MEMORANDUM

TO: Anne Heindel, Legal Advisor, Documentation Center of Cambodia
FROM: Adam Coady, Legal Associate, Documentation Center of Cambodia
DATE: July 29, 2009
RE: Misconduct of Defense Counsel

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I. Background

Although the Extraordinary Chambers in the Courts of Cambodia ("ECCC") has yet to sentence a single defendant, the ECCC has determined that behavior by two separate counsel constitute misconduct. In the *Ieng Sary* case, the defense counsel disclosed previously unpublished information on their website, even after receiving a letter from the Co-Investigating Judges ("OCIJ") stating the material was considered confidential.[1] The unauthorized disclosure of information was considered Rule 38 misconduct and the counsel was warned by the OCIJ that subsequent misconduct would "expose [counsel] to the legal consequences."[2] In addition, the misconduct was referred to the Bar Association of the Kingdom of Cambodia ("BAKC"), the American Bar Association, the Alaska State Bar Association and the Defence Support Section.

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[1] Case of Ieng Sary, Case No: 002/14-08-2006, Order on Breach of Confidentiality of the Judicial Investigation, Office of the Co-Investigating Judges, ¶¶ 1-4 (March, 3, 2009) [*hereinafter* Ieng Sary Confidentiality Order].
[2] Id. at ¶ 20.

In the *Khieu* case, the Pre-Trial Chamber issued the first of two warnings to the International Defense Co-Counsel after he declined, without notice, to continue to act on behalf of his client at a hearing because the entirety of the case file was not available in French.[3] In response, the Pre-Trial Chamber issued him a warning pursuant to Internal Rule 38(1), "as he has abused the processes of the Pre-Trial Chamber and the rights of the Charged Person."[4]

A year later, a pre-trial hearing was delayed, then postponed because the International Co-Counsel was unexpectedly absent and the National Co-Counsel argued that the International Co-Counsel's presence was necessary.[5] When the International Co-Counsel spoke at the rescheduled hearing, he implied that the judges were guilty of corruption, called the judges "squatters," and said that they were obsessed only with money.[6] Notably, although the previous hearing had been rescheduled to allow the International Co-Counsel to be present and contribute, at the rescheduled hearing he said nothing of direct relevance to the legal substance of the hearing, but let the National Co-Counsel make all of the arguments.[7]

In response, the Chamber issued the second warning, holding that the unexplained absence, "abusive" language and refusal to "participate meaningfully in the hearings" could not be tolerated by the Pre-Trial Chamber, which "has a duty to ensure that decorum and

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[3] Case of Khieu, Case No: 002/19/09-2007-ECCC/OCIJ (PTC 14 and 15), Decision on Application to Adjourn Hearing on Provisional Detention Appeal, Pre-Trial Chamber, ¶ 11 (April 23, 2008).
[4] Case of Khieu, Case No: 002/19/09-2007-ECCC/OCIJ (PTC 14 and 15), Public Warning to International Co-Lawyer, ¶ 27 (May 20, 2009) [*hereinafter* Khieu Warning].
[5] Khieu Warning, ¶¶ 5, 6.
[6] Id. at ¶ 13.
[7] Id. at ¶ 28.

dignity necessary for the court proceedings are preserved."[8] His behavior had "delay[ed] proceedings and misus[ed] the Court's resources."[9] The Chamber warned the International Co-Counsel that his behavior was obstructive conduct and an abuse of the process within the meaning of Internal Rule 38. In addition, the Chamber forwarded a copy of the warning to the BAKC, the Paris Bar Association and the Defense Support Section.

II. The right to counsel of the defendant's choosing is a minimum guarantee, but certain behavior can warrant a restriction of the right

Article 13 of the 2003 Framework Agreement between Cambodia and the United Nations ("2003 Framework Agreement") guarantees certain minimum trial rights to a defendant at the ECCC.[10] The rights listed closely mirror the fair trial rights guaranteed in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights ("ICCPR") and other major international agreements.[11] These rights include the right to engage a counsel of one's choice.[12] This fair trial right serves the purpose of ensuring that a defendant, by being able to freely choose his own counsel, is able to pursue a defense strategy of his own choosing. Depending on what the defendant believes is the best strategy of defense, he can choose a counsel that is a master of international law, or an expert at procedural issues, or even counsel with a reputation of challenging the legitimacy of courts.

However, under Internal Rule 38, the ECCC has the authority to limit who a defendant chooses and how that counsel acts. Rule 38 states:

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[8] Id. at ¶ 30.
[9] Id. at ¶ 31.
[10] Framework Agreement between Cambodia & the United Nations [*hereinafter* Framework Agreement], Art. 13 (2003)
[11] International Covenant on Civil and Political Rights, Art. 14, 15; European Convention on Human Rights, Art. 6(3)(c); American Convention on Human Rights, Art. 8(2)(d); Statute of the International Criminal Court, Art. 67(1)(d).
[12] Framework Agreement, Art. 13(1).

1. The co-investigating judges or the Chambers may, after a warning, impose sanctions against or refuse audience to a lawyer if, in their opinion, his or her conduct is considered offensive or abusive, obstruct the proceedings, amounts to abuse of process or is otherwise contrary to Article 21 (3) of the Agreement.
2. The Co-Investigating Judges or the Chambers may also refer such misconduct to the appropriate professional body. [13]

Accordingly, a defendant's right to counsel of choice and a defense strategy are not unlimited. If the conduct of the chosen counsel is determined to be "misconduct," the ECCC may decide to restrict the counsel's conduct in court, or refuse him an audience altogether, requiring the defendant to pick another counsel.

Nevertheless, the ECCC should be careful not to overstep and unnecessarily limit the right of the defendant to choose his own counsel and defense strategy. Although these fair trial guarantees can be restricted under certain circumstances, international courts have proceeded with caution, and as shown below, will often allow a defendant a certain amount of latitude before acting to restrict the defendant's right by any considerable amount.[14] The observation of fair trial rights, including the right to counsel of choice, is an important legitimizing factor for an international tribunal and any move on the part of the ECCC to

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[13] Extraordinary Chambers in the Courts of Cambodia Internal Rules [*hereinafter* Internal Rules], Rule 38(1), (rev. 3, March 2009)

[14] Prosecutor v. Seselj, Case No: IT-03-67-AR73.3, Decision on Appeal against the Trial Chamber's Decision on Assignment of Counsel, Appeals Chamber, (Oct. 20, 2006) [*hereinafter* Seselj Decision on Appeal of Assignment of Counsel]; Milosevic v. Prosecutor, Case No: IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, Appeals Chamber, (Nov. 1, 2004) [*hereinafter* Milosevic Decision on Interlocutory Appeal]. *But see* Prosecutor v. Jankovic, Case No: IT-96-23/2-PT, Decision Following Registrar's Notification of Radovan Stankovic's Request for Self-Representation, Trial Chamber I, (Aug. 19, 2005); Prosecutor v. Barayagwiza, Case No. ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw, Trial Chamber, (Nov. 2, 2000).

prematurely restrict these rights would raise questions about the judges' impartiality and the ability of the ECCC to render a fair verdict. Therefore, this memo will examine ECCC and international jurisprudence with the purpose of providing guidance to the ECCC as to when a counsel's conduct is inappropriate, what factors the ECCC should consider when deciding to sanction a counsel, and what remedies may be appropriate.

