this responsibility and intensify its efforts to establish a proper control mechanism.

Also, self-represented defendants could find support from ICTY decisions upholding the right of self-representation.<sup>245</sup> If precedential value is given to the ICTY's decision, it might be hard for future tribunals to deny self-representation to defendants.<sup>246</sup> However, if the

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Hussein implemented the tactics of the defendants from the ICTY, knowing full well that he could not be controlled).

<sup>240</sup> See Tuinstra, *supra* note 108, at 59. The Trial Chamber and the Appeals Chamber agreed that self-representation could potentially undermine that tribunal, and at some point it needed to be restrained; the Appeals Chamber went on to conclude that any disruption could develop a "risk of a miscarriage of justice" because the trial was not "conducted and concluded fairly." *Id.*

<sup>241</sup> See *id.* at 61 (noting some critics thought that the ICTY had an opportunity during Milošević's trial "to establish the highest fair trial standards of the accused").

<sup>242</sup> See Terry Prime & Gary Scanlan, *Limitation and Personal Injury in the House of Lords – Problem Solved?*, 29 STATUTE L. REV. 111, 127 (2008) (without a guiding principle, the issue becomes a matter of first impression). Cf. Roy Rydan Anderson, *Of Mack Trucks, Road Bugs, and Gilmore and Danzig: Happy Birthday Hadley v. Baxendale*, 11 TEX. WESLEYAN L. REV. 431, 452 n.88 (2005) (discussing the legal principle of "disproportionate compensation" and how if it does not have a guiding principle for implementation, it contradicts the aim of codification). By analogy, if a guiding principle of how to control a self-represented defendant is not established, it contradicts the aim of unifying standards across international tribunals.

<sup>243</sup> See *supra* notes 41–42, 164 (discussing the creation of various special tribunals including Special Court of Sierra Leone, International Criminal Tribunal for Rwanda, and Iraq's Special Tribunal for Crimes Against Humanity). See also S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007) (creating the Special Tribunal Lebanon); G.A. Press Release, U.N. Doc. GA/10135 (May 13, 2003) (announcing that the United Nations intended to help with Khmer Rouge Courts arrangements).

<sup>244</sup> See *supra* note 243 (demonstrating that there have been numerous special tribunals since Nuremberg).

<sup>245</sup> See Sluiter, *Compromising the Authority*, *supra* note 198, at 535 (noting that Krajišnik sought self-representation and supported his motion through Šešelj's case).

<sup>246</sup> See Christopher "Kip" Hale, Note, *Does the Evolution of International Criminal Law End with the ICC? The "Roaming ICC": A Model International Criminal Court for a State-Centric World of International Law*, 35 DEN. J. INT'L L. & POL'Y 429, 463 (2007) (noting that the

ICTY effectively and fairly controls Karadžić's right to self-representation, then future tribunals can follow that precedent.<sup>247</sup>

The Trial Chamber has much to consider in its upcoming Karadžić trial. This could be its last high-profile case, so the resulting precedent could have long-lasting implications.<sup>248</sup> The ICTY must evaluate why Karadžić may want to represent himself and determine if those reasons should be protected.<sup>249</sup> Furthermore, the tribunal must understand why it is crucial to control this right.<sup>250</sup> It is necessary in order to promote efficiency, effectiveness, and fairness.<sup>251</sup> The tribunal will likely balance these interests and could resolve this tension with a newly-developed solution that appeases all sides.<sup>252</sup> The Trial Chamber can look to its past precedents and evaluate the strengths and weaknesses of each approach attempted.<sup>253</sup> A newly-developed procedure could have lasting effects on future tribunals. As such, the ICTY must establish an appropriate solution.<sup>254</sup>

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International Criminal Court has recognized the ICTY's decisions as legal precedent). *See also* Higonnet, *supra* note 169, at 429 ("Indeed, the [ICTY's] . . . jurisprudence contributes markedly to the important development and expansion of international humanitarian law, setting valuable precedent."); Hotis, *supra* note 207, at 788-89 (noting that ICTY's precedents are well-established and well-respected). It has been argued that "[t]he ICTY serves as a model for future international criminal tribunals, primarily because of its statutory power of primacy over national courts." David L. Herman, *A Dish Best Not Served at All: How Foreign Military War Crimes Suspects Lack Protection Under United States and International Law*, 172 MIL. L. REV. 40, 89 (2002).