Specifically, this memo will look at instances where international courts have restricted a defendant's choice of legal representation. This has most often occurred when defendants have chosen to represent themselves. When the defendant exercises his right to self-representation, he is also exercising the right to counsel of his choice. Therefore, an examination of when courts have found it appropriate to restrict this right of self-representation, will provide additional guidance as to appropriate limits that may be placed on defense counsel behavior. By considering this jurisprudence before restricting a defendant's counsel, the ECCC can help to ensure that any future decision will be viewed as impartial, comprehensive and legitimate.

III. When does counsel commit misconduct?

In the Internal Rules of the ECCC, Rule 38(1) describes broad categories of conduct that could be classified as misconduct and subject to court action, including acts that are: offensive or abusive; obstruct the proceedings; amount to abuse of process; or are not in accordance with standards of the court or the legal profession.[15] Although these categories

[15] **Internal Rules, Rule 38(1) ("The co-investigating judges or the Chambers may, after a warning, impose sanctions against or refuse audience to a lawyer if, in their opinion, his or her conduct is considered offensive or abusive, obstruct the proceedings, amounts to abuse of process or is otherwise contrary to Article 21 (3) of the Agreement); Framework Agreement, Art. 21(3) ("Any**

are not defined within the Rule, the ECCC and international courts have found behavior to fall into these categories, or very similar categories, when counsel a) is absent from court; b) verbally abuses the court; c) physically disrupts the proceedings; d) significantly abuses the process and proceedings of the courtroom; and/or e) violates a specific ECCC statute or rule. Although these categories often overlap in practice, by breaking out each act into distinct behaviors, this memo will be better able to define when court action is appropriate.

a. Absence from court

The ECCC has considered absences from court to potentially constitute misconduct pursuant to Rule 38. In *Khieu*, the International Defense Co-Counsel was unexpectedly absent from one of the few pre-trial hearings that were scheduled, reportedly detained in France tending to a sick acquaintance.[16] The National Co-Counsel requested a delay, arguing that the International Co-Counsel's presence was necessary for that day's defense argument.[17] This absence, combined with other disruptive behavior by the International Co-Counsel at the rescheduled hearing, led the Pre-Trial Chamber to issue a warning that the counsel's behavior amounted to Rule 38 misconduct.[18]

International courts consider absences that are intentional to justify court action. In the Special Court for Sierra Leone ("SCSL") *Norman* case, the defendant, who was

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counsel…engaged by or assigned to a suspect or an accused shall, in the defence of his client, act in accordance with the present Agreement, the Cambodian Law on the Statutes of the Bar and recognized standards ethics of the legal profession").

[16] Stephanie Gee, *Khmer Rouge Trial: Where is Jacques Verges?* Ka-Set, Feb. 27, 2009, available at http://cambodia.ka-set.info/khmer-rouge/news-tribunal-verges-khmer-rouge-cour-sa-sovan-report-khieu-Khieu-defense-090227.html (accessed July 29, 2009).

[17] Khieu Warning, ¶¶ 5, 6.

[18] Id. at ¶ 31.

representing himself, was absent from court and repeatedly confirmed his intention to be absent until certain issues were resolved. [19] The court quickly labeled this behavior as disruptive and acted within ten days of the initial absence, deciding to restrict the defendant's right to self-representation.[20] Similarly, in the International Criminal Tribunal for Rwanda ("ICTR") *Barayagwiza* case, the defendant boycotted the trial and also tried to prevent his counsel from further representing him in court.[21] Within a matter of days of the initial boycott, the Chamber declared the defendant's absence and refusal to allow his counsel to represent him to be an obstruction of justice.[22] The Chamber found that the defendant's absence was deliberate and refused to allow his counsel to withdraw, restricting the defendant's right to dictate the defense strategy to his counsel.[23]

If the absence is unintentional and repeated, international jurisprudence supports the view that the behavior may be sufficient to warrant court action. In the International Criminal Tribunal for the Former Yugoslavia ("ICTY") *Milosevic* case, the defendant's health issues forced him to be repeatedly absent from court.[24] Because he had chosen to exercise his right to self-representation, any health issues that prevented his presence at the Trial Chamber also prevented the chamber from convening. Overall the defendant's health

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[19] Prosecutor v. Norman, Case No. SCSL-2004-14-PT, Ruling on the Issue of Non-Appearance of the First Accused Samuel Hinga Norman, the Second Accused Moinina Fofana, and the Third Accused, Allieu Kondewa at the Trial Proceedings, Trial Chamber, ¶¶ 18, 23 (Oct. 1, 2004).

[20] Id.

[21] Barayagwiza, ¶¶ 6, 12.

[22] *See* Barayagwiza, ¶¶ 15, 16; *Cf.* Prosecutor v. Sesay, Case No: SCSL-2004-15-T, Decision on Application for Leave to Appeal Gbao - Decision on Application to Withdraw Counsel, Trial Chamber, (Aug. 4, 2004) (Court continued the trial, restricting the right of the defendant to be present. The defendant stated his intent to be absent, but did not expressly request to exercise his right to self-representation)

[23] Barayagwiza, ¶¶ 24, 27.

[24] Milosevic Decision on Interlocutory Appeal, ¶ 4.

forced the court to adjourn multiple times, contributing to a loss of 66 trial days.[25] Doctors also predicted that if the defendant continued to represent himself, there would be further delays.[26] The Appeals Chamber held that intentional disruption cannot be "the only kind of disruption legitimately cognizable by a Trial Chamber."[27] An unhealthy defendant asserting his right to self-representation can still significantly disrupt the court, intentionally or not; the court should not have to choose "between setting that defendant free and allowing the case to grind to an effective halt."[28] The ICTY *Seselj* chamber agreed with the *Milosevic* Chamber, stating that "it is not determinative whether the disruption is intentional or unintentional, in both situations, the disruption caused may be a proper basis for restricting the right to self-representation."[29]

The more difficult cases are those where the intention is unclear. In the ICTR *Musema* case, counsel was absent but it was not clear whether the absence was with the intent to delay the proceedings or for a legitimate reason.[30] She refused to show up to court until the defendant paid her for a previous appearance. The court did not immediately act; instead it tried to rectify the payment situation.[31] Even after payment was received, the counsel did not show up to court, stating that she was very busy and could not arrive for a few more months. Finally, the Chamber considered this behavior to be obstructing the

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[25] Id.
[26] Id. at ¶ 6.
[27] Id. at ¶ 14.
[28] Id.
[29] Seselj Decision on Appeal of Assignment of Counsel, ¶ 8.
[30] *See* Prosecutor v. Musema, Case No: ICTR-96-13-I, Warning and Notice to Counsel in Terms of Rule 46A of the Rules of Procedure and Evidence, Trial Chamber, (Oct. 31, 1997).
[31] Id. at pg. 2.

proceedings and contrary to the "interests of justice", warranting court action.[32] Although this behavior was not clearly intended to disrupt proceedings for the purposes of delay, after a period of time, the continued behavior, intentional or not, was sufficient to justify court action.

Notably, the ICTY has avoided acting in anticipation of a possible absence that would cause an obstruction of the proceedings. In the early stages of the *Milosevic* case, the prosecution requested the assignment of counsel for the defendant because it was predicted that the defendant's desire for self-representation would "inevitably increase the strain on his health" thereby causing future delay.[33] Although this assumption was probably reasonable, the Trial Chamber refused to restrict the defendant's right to self-representation.[34] Although the Chamber believed that it would be in the defendant's "best interests to accept the assistance of defence counsel," at that time, there were no circumstances in which to justify restricting the defendant's rights.[35]

Comparatively, the SCSL undertook steps that would mitigate anticipated delay without significantly restricting the defendant's rights. In *Norman*, the defendant decided mid-trial that he wanted to remove his counsel and conduct his own defense.[36] The court anticipated that the defendant's unfamiliarity with the legal issues would require long

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[32] Id. at pg. 3.
[33] Prosecutor v. Milosevic, Case No: IT-02-54-T, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, Trial Chamber, ¶ 10 (April 4, 2003) [*hereinafter* Milosevic Trial Chamber Reasons for Decision on Assignment of Counsel].
[34] *See* Id. at ¶¶ 39, 40.
[35] Id.
[36] Prosecutor v. Norman, Case No. SCSL-04-14-T, Decision on the Application of Samuel Hinga Norman for Self Representation under Article 17(4)(d) of the Statute of the Special Court, Trial Chamber, (June 8, 2004).

adjournments and infringe on the trial rights of his co-defendants.[37] The court did not initially completely forbid the defendant from exercising his right, but instead found that the defendant was entitled to represent himself, but with limited assistance from counsel and only as long as it did not hinder the "interests of justice." [38] The ruling would suggest that the court was willing to anticipate and prepare for behavior that would dictate action, but until that behavior actually occurred, the defendant was allowed to exercise his right conditionally.

The international jurisprudence suggests that there are a range of absences that justify court action. Courts appear to error on the side of allowing time to correct the behavior, unless the behavior is clearly intended to disrupt the court. In *Milosevic*, the court exhibited a remarkable level of tolerance primarily because the health problems that caused the absence were largely unavoidable. In *Norman* and *Barayagwiza*, the defendants clearly stated their intent to be absent because of their disagreements with the functioning of the court. The difficult cases are those like *Musema*, where the counsel appears to have a legitimate excuse at first, and then continues to come up with excuses. Courts generally do not allow this behavior to go on indefinitely; however, this type of behavior is, at first glance, given the benefit of the doubt. Finally, it appears courts have avoided acting in anticipation of absence, even when the absence is almost certain. Until the behavior occurs and the courtroom is disrupted by the absence, courts should not use an expected absence as justification to restrict a fair trial right.

[37] Id. at ¶¶ 13, 14, 15.
[38] Id. at ¶ 30.

b. Verbally abusing the court

Conduct that includes verbally abusing the court has also been found to justify court action. At the ECCC, the International Defense Co-Counsel in *Khieu* accused the judges of corruption and called them "squatters" because the prime minister had "stated publicly that he wish[ed] [the judges] to leave."[39] The Pre-Trial Chamber found the counsel's remarks insulting towards the judges and "offensive and obstructive conduct" constituting Rule 38 misconduct.[40]

International courts have considered deliberate vulgar, inflammatory language in the courtroom as offensive and subject to court action. In the ICTY *Jankovic* case, the defendant repeatedly and consistently used inflammatory and abusive language. In every hearing and in every written submission, the defendant used his right to self-representation to insult and abuse the court and everyone involved in the proceedings.[41] Some of his more inflammatory statements included calling his counsel an "immoral bastard who works for this grotesque Hague Tribunal" and both his counsel and the Chief Prosecutor of the Tribunal, "fascist spies and complete bastards."[42] The Chamber found his behavior to be "deliberately disrespectful and inappropriate."[43] The Chamber held the behavior to be disruptive and predicted that it would impair the "effective and fair defence of the Accused if he were to defend himself in person."[44] Therefore, the defendant's action was subject to court action that restricted the defendant's right to self-representation.

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[39] **Khieu Warning, ¶ 13.**
[40] **Id. at ¶ 31.**
[41] **Jankovic, ¶ 22.**
[42] **Id. at ¶ 23.**
[43] **Id. at ¶ 22.**
[44] **Id. at ¶ 23.**

Courts generally attempt to distinguish between language that is critical of the court versus language that abuses the court. In the European Court of Human Rights ("ECHR") *Saday v. Turkey* case, the defendant had verbally attacked the Turkish court. He criticized the judges as "executioners in robes" and directed most of his abusive language towards the officers of the court.[45] In reviewing the Turkish court's decision, the ECHR stated that while the "composition and functioning of a tribunal may be criticized, verbal attacks of a personal nature made against the judges, creating an atmosphere detrimental to the orderly administration of justice, may be subject to sanctions."[46] The ECHR considered the remarks the defendant made in his speech particularly "acerbic" and because the remarks constituted a direct attack on the dignity of the judges, the ECHR agreed that the remarks were offensive and warranted court action.[47] Comparatively, in *Barayagwiza,* in a motion to the court the defendant challenged the ability of the ICTR to "render an independent and impartial justice due…to the fact that it is so dependent on the dictatorial anti-Hutu regime of Kigali" and was therefore incapable of respecting fundamental human rights.[48] The Chamber chose to ignore these comments and did not act until the defendant actually boycotted the trial.

In the ECCC *Khieu* case, the International Defense Co-Counsel walks a fine line during his in-court speeches. In a roundabout manner, he questions the legitimacy of the

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[45] Prosecutor v. Seselj, Case No: IT-03-67-PT, Decision on Assignment of Counsel, Trial Chamber, pg. 9 (Aug. 21, 2006) (citing Saday v. Turkey, Case No: 32458/96, European Court of Human Rights, judgment has not been translated into English yet).
[46] Id.
[47] Netherlands Institute of Human Rights, "Saday v. Turkey Summary", available at http://sim.law.uu.nl/sim/caselaw/tribunalen.nsf/(Accused_All)?OpenView, (accessed July 29, 2009).
[48] Barayagwiza, ¶¶ 1, 5, 12.

court by insulting the character of the judges.[49] The Pre-Trial Chamber found his remarks to be "abusive and insulting towards the judges" and therefore misconduct.[50] Although an argument could be made that his remarks were not intended to be abusive towards the judges, but instead an attack on the overall legitimacy of the court, the Pre-Trial Chamber's decision would be aligned with international jurisprudence.

c. <u>Behavior that physically disrupts the proceedings</u>

Some physical acts in the court room are likely to be considered offensive and an obstruction of justice warranting a restriction of a defendant's rights. In the United Nations Human Rights Committee ("UNHRC") *Domukovsky* case, the defendants allegedly turned their backs to the Georgian court, resisted the military guards, fled from the courtroom to the cells and whistled, and [one defendant] leapt over the bar into the courtroom and grabbed a guard's automatic weapon."[51] The Georgian court found the defendants to have "regularly disrupted the proceedings during the judicial hearings, [by] showing disrespect to the court, ignoring the instructions from the chairman, and preventing the court to go about its normal work."[52] The Georgian court used this conduct as one of the many reasons the defendants' right to be present and the right to counsel of their own choice could be restricted. Upon review, the UNHRC reversed the Georgian court's decision, holding that the defendants must be allowed to conduct their own defense and to be represented by lawyers of their choice.[53]

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[49] Khieu Warning, ¶ 13.
[50] Id. at ¶ 30.
[51] Domukovsky v. Georgia, Communications No: 623/1995, 624, 1995, 626, 1995, 627, 1995, Human Rights Committee, ¶ 10.11 (July 5, 1996).
[52] Id.
[53] Id. at ¶ 18.9.