<sup>247</sup> *See* Göran Sluiter, *The ICTR and The Protection of Witnesses*, 3 J. INT'L CRIM. JUST. 962, 967 (2005) (noting that the ICTR followed the ICTY's precedent with regard to protective measures for witness). The Iraqi Special Tribunal could look at ICTY and SCSL precedent to allow them to examine its own legality and statute. Scharf & Kang, *supra* note 164, at 923. The ICC followed the ICTY's precedent with regard to procedure in its court. Patricia M. Wald, *ICTY Judicial Proceedings*, 2 J. INT'L CRIM. JUST. 466, 466 (2004).

<sup>248</sup> *See* Completion Strategy, <http://www.icty.org/sid/10016> (last visited Jan. 16, 2010) (stating that the ICTY's goal is to have all its proceedings completed by 2012). Ratko Mladić and Goran Hadžić, two top ranking officials the ICTY still seeks, remain at large. United Nations International Criminal Tribunal for the Former Yugoslavia, *Fugitives*, <http://www.icty.org/sid/10010> (last visited Jan. 16, 2010).

<sup>249</sup> *See supra* Part III.A (discussing why defendants decide to use their right to self-representation).

<sup>250</sup> *See supra* Part III.B (discussing the reasons why the ICTY needs to control its defendants).

<sup>251</sup> *See supra* Part III.B (discussing the reasons to control defendants are efficiency, effectiveness, and fairness).

<sup>252</sup> *See supra* notes 85, 98, 208 and accompanying text (discussing the solution needs to balance various interests).

<sup>253</sup> *See supra* Part III.C (analyzing the strengths and weakness of each of the ICTY's control mechanisms).

<sup>254</sup> *See supra* Part III.D (discussing how a proper solution could be used by future tribunals).

IV. CONTRIBUTION

The ICTY's most recent high-profile case serves as an opportunity to finalize an appropriate method of controlling defiant defendants.<sup>255</sup> This Part will offer a resolution that will enable the ICTY to control trial proceedings while respecting the defendant's right to self-representation.<sup>256</sup> Part IV.A will elaborate on the ICTY's current mandate to warn a defendant while expanding on a common "three strikes" approach.<sup>257</sup> Part IV.B will offer an appropriate solution for defendants who exhaust their three warnings.<sup>258</sup>

A. *Proposed Three Strikes Approach*

The right of self-representation entails that the defendant opting for this right is fully aware of the risks and difficulties.<sup>259</sup> Therefore, it is understandable why the ICTY mandates that judges warn a self-represented defendant when he is acting inappropriately.<sup>260</sup> However, the ICTY receives criticism when it restrains or retracts the right of self-representation.<sup>261</sup> Thus, the ICTY should implement additional warnings for defendants who act disruptively.<sup>262</sup> Moreover, the ICTY should inform the defendant of this procedure before the trial begins so that the defendant is fully aware of the consequences of disruptive behavior.<sup>263</sup>

The three strikes or three warnings could allow for the ICTY to demonstrate overall fairness by giving the defendant ample opportunity to display appropriate behavior during his defense.<sup>264</sup> This method does

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<sup>255</sup> See *supra* Parts II.E, III.C (discussing Karadžić and his upcoming trial and the deficiencies in the ICTY's current control mechanisms).

<sup>256</sup> See *infra* Part IV.A-B (explaining a proposed solution that incorporates a three strikes approach).

<sup>257</sup> See *infra* Part IV.A (explaining a solution and its specifics for controlling disruptive, self-represented defendants).

<sup>258</sup> See *infra* Part IV.B (describing a possible approach of reinstatement after a reasonable period of time and consideration for defendants who find themselves banned from the courtroom).

<sup>259</sup> See *supra* Part II.C (discussing origins of self-representation and its intricacies).

<sup>260</sup> See *supra* notes 105, 230 (discussing the mandate that judges must warn every disruptive defendant).

<sup>261</sup> See *supra* Part III.B (discussing the Serbs' criticism of the ICTY, among other critics who thought the ICTY was ineffective).

<sup>262</sup> See *supra* note 105 (explaining the current warning system). Therefore, this proposed approach would simply expand use of a technique already in existence in the ICTY.

<sup>263</sup> See *supra* text accompanying note 210 (explaining the ICTY's notion of placing the defendant on notice of his disruptive behavior). Accordingly, giving notice, before the trial starts, of the three-strikes approach follows the ICTY's current policy on notice.

<sup>264</sup> See *supra* Part III.B (discussing fairness as a main reason why the ICTY needs to control unruly, self-represented defendants).

not infringe on the defendant's right because it is a qualified right, and it would be conditioned on not disrupting the court more than three times.<sup>265</sup> Moreover, this approach would allow the ICTY to maintain its guarantee of a speedy trial because it permits only three interruptions or disturbances throughout the case.<sup>266</sup> In addition, by issuing three warnings, the ICTY can silence its critics because it can point to specific instances where it gave warnings.<sup>267</sup> This would illustrate that defendants cause their own rights to be restricted. However, there must be a distinction between warning a defendant about disruptive behavior and acknowledging that a defendant may improperly use a typical lawyer's tactic.

Because a majority of defendants are not attorneys, self-represented defendants inevitably become confused under the ICTY rules for procedure and evidence.<sup>268</sup> Therefore, the self-represented defendant should not receive a warning for asking an irrelevant or a leading question.<sup>269</sup> The defendant should receive a warning only after displaying certain antics in an attempt to humiliate, embarrass, or attack the legitimacy of the court.<sup>270</sup> Once the ICTY takes away the defendant's right to self-representation, he needs counsel to complete his case.<sup>271</sup>

Previous ICTY cases illustrate the complexity and intricacy of issues, leading to the decision that amicus curiae should assist the court.<sup>272</sup> Additionally, the ICTY allows for the amicus curiae to act as defense counsel when it is appropriate to ensure a fair trial.<sup>273</sup> Therefore, if the ICTY revokes the defendant's right to self-representation, the amicus

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<sup>265</sup> See *supra* Part II.C (defining the right of self-representation as a qualified right, not an absolute right).

<sup>266</sup> See *supra* Part III.B (discussing how defendants' delay tactics hindered right to a speedy trial and increased the prosecutorial workload).

<sup>267</sup> See *supra* Part III.B (discussing ways the ICTY can silence its critics). Therefore, this proposal would fit with the ICTY's goal of perfecting a solution to suppress its criticism.

<sup>268</sup> See *supra* note 110 (mentioning the ICTY Rules for Procedure and Evidence and its requirements for an attorney).

<sup>269</sup> See *supra* note 147 (discussing the complexity of ICTY cases). This lends itself to a defendant's confusion on lawyerly tactics.

<sup>270</sup> See *supra* Parts II.B, II.C, III.A (discussing Milošević, Šešelj, and Krajišnik's attempts to humiliate the courts and discussing the reasons why defendants would want to do such a thing). See also notes 80, 216, 231 (discussing the ICTY's need to show obstructionist behavior or persistent behavior).

<sup>271</sup> See *supra* Part II.D (discussing what duties assignment of counsel, standby counsel, or amicus curiae perform when a defendant's right to self-representation has been restricted or restrained).

<sup>272</sup> See *supra* Parts II.D, III.C (discussing how the ICTY has found it necessary to assign amicus curiae to the defendants because of the complexity of their cases).

<sup>273</sup> See *supra* Part II.D (defining and discussing amicus curiae and its functions and duties).

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curiae can take over the case because he knows and understands the defendant's case.<sup>274</sup> As a result, the ICTY could avoid assigning counsel and therefore avoid vehement protests such as Šešelj's hunger strike.<sup>275</sup>

The three-strikes approach would solve the problem of respecting the defendant's rights while allowing judges to control proceedings in the ICTY.<sup>276</sup> This approach can be implemented easily because of rules and methods already established at the ICTY.<sup>277</sup> However, the ICTY would still have to allow the defendant to know what is happening in his case.<sup>278</sup>

B. *After the Right of Self-Representation Has Been Revoked*

Once the ICTY restricts the right of self-representation, it needs to ensure fairness by allowing a defendant to be aware of the happenings of his case.<sup>279</sup> The ICTY would have to choose between two ways to keep the defendant abreast of his case. The first option would allow the defendant to remain in the courtroom, but not actively participate in his defense.<sup>280</sup> The other option would be to ban the defendant from the courtroom and allow him to watch his trial by closed circuit television from his cell.