This case is unique because the defendants faced the death penalty and the UNHRC was concerned that a defendant's right to conduct his own defense should never be restricted when a possible punishment was death. [54] Because the death penalty is not an option at the ECCC, it seems likely that physical disruptions could be compared to inappropriate verbal behavior. Therefore, it can be inferred that this type of physical behavior, if repeated and abusive or offensive, would warrant a restriction on the defendant's fair trial rights.

d. Abuses of process

Behavior that amounts to abuse of process may also be subject to court action. In the ECCC *Khieu* case, the International Defense Co-Counsel refused to participate in a pre-trial hearing because the entirety of the case file had not been translated into French. He had given no previous warning to the Pre-Trial Chamber and as a result, the Chamber had to adjourn unexpectedly.[55] The Chamber found that the counsel's conduct was an abuse of process and subject to court action.[56] At a later date, the International Co-Counsel was absent from a hearing and the National Co-Counsel requested that the hearing be postponed because the International Co-Counsel was responsible for the defense's argument on that day.[57] At the rescheduled hearing, when the International Co-Counsel did show up, he refused to "participate meaningfully in the hearings" and "fail[ed] to bring any contribution to the debate."[58] The Chamber held this behavior impermissibly delayed the proceedings

[54] **Id. at ¶ 18.6-18.9.**
[55] **Khieu Warning, ¶ 26.**
[56] **Id. at ¶ 27.**
[57] **Id. at ¶ 6.**
[58] **Id. at ¶ 31.**

and misused the Court's resources, amounting to obstructive conduct and an abuse of process within the meaning of Internal Rule 38.[59]

i. Totality of the circumstances test

According to Black's Law Dictionary, the term "abuse of process" is the "improper and tortuous use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope."[60] Accordingly, behavior that can be construed as an abuse of process may be initially permissible. For example, court submissions may become frivolous only if excessive and the refusal to heed court orders might, initially, be justifiable. At some point, behavior that takes legitimate court process and uses the allowed procedure to slow down and delay the trial is subject to court action. However, international courts often find it is difficult to delineate when annoying, yet permissible behavior becomes a more serious concern, one warranting court action. In order to determine when behavior crosses this threshold of tolerance, courts likely use a totality of the circumstances test to identify when certain behavior becomes intolerable and justifies restricting the defendant's rights.

In the ICTY, conduct that "substantially and persistently" obstructs the proper and expeditious conduct of the trial has been found to be an abuse of process justifying court action. In order to decide when conduct "substantially and persistently" obstructs trial, the ICTY *Seselj* court appears to use a totality of the circumstances test. During the beginning of the proceedings, the Trial Chamber refused to restrict the defendant's right to self-representation, even though the defendant "increasingly demonstrated a tendency to act in

[59] Id. at ¶ 31.
[60] Black's Law (8th ed. 2004), abuse of process.

an obstructionist fashion."[61] At that point in the trial, he had engaged in numerous disruptive tactics, including only responding to motions in "excessively long and largely irrelevant" hand written notes; refusing to use a laptop for fear of electric shock; and submitting hand-written petitions to the Appeals Chamber, even though the defendant knew the Rules did not allow it. The Trial Chamber held that the "'attitude and actions" of the Accused…are indicative of obstructionism on his part."[62] Nevertheless, the Trial Chamber only appointed stand-by counsel, stating that the defendant's right to defend himself was "left absolutely untouched."[63] The stand-by counsel was assigned in order to "safeguard a fair and expeditious trial" and only served as an assistant to the defendant.[64]

Three years later, the defendant's process-abusing behavior continued, combined with abusive and offensive conduct. He rarely complied with the procedural rules of court, filed 191 "frivolous" submissions, disrespected the decorum of the court, repeatedly expressed his "intent to shatter the Tribunal in the Hague that even the Queen of Holland would not remain whole," published multiple books with offensive titles relating to witnesses, used abusive language, and constantly raised irrelevant arguments in court.[65] The Trial Chamber adopted, and the Appeals Chamber affirmed, the test stated in *Milosevic* ("*Milosevic* test") holding that a restriction of the defendant's right to self-representation is warranted if it

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[61] Prosecutor v. Seselj, Case No: IT-03-67-PT, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defence, Trial Chamber, ¶ 23 (May 9, 2003) [*hereinafter* Seselj TC Decision on Motion for Order Appointing Counsel].
[62] Id. at ¶ 26.
[63] Id. at ¶ 28.
[64] Id. at ¶ 29.
[65] Prosecutor v. Seselj, Case No: IT-03-67-PT, Decision on Assignment of Counsel, Trial Chamber, (Aug. 21, 2006) [*hereinafter* Seselj TC Decision on Assignment of Counsel].

"substantially and persistently" obstructs the proper and expeditious conduct of the trial. [66] The *Seselj* chamber did not explain why the similar behavior three years earlier did not "substantially and persistently" obstruct justice whereas the most recent behavior did. However, one could assume that the Chamber based its decision not on the individual actions themselves, which may independently have been tolerable, but on the disruptive impact of the collective behavior considered in the aggregate. The Chamber had tolerated the defendant's behavior for three years, but the conduct had finally reached a certain threshold, justifying a restriction on his right to self-representation.

Another factor courts can consider is whether an abuse of process brings the trial to a complete stop, or just slows the proceedings down. In the *Seselj* case, the Appeals Chamber agreed with the Trial Chamber that it "was not required under the *Milosevic* test to specifically find that [the defendant's] behavior has been extremely disruptive to the point of rendering continuation of the proceedings practically impossible [in order to restrict the right to self-representation]."[67] Although the defendant's actions did not prevent the proceedings from taking place, the Appeals Chamber upheld the Trial Chamber's determination that the conduct was subject to court action.[68]

Although the precise moment when a defendant's abuse of court process justifies action is difficult to determine, international courts appear to examine the totality of the circumstances, weighing the defendant's and court's interests and deciding if the restriction of rights is justified by the level of disruption caused by the defendant. Each case will require

[66] Id. at ¶¶ 73, 75; Seselj Decision on Appeal of Assignment of Counsel, ¶ 21.
[67] Seselj Decision on Appeal of Assignment of Counsel, ¶ 20.
[68] Id. at ¶ 20.

an examination of the specific abuses but the court should do so in the context of the entire trial and how the acts have cumulatively affected the court.

ii. Questioning the legitimacy of the tribunal

Although counsel behavior that uses court procedure to slow and disrupt the court can be considered subject to court action, international jurisprudence suggests that there is at least one tactic that should be initially immune to charges of being frivolous and an abuse of process. In the ICTY *Tadic* case, the counsel attacked the establishment of the Tribunal and questioned its legitimacy.[69] Instead of immediately considering the issue an abuse of process and dismissing or ignoring the charge, the Appeals Chamber addressed and answered the concerns about legitimacy.[70] Although the Appeals Chamber disagreed with the assertion that it was an illegitimate court, the fact that the Chamber did not immediately sanction the counsel for questioning the basis of the tribunal's authority supports the contention that defense counsel should be able to question the foundations of any international court. Although this decision suggests that it is an appropriate strategy, once the court rules on its legality, if counsel were to continue to raise this issue throughout the trial, it would probably be considered frivolous and fit somewhere on the spectrum of abuse of process discussed above.

e. <u>Acting contrary to specific ECCC standards, statutes and rules</u>

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[69] Prosecutor v. Tadic, Case No: IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, ¶ 27, (Oct. 2, 1995) [*hereinafter* Tadic Decision on the Interlocutory Appeal]; *See also* Prosecutor v. Taylor, Case No: SCSL-2003-01-I, Decision on Immunity from Jurisdiction, Appeals Chamber, ¶34-42 (May 31, 2004) (The Defense questioned the legal basis of the SCSL. The court responded and accepted this as a valid although incorrect argument).

[70] Tadic Decision on the Interlocutory Appeal, ¶¶ 13-48.