When the ICTY assigns counsel to a defendant, it sets out certain modalities, including that counsel discuss the case and listen to concerns of the defendant.<sup>281</sup> Therefore, the ICTY could allow the defendant to remain in the courtroom in order to confer with his counsel.<sup>282</sup> Accordingly, the judge would have to be confident that the defendant would not further disrupt the trial, even though he is not representing

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<sup>274</sup> See *supra* note 218 (explaining the strengths of the assignment of amicus curiae, specifically the thorough understanding of procedure and defense tactics).

<sup>275</sup> See *supra* Parts II.D, III.C (defining other control mechanisms and analyzing their strengths and weaknesses).

<sup>276</sup> See *supra* notes 85, 177, 208 (explaining the balancing approach used during assignment of counsel). Therefore, this proposed approach also incorporated the ICTY's current balancing test.

<sup>277</sup> See *supra* Part II.C (explaining the various aspects and methods of the control mechanisms at the ICTY).

<sup>278</sup> See *infra* Part IV.B (explaining what the ICTY should do after it bans the disruptive defendant).

<sup>279</sup> See *supra* Part III.B (discussing the fairness notion that needs to be incorporated into trials).

<sup>280</sup> See *supra* note 99 (discussing how the assignment of counsel completes the case for the defendant and therefore the defendant is prohibited from actively participating in his case).

<sup>281</sup> See *supra* Part II.D (defining assignment of counsel and its functions).

<sup>282</sup> See *supra* Part II.D (discussing that any type of assigned counsel still needs to keep in mind that they are acting on behalf of the defendant and certain responsibilities are still intact).

himself.<sup>283</sup> If the defendant continues to interrupt court proceedings or the judge is apprehensive about allowing the defendant to remain in the courtroom, the court could ban the defendant.<sup>284</sup>

A main goal of the ICTY is to maintain fair and expeditious trials.<sup>285</sup> Therefore, if allowing defendants to remain in the courtroom leads to situations that are not conducive to the ICTY's goals, the judge could order the defendant to his cell.<sup>286</sup> While in his cell, the defendant would be able to follow his trial via closed circuit television.<sup>287</sup> In addition, technology can enable the defendant to talk with his counsel.<sup>288</sup> This approach mirrors the approach at the International Criminal Court.<sup>289</sup> The ICTY should take such measures only if less drastic alternatives do not remedy the situation of a disruptive defendant. These alternative methods would serve as warnings to the defendant, and allow the defendant to remain passively in the courtroom. However, this should not be the absolute and final course for the defendant.

If a defendant finds himself banned from the courtroom and watching his trial from a cell, he should have an opportunity to return to the courtroom.<sup>290</sup> After a suitable period of time the ICTY could grant a defendant's request to rejoin his counsel in the courtroom.<sup>291</sup> Again, the defendant would have to convince the judge that he will not resume

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<sup>283</sup> See *supra* Part III.A (analyzing why defendants disrupt the trials). The defendant could accomplish the same goals by acting inappropriately even though he is not representing himself.

<sup>284</sup> See *supra* III.B (explaining the various reasons why the ICTY needs to control the courtroom).

<sup>285</sup> See *supra* Parts II.A, III.B (discussing the establishment of the ICTY, its main goals, and the crucial need to control disruptive, self-represented defendants).

<sup>286</sup> See *supra* Part III.B (discussing that the ICTY needs to control defendants to ensure efficiency, fairness, and effectiveness).

<sup>287</sup> See *supra* Part III.B (discussing the ICTY's need to ensure fairness). If the ICTY did not allow the defendant to follow his trial, it could lead to more criticism of being unfair.

<sup>288</sup> See *supra* note 104 (explaining counsel's duty to keep the defendant informed of his proceedings).

<sup>289</sup> Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998), Art. 63(2), available at [http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome\\_Statute\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf) ("If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required.").

<sup>290</sup> See *supra* notes 182-89 (discussing the notion of fairness as an essential component to jurisprudence). Therefore, the proposed solution must maintain the element of fairness.

<sup>291</sup> See *supra* Part III.B (discussing fairness as reason for the ICTY to control defendants). Allowing the defendant the potential to rejoin his counsel reiterates this notion of fairness.

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disruptive antics.<sup>292</sup> If the defendant becomes defiant again, the judge could again banish him from the courtroom.<sup>293</sup>

With the ICTY preparing to begin Karadžić's trial, it will undoubtedly have another opportunity to establish a method to control a disruptive self-represented defendant.<sup>294</sup> The ICTY could create a method that future tribunals can use as a guide.<sup>295</sup> The ICTY could redefine its legacy as a legitimate tribunal if it successfully controls Karadžić's anticipated stalling tactics and unruly behavior.<sup>296</sup>

V. CONCLUSION

Many of the victims, such as the one described in the Introduction, are still looking for answers as to why they and the "2,000 Bosnians [who] are believed to have died at Omarska" suffered under such appalling circumstances.<sup>297</sup> Questions remain—such as "who had assembled the gangs of petty crooks, small-time gangsters, and corrupt policeman who murdered them?"<sup>298</sup> Hamdo received one answer when he "spotted a familiar face striding across the grounds, a tall dark-haired man with a nose like a knife, to whom the guards bowed and scraped in deference. *Simo—was that Simo Drljača . . . ?* Hamdo knew Drljača had transformed himself almost overnight from school legal advisor to Serb nationalist . . . . But this?"<sup>299</sup>

Yugoslavia endured a gruesome history of ethnic strife and bloody war. Its most recent conflict, the Bosnian War, revealed horrific crimes with innocent victims, such as Hamdo, suffering the most. Atrocious war crimes, crimes against humanity, grave breaches of the Geneva Conventions, and genocide symbolized the Bosnian conflict of the early 1990s. The world demanded a response, and the United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia. The ICTY's goal was to discover the truth, to offer

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<sup>292</sup> See *supra* Part III.A (discussing reasons why defendants create disturbances and their effect on the victims' reconciliation and the image of the ICTY).

<sup>293</sup> See *supra* Part III.B (discussing that efficiency, fairness, and effectiveness are reasons to control defiant, self-represented defendants). These reasons apply to banishing a disruptive defendant.

<sup>294</sup> See *supra* Part II.E (discussing Karadžić, his arrest, his upcoming trial, and his threat to exercise his right of self-representation).

<sup>295</sup> See *supra* notes 246-47 (discussing the precedential value that decisions in the ICTY could have on future tribunals).

<sup>296</sup> See *supra* Part III.D (discussing the implications of not establishing an adequate and proper control mechanism for Karadžić's anticipated defense strategy).

<sup>297</sup> See NEUFFER, *supra* note 1, at 41; *supra* Part I.

<sup>298</sup> NEUFFER, *supra* note 1, at 41.

<sup>299</sup> *Id.*

reconciliation to the victims, and punish the perpetrators. However, through their strategy of self-representation the accused made these goals hard to attain. Because the right to self-representation is considered a fundamental right in many jurisdictions around the globe, the ICTY found it difficult to control this right when a defiant defendant delayed trials and made a mockery of the courtroom proceedings.

The ICTY attempted various control mechanisms such as assignment of counsel, assignment of standby counsel, and assignment of amicus curiae. However, even though these solutions appeared to control the defendant without infringing on his right, weaknesses proved that these were not the perfect resolution. With the high-profile Karadžić case on the horizon, the ICTY must establish a control mechanism that will appease all in order to offer guidance to future tribunals facing the same dilemma.

The resolution proposed in this Note attempts to correct the problem of controlling self-represented, defiant defendants of international criminal tribunals. It incorporates pieces of control mechanisms from different jurisdictions around the world. Its purpose is to not infringe on the rights of the accused, but to afford the court an opportunity to control defendants without sacrificing any of the court's objectives. Unfortunately, it is likely that ad hoc tribunals will be established again for similar situations; perhaps these future courts will be able to find an easier and more efficient route to justice.

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