At the ECCC, behavior that violates standards of the court or the legal profession may constitute misconduct. Article 21(3) lists a series of documents and norms that lay out these standards, helping to guide the ECCC in determining when future conduct may be actionable. Article 21(3) requires counsel to act in accordance with certain standards, including those listed in i) the 2003 Framework Agreement between United Nations and Cambodia; ii) the Cambodian Law on the Statutes of the Bar and iii) "recognized standards and ethics of the legal profession."[71] Additionally, the ECCC may find conduct that violates one of the Internal Rules to constitute misconduct.

i. 2003 Framework Agreement

The 2003 Framework Agreement does not specifically list instances where a counsel's behavior would constitute misconduct. However, the Agreement contains several Articles that may be found to establish standards of behavior. Article 13 lists the fair trial rights of the accused and it would be reasonable to assume that if counsel's behavior somehow violates one of the defendant's fair trial rights, that the behavior could be classified as misconduct.[72] Additionally, Article 23 guarantees court protection for victims and witnesses.[73] Any counsel behavior that interferes with this protection could constitute misconduct in violation of the 2003 Framework Agreement.

ii. Cambodian Law on the Statutes of the Bar

The Cambodian Law on the Statutes of the Bar ("CLSB") is the governing statute of the Bar Association of the Kingdom of Cambodia ("BAKC") and lists a number of offenses that

[71] **Framework Agreement, Art. 21(3).**
[72] **Framework Agreement, Art. 13.**
[73] **Framework Agreement, Art. 23.**

the ECCC could use to justify court action against defense counsel. For example, the CLSB demands that counsel who practice law while part of BAKC must maintain absolute confidentiality.[74] CLSB considers the following to be confidential: "consultation, advice, and non-official documents prepared by the lawyer for his or her client, and correspondence sent between the lawyer and his or her client."[75] Under Article 19, the CLSB also requires the Bar Council to establish and enforce a "Code of Ethics."[76] The Code of Ethics requires that counsel must: respect the obligations of his oath and the "principles of conscience, humanity, and tact";[77] wear a robe;[78]"preserve for the judges, in independence and dignity, the respect due to their position;"[79] observe the procedural rules and practices of the jurisdiction;[80] and refuse to engage in disloyal and disruptive conduct.[81] Accordingly, any behavior that is not in accordance with these standards could be construed as actionable misconduct.

iii. Recognized standards and ethics of the legal profession: Apparent incompetence or mistakes by counsel do not necessarily justify court action

Although the term "recognized standards and ethics of the legal profession" is very broad, the *Ieng Sary* defense counsel supposedly breached these "standards and ethics" when the counsel made case file documents public after being told by the OCIJ that the

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[74] Cambodia Law on the Statutes of the Bar ("CLSB"), Art. 58.
[75] CLSB, Art. 58.
[76] CLSB, Art. 19.
[77] CLSB, Art. 6 ("…[a]ny participation in an act contrary to the law and regulations, professional rules of conduct, and the imperatives of conscience are prohibited").
[78] CLSB, Art. 11.
[79] CLSB, Art. 24.
[80] Id.
[81] Id.

documents were not to be disclosed.[82] The OCIJ held, and the Pre-Trial Chamber affirmed, that counsel acted in violation of Article 21(3) by failing to "act in accordance with the standards and ethics of the legal profession."[83]

At the ICTY, the Chamber found the defense counsel in *Tadic* in violation of the recognized standards and ethics of the legal profession and in violation of the ICTY's Code of Professional Conduct for Defense Counsel[84] for manipulating witnesses and "putting forward to the Appeals Chamber…a case which was known to the Respondent to be false…in relation to the weight to be given to statements…and… in relation to [an individual's] responsibility… for the killing of two Muslim policemen."[85] The Appeals Chamber held that "beyond reasonable doubt that this conduct constituted contempt of the Tribunal…and [counsel] has been guilty of professional misconduct…"[86]

Nonetheless, it is notable that international courts appear to give the defense counsel considerable leeway within the "recognized standards and ethics" to devise a defense strategy. These courts could have found that a counsel's lack of relevant legal arguments, or seeming incompetence, to not be in accordance with the "recognized standards" of the legal community. However, they have not found inadequate defense strategies by the counsel to justify court action, as long as the client consents. In the ICTY *Tadic* case, the Appeals

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[82] Ieng Sary Confidentiality Order, ¶ 4, 6, 19.
[83] Id. at ¶ 20.
[84] Prosecutor v. Tadic, Case No: IT-94-1-A, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin, Appeals Chamber, ¶169 (January 31, 2000) [*hereinafter* Tadic Judgment on Allegations of Contempt] (The ICTY Code of Professional Conduct for Defense Counsel defined professional misconduct as including "any violation of the Code and engaging in conduct which involves dishonesty, deceit or misrepresentation, or which is prejudicial to the proper administration of justice before the Tribunal").
[85] Id. at ¶ 41.
[86] Id. at ¶¶ 160, 170.

Chamber refused to rectify the alleged incompetence by counsel for failing to call relevant evidence.[87] The Chamber held that "the unity of identity between client and counsel is indispensable to the workings of the International Tribunal."[88] Even if the Chamber disagreed with the advice the defendant was given by the counsel, it was not the place for the Chamber to act, unless there was a showing of gross incompetence, which the Chamber held there was not.[89]

Additionally, in the ICTR *Akayesu* case, on appeal the defendant contended that he was deprived of his right to a full and complete defense and of his right to a competent counsel.[90] As evidence of his minimum trial rights being violated, the defendant pointed to his counsel's lack of preparation, failure to appear in court, and failure to put forward any real legal strategy.[91] The *Akayesu* Chamber endorsed the view of the ICTY Appeals Chamber in the *Tadic* Decision and held that the incompetence of counsel is an actionable offense only when the counsel acted "despite the wishes of the Appellant [and] in the absence of protest [by the defendant] at the time."[92] The Chamber found that since the beginning of the trial there was no evidence of the defendant protesting the counsel's strategy. The defendant and counsel had actually "shown a sense of cooperation" and no evidence refuted the belief that

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[87] Prosecutor v. Tadic, Case No: IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, Appeals Chamber, ¶ 65 (Oct. 15, 1998) [*hereinafter* Tadic Admission of Additional Evidence].
[88] Id.
[89] Id.
[90] Prosecutor v. Akayesu, Case No: ICTR-96-4-A, Judgment: Second Group of Appeal, Appeal Chamber, ¶ 68 (June 1, 2001).
[91] Id. at ¶ 73.
[92] Id. at ¶ 77.

the counsel's strategy was agreed-upon with the defendant. Therefore the alleged misconduct was not grounds for overturning the defendant's conviction.[93]

Thus, although a counsel's choice of defense may not appear to be in the best interests of the client, international courts generally refrain from determining that a counsel's incompetence or poor strategy has violated standards and ethics of the legal profession unless there is some indication that the defendant and counsel do not act as one.

iv. Violation of ECCC Internal Rules

A violation of one of the Internal Rules by counsel may be considered misconduct. For example, Rule 35 states that conduct is Rule 38 misconduct if any of the listed offenses are committed. The offenses include if counsel:

a. Discloses confidential information in violation of an order of the Co-Investigating Judges or the Chambers;
b. Without just excuse, fails to comply with an order to attend, or produce documents or other evidence before Co-Investigating Judges or the Chambers;
c. Destroys or otherwise tampers in any way with any documents, exhibits or other evidence in a case before the ECCC;
d. Threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with a witness, or potential witness, who is giving, has given, or may give evidence in proceedings before the Co-Investigating Judges or a Chamber;
e. Threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an order of the Co-Investigating Judges or the Chambers;
f. Knowingly assists a Charged Person or Accused to evade the jurisdiction of the ECCC; or
g. Incites or attempts to commit any of the acts set out above

Although these are very specific offenses and a strict reading would offer very easy determinations of misconduct, the ECCC will probably want to examine each alleged

[93] **Id. at ¶ 83.**

violation of Rule 35 on a case-by-case basis. Within each instance of misconduct, there is still a considerable amount of room for ambiguity. For example, in Rule 35(1)(a), the definition of "confidential" or "order" can be uncertain. As seen in the ECCC *Ieng Sary* case, the defense counsel disclosed information that it did not believe was confidential, but the OCIJ had not created guidelines for what is confidential except to say that anything not already published was confidential.[94] Additionally, there was confusion as to what exactly constituted an "order." In the initial decision, the OCIJ found that it had prohibited the publication of case file material in a letter to counsel and therefore the letter represented an order that was violated by the defense counsel thereby constituting a breach of Rule 35(1)(a).[95] The Pre-Trial Chamber disagreed and found that the letter did not represent an "order," therefore the defense counsel's conduct could not be a breach of Rule 35(1) (a).[96] Thus, each alleged violation of Rule 35 (1) will need to be examined on a case-by-case basis in order to determine if there has truly been a violation.

Violations of the other ECCC Internal Rules could be considered misconduct by the ECCC and subject to court action. In the *Ieng Sary* case, the OCIJ found that when the defense counsel published confidential documents without first "seeking the approval of the relevant authority," counsel had acted in violation of Rule 56, entitled "Public Information by the Co-Investigating Judges."[97] This breach of Rule 56 was subject to Rule 38 sanctions.[98]

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[94] Ieng Sary Confidentiality Order, ¶¶ 1-4.
[95] Id. at ¶¶ 19, 20. (This policy on confidentiality was criticized by both the Civil Parties and the Office of the Co-Prosecutors. The criticism eventually resulted in the OCIJ releasing more filing, including some of the filings that the defense counsel was originally reprimanded for releasing).
[96] Ieng Sary Decision on Admissibility, ¶ 43.
[97] Id.

Another example includes Internal Rule 11, entitled "The Defence Support Section." The Rule gives the Defence Support Section the power to create criteria and procedures that counsel must follow to be allowed an audience at the ECCC. For Cambodian Counsel, they must be a member of BAKC and have "established competence in criminal law and procedure at the national or international level."[99] International Counsel must be a current member in good standing of a recognized association of lawyers in a United Nations member state; have a degree in law or an equivalent legal or professional qualification; have at least ten years of relevant work experience; have established competence in criminal law and procedure at the international or national level; be fluent in Khmer, French, or English and be authorized by the BAKC to practice before the ECCC.[100] Presumably, if during the course of the proceedings, counsel is shown to not meet these criteria, the ECCC could find that the counsel's behavior constituted misconduct.

IV. When does the misconduct need to occur for it to justify action?

Courts have generally divided misconduct into two time periods: i) misconduct of counsel that occurs during any stage of the defendant's proceedings and ii) misconduct that occurred in a previous court while representing a different defendant. The ECCC has relied primarily on behavior that occurred during the early stages of the defendant's proceedings and has not used evidence of counsel misconduct from previous international courts. In *Ieng Sary*, the acts that constituted misconduct occurred during the pre-trial stages. In *Khieu,* although the Co-Prosecutor originally argued that both the counsel's conduct in previous

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[98] **Id. at ¶¶ 43, 47.**
[99] **Counsel Criteria, Defense Support Section (DSS) available at http://www.eccc.gov.kh/english/dss_the_list.aspx, (accessed July 27, 2009).**
[100] **Id.**

international courts and his conduct at the ECCC should be considered, the Pre-Trial Chamber relied primarily on the counsel's behavior during the pre-trial stages of the ECCC.[101]

International courts have used misconduct that occurred during the same proceedings to justify court action. In the ICTY *Seselj* case, the Acting Counsel argued that the Trial Chamber's use of misconduct that occurred in a previous court was reversible error.[102] The Appeals Chamber held that the Trial Chamber did not error because when determining that there was misconduct, the Chamber had relied primarily on behavior that occurred during the same proceedings and not on misconduct from previous courts.[103] This would suggest that while misconduct from different courts can also be used to justify court action, the court should at least primarily rely on misconduct that occurred during the same proceedings.

Notably, however in the ICTY *Kunarac* case, the Chamber allowed the counsel's behavior from a previous ICTY chamber to be considered as the main evidence of disruptive behavior.[104] The *Kunarac* defendant had requested the services of counsel who had been found in contempt of another ICTY Chamber during the prior *Tadic* trial.[105] Although the counsel had not yet appeared before the specific trial chamber and could not have been said to have obstructed the proceedings of the *Kunarac* Chamber, the Chamber refused the

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[101] Khieu Warning.
[102] Seselj Decision on Appeal of Assignment of Counsel, ¶ 32.
[103] Id.
[104] Prosecutor v. Kunarac, Case No: IT-96-23&23/1, Decision on the Request of the Accused Radomir Kovac to Allow Mr. Milan Vujin to Appear as Co-Counsel Acting Pro Bono, Trial Chamber, ¶ 14 (March 14, 2000).
[105] Id. at ¶ 1.

counsel an audience.[106] Because "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," and the counsel had already demonstrated a complete lack of respect for the rules of the ICTY while representing a previous client, the Chamber did not allow the *Kunarac* defendant to choose this particular counsel.[107]

Because of the infancy of the ECCC, there has not been an example of counsel acting inappropriately in a previous ECCC case. The *Kunarac* case however suggests that a court may consider misconduct that occurred in courts with similar, but not identical rules and obligations. If the ECCC is satisfied that the counsel was under similar rules and still showed a complete lack of regard towards the rules, then it could justify restricting the defendant's rights based on the counsel's previous behavior.

V. When behavior is sufficiently disruptive to warrant action, what steps should the court take?

a. Warning

The Internal Rules of the ECCC require that a warning be given before the court sanctions or refuses an audience to the counsel.[108] The International Co-Counsel in *Khieu* has received two warnings for different types of behavior. The first warning informed the counsel that he had abused the processes of the Pre-Trial Chamber.[109] The second warning informed the counsel that if his conduct remained "offensive or otherwise abusive, or was he

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[106] Id. at ¶¶ 8, 9.
[107] Id. at ¶¶ 15, 17. (The Chamber reasoned that because the counsel was under identical obligations and still chose to flagrantly disobey his duties, there was no reason to believe he would act any different than before).
[108] Internal Rules, Rule 38(1).
[109] Khieu Warning, ¶ 27.

to obstruct proceedings or adopt a conduct that amounts to an abuse of process, the Chamber would impose sanctions."[110] The Pre-Trial Chamber in *Ieng Sary* held the defense counsel received a warning in the Confidentiality Order pursuant to Rule 38. The Order stated that if counsel did not act in the specified manner, then counsel "would commit a further breach of this Order and will thus expose themselves to legal consequences."[111]

International jurisprudence suggests two criteria to consider in determining if a warning is adequate, including: i) the specificity of the warning; and ii) whether the court gives a real chance for the misconduct to be rectified before acting to restrict a defendant's right.

i. Specificity of the warning

The Appeals Chamber in *Seselj* required the court warning to be specific and clearly explain the repercussions if the misconduct continues. The Trial Chamber had repeatedly warned the defendant but never stated explicitly that if the disruptive behaviour continued, it would result in restrictions on the defendant's right to self-representation. The Appeals Chamber held that the ICTY Rule 80(B) warning must "specifically indicate that the disruptive conduct, if it persists, could result in a specific restriction."[112] The Chamber reasoned that any court action would affect a fundamental right, so the required warning must be unequivocal that further misconduct would restrict this basic right.[113] The Chamber

[110] Id. at ¶ 31.
[111] Ieng Sary Decision on Admissibility, ¶ 47.
[112] Seselj Decision on Appeal of Assignment of Counsel, ¶ 25.
[113] Id.; International Criminal Tribunal for the former Yugoslavia Internal Rules of Procedure and Evidence, Rule 80(B), (rev. 22, amended Dec. 2001) ("Following a

provided additional guidance stating that a warning "needs to be explicit, in the form of an oral or written statement to an accused explaining the disruptive behaviour and that, if it persists, the consequence will be restriction on the accused's right of self-representation."[114]

Although the Internal Rules of the ECCC do not have as detailed language as the ICTY Rule 80 (B) regarding the specificity of the warning, the ECCC may want to follow the *Seselj* court's reasoning. A general warning to the defense does not give real guidance in how any future court action can be avoided. At the ECCC, the Pre-Trial Chamber and the OCIJ seem to recognize the benefit of specificity as the warnings in the *Khieu* and *Ieng Sary* cases have been very specific and stated exactly what kind of behavior is considered misconduct.[115] However, neither of the warnings gives a clear indication of the types of disciplinary action the counsel would face if the misconduct continued.[116]

ii. Timing of the warning

ICTY jurisprudence suggests that there should be a gap in time between when a warning is issued and any action by the court to punish the misconduct. For example, in the ICTY *Seselj* case, the Acting Counsel for the defendant argued that the Rules of Procedure and Evidence of the ICTY required that any warning must be "given immediately prior to the restriction of the right of self-representation."[117] Even though the Appeals Chamber reversed the assignment of counsel on other grounds, the Appeals Chamber

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warning that such conduct may warrant the removal of the accused from the courtroom").

[114] Seselj Decision on Appeal of Assignment of Counsel, ¶ 26.

[115] Khieu Warning; Ieng Sary Confidentiality Order.

[116] Ieng Sary Confidentiality Order, ¶ 7.

[117] Seselj Decision on Appeal of Assignment of Counsel, ¶ 24.

explicitly rejected the Acting Counsel's argument, holding that the language of the rule implied some "gap" in time between warning and actual court action.[118]

The "gap" was clarified in a subsequent appeal. After the first Appeals Chamber decision, the defendant's right to self-representation had been reinstated.[119] As soon as the proceedings restarted in the Trial Chamber, standby-counsel was immediately re-assigned, which led to additional disruptive behavior by the defendant, and the Trial Chamber imposed counsel again. The Appeals Chamber held that the Trial Chamber failed to give the defendant a real chance to show that "despite his conduct pre-trial and the conduct leading up to the imposition of assigned counsel, he now understood that in order to be permitted to conduct his defense, he would have to comply with the Rules …. and that he was willing to do so."[120] Therefore, after a warning, the defendant must be given a chance to demonstrate changed behavior before the court can act.

Jurisprudence from the both ECCC and the ICTR seem to support this requirement that a defendant be given a "real opportunity" to correct their behavior before the court acts on the misconduct. In the ECCC, after the warning was given in both *Ieng Sary* and *Khieu*, the court took no additional action, but appear to be giving the counsel a "real opportunity" to not behave in a further manner that would be considered misconduct. In the ICTR *Musema* case, the counsel was given a warning after her repeated absences from court and then was allowed the opportunity to appear in court and represent her client. Only after she

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[118] Id.; ICTY Rules, Rule 80(B) ("… if the accused has persisted in disruptive conduct following a warning…").
[119] Seselj Decision on Appeal of Assignment of Counsel, ¶ 52.
[120] Prosecutor v. Seselj, Case No: IT-03-67-AR73.4, Decision on Appeal Against the Trial Chamber's Decision (No.2) on the Assignment of Counsel, Appeals Chamber, ¶27 (Dec. 8. 2006) [*hereinafter* Decision on Appeal No. 2].

was absent an additional time, did the court act and require the assignment of new counsel.[121]

b. Remedies for Misconduct of a Lawyer

If the ECCC determines that a counsel's behavior constitutes misconduct, there are three remedies available under Rule 38. The court may i) sanction counsel; ii) refuse audience to the counsel; and/or iii) refer such misconduct to the appropriate professional body.[122] In international jurisprudence, once a court decides to apply a remedy, courts are guided by the principle of proportionality in determining which remedy to use.[123] In the ICTY *Milosevic* case, the Appeals Chamber held that a restriction of the defendant's right should be guided by the "basic proportionality principle: any restriction of a fundamental right must be in service of a 'sufficiently important objective' and must 'impair the right' no more than is necessary to accomplish the objective."[124] The Appeals Chamber overturned the Trial Chamber's decision to forbid the defendant's involvement in his defense. The Appeals Chamber recognized that because the defendant's health could improve, his right to participate in the future should not be prematurely restricted. The case was remanded to the Trial Chamber so it could "craft a working regime that minimizes the practical impact of the

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[121] Prosecutor v. Musema, Case No: ICTR -96-13-I, Decision to Withdraw Assigned Counsel and to Allow the Prosecutor Temporarily to Redact Identifying Information of Her Witnesses, Trial Chamber, (Nov. 18, 1997).
[122] Internal Rules, Rule 38 (1).
[123] Milosevic Decision on Interlocutory Appeal; *see also* Seselj Decision on Appeal of Assignment of Counsel, ¶ 46; Saday v. Turkey (6 month sentence was not proportionate to remedy his disruptive behavior); Kunarac, ¶ 14 (The chamber suggested that if the misconduct had been an isolated event, a sanction by way of "mere warning or admonition, or even a fine" would have been sufficient. However, the repeated instances of misconduct revealed an "underlying attitude of utter disrespect for his professional duties towards his clients and the Tribunal").
[124] Milosevic Decision on Interlocutory Appeal, ¶ 17.

formal assignment of counsel, except to the extent required by the interests of justice."[125] The ECCC may want to look to cases where courts have applied this principle for guidance as it decides when and how to apply Rule 38 remedies.

i. Sanctioning the Counsel

Depending on the counsel, the Chamber might sufficiently deter further misconduct by sanctioning the counsel. In neither the *Ieng Sary* nor *Khieu* cases, have specific sanctions been used or threatened. International courts have used various sanctions including: admonitions,[126] fines,[127] and prison time.[128] In determining which sanction for which offense, as discussed above, international courts appear to use the proportionality principle. For example in ICTY *Blagojevic* case, the Chamber found that the defense counsel, after a warning by the court, had filed a frivolous motion that alleged "serious allegations of professional and ethical misconduct or impropriety."[129] For this misconduct, the Chamber decided that the appropriate sanction was an admonishment only. Comparatively, in the ICTY *Aleksovksi* case, the Trial Chamber imposed a fine after counsel acted in a more inappropriate manner, disclosing the identity of a protected witness. When deciding to

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[125] Milosevic Decision on Interlocutory Appeal, ¶ 19; Seselj Decision on Assignment of Counsel, ¶ 72 (Any restriction on his right to represent himself "must be limited to the minimum extent necessary to protect the Tribunal's interest in assuring a reasonably expeditious trial").

[126] *See* Kunarac, ¶ 14.

[127] International Criminal Tribunal for Rwanda Rules of Procedure ("ICTR Rules"), Rule 77 (A); Prosecutor v. Kajelijeli, Case No: ICTR-98-44A-T, Decision on Kajelijeli Motion to Hold Members of the Office of the Prosecutor in Contempt of the Tribunal, Trial Chamber, pg. 3 (Nov. 15, 2002); Tadic, Judgment on Allegations of Contempt; Prosecutor v. Aleksovski, Case No: IT-95-14/1-T, Finding of Contempt of the Tribunal, Trial Chamber (Dec. 11, 1998).

[128] Saday v. Turkey.

[129] Prosecutor v. Blagojevic, Case No: IT-02-60-T, Decision on Motion to Seek Leave to Respond to the Prosecution's Final Brief, Trial Chamber, (Sept. 28, 2004).

impose a fine instead of a prison sentence, the court found as mitigating factors that this offense was his first violation and he had pledged not to repeat the offence.[130]

ii. Refusing Audience to Counsel

If the ECCC has determined that a counsel's behavior constitutes misconduct, another option under Rule 38 (1) is to refuse audience to counsel.[131] Once the court refuses an audience, the defendant, if he can afford counsel, must chose new counsel from those who are registered with the BAKC. If the defendant is indigent, the defendant can choose from amongst national lawyers and foreign lawyers included in the list created by the Defense Support Section.[132] This procedure is similar to the procedure followed in international courts. For example, in the ICTY *Kunarac* case, the Chamber refused an audience to one of the defendant's chosen co-counsel because he had been found in contempt of a previous court.[133] Subsequently, the defendant chose another co-counsel and the trial proceeded. In the ECCC, if the defendant refuses to choose new counsel, Internal Rule 81(4) allows the Chamber to order that the defendant be represented by counsel assigned by the Defence Support Section.[134]

International jurisprudence is mixed about whether or not a court should actually assign counsel to an unwilling defendant. In *Seselj*, although the Chamber found that the defendant's behavior constituted misconduct, the Chamber never truly succeeded in assigning counsel. The defendant had made it very clear that he did not want to be assigned counsel and every time the Trial Chamber tried to assign counsel, the Appeals Chamber

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[130] **Aleksovski, pg. 5.**
[131] **Internal Rules, Rule 38 (1).**
[132] **Internal Rules, Rule 11(2)(d).**
[133] **Kunarac, ¶ 12.**
[134] **Internal Rules, Rule 81(4).**

found another reason to reverse the assignment.[135] A similar situation occurred in *Milosevic*. Additionally, in the UNHRC *Hill v. Spain* case, the Spanish court assigned counsel to the defendant who had tried to assert his right to self-representation, but the UNHRC reversed the assignment, finding that the right to self-representation had not been respected.[136] This case is unique because the assigned counsel was considered incompetent and the facts suggest that the UNHRC was concerned about the overall fairness of the trial.[137] Nevertheless, it would appear that many courts have been very reluctant to impose counsel on unwilling defendants.

Some courts have however, assigned counsel to unwilling defendants. In *Sesay* and *Barayagwiza*, the SCSL and ICTR courts forced counsel upon the defendants, even though they had explicitly stated that they did not want counsel to represent them. When assigning counsel in the SCSL *Sesay* case, the court stated that, "the law does not recognize a right 'not to have counsel assigned' to an accused who has refused to exercise the choice available to him."[138] Although the jurisprudence does not suggest a clear pattern of when to assign counsel over the defendant's objections, the ECCC may want to be cautious when assigning counsel over a defendant's adamant objection. If a defendant's objections to assigned counsel either a) cause him to boycott the trial and the court to proceed without him, or b) create the appearance that the defendant is not in charge of his defense and not receiving a

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[135] *See* Seselj Decision on Assignment of Counsel; Seselj Decision on Appeal of Assignment of Counsel; Seselj Decision on Appeal No. 2.
[136] Hill v. Spain, Case No: 526/1993, UNHRC, ¶ 14.2 (June 23, 1997).
[137] Id. at ¶¶ 12.3, 12.4.
[138] Prosecutor v. Sesay, Case No: SCSL-04-15-AR73, Gbao - Decision on Appeal Against Decision on Withdrawal of Counsel, Appeals Chamber, ¶ 58 (Nov. 23, 2004).

fair trial, the reputation of the ECCC will suffer and the success of the case, regardless of the verdict, may be questioned.

iii. Sending notice to the bar association

Finally, under Rule 38, the ECCC may refer misconduct of counsel to the appropriate professional body. The ECCC has twice referred misconduct to the professional body of counsel. In *Khieu*, the Pre-Trial Chamber warned the International Defense Co-Counsel that if his disruptive behavior continued, the appropriate sanctions would be applied. The Pre-Trial Chamber forwarded a copy of the warning to the BAKC, the Paris Bar Association, and the Defense Support Section. In *Ieng Sary*, the OCIJ referred a copy of the misconduct to the BAKC, the American Bar Association, the Alaska State Bar Association and the Defence Support Section.[139]

According to Article 60 of the BAKC governing statute, if BAKC receives a complaint, such as a referral of misconduct from the ECCC, it may open an investigation.[140] If the Bar Counsel fails to respond to the complaint, it is considered a rejection,[141] but if the Bar Council investigates the complaint, the possible penalties are, under Art. 63: "a warning, blame, ban from practicing the profession for a period not to exceed 2 years, or the elimination from the Bar List."

If a complaint of misconduct is sent to a foreign lawyer's bar association, the complaint can initiate a wide range of action. For example, if the Alaska Bar Association receives a complaint, the Bar Counsel will review the complaint to determine if the

[139] **Id.**
[140] **CLSB, Art. 60.**
[141] **Id.**

documents contain enough factual allegations which, if true would constitute ethical misconduct.[142] If the complaint indicates misconduct, a copy is sent to the lawyer for a response. Furthermore, if the factual allegations are sufficient, the Bar Counsel will begin a full investigation into the alleged misconduct and will either a) dismiss the grievance; b) issue a private admonition which is placed on the lawyer's record, or c) file a petition for a formal hearing, or enter a stipulation for discipline, either of which will be taken to the Disciplinary Board and/or the Alaska Supreme Court.[143] In *Ieng Sary*, the defense counsel's misconduct was sent to the Alaska Bar Association ("Association"), but the Association recently decided to take no action against the foreign defense co-counsel, Michael Karnavas. The Association found that the "breach of confidentiality" did not warrant a formal investigation.[144] Although not subjected to any disciplinary action, in essence, the referral penalizes Karnavas because, one could assume, any additional referral to the Association will subject him to greater scrutiny.

VI. Conclusion

At the ECCC, a defendant is initially guaranteed the right to counsel of one's choosing, ensuring that he or she is able to pursue their defense strategy of choice. Although Internal Rule 38 allows the ECCC to limit a defendant's right to counsel and defense strategy, the court should be cautious. An examination of international jurisprudence suggests that a considerable amount of latitude is given to counsel before the court will label many types of

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[142] Alaska Bar Association, *The Process of Investigation*, available at http://www.alaskabar.org/servlet/content/how_a_complaint_is_investigated.html (accessed July 29, 2009).
[143] Id.
[144] Georgia Wilkins, *KR Tribunal: Bar Takes No Action on KRT Lawyer*, Phnom Penh Post, July 10, 2009.

behavior to be misconduct. Furthermore, once a court has determined that behavior is misconduct, any decision on a remedy should be guided by the principle of proportionality. By balancing the right of the defendant to counsel of choice and the need of the court to proceed without delay or disruption, the ECCC will help to guarantee that any future verdict will be viewed as fair and impartial.