Defence counsel in international criminal law

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VII
ASSISTING AN ACCUSED WHO REPRESENTS HIMSELF[1]

7.1 INTRODUCTION

It has been suggested that 'rogue leaders' should not be allowed to represent themselves before international criminal courts, since they would simply abuse this right.[2] However, under the statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for (ICTR) and the Special Court for Sierra Leone (SCSL), the right to self-representation is one of the 'minimum guarantees' accorded to the accused. Article 21(4)(d) of the ICTY Statute[3] entitles the accused 'to be tried in his presence, and to *defend himself in person* or through legal assistance of his own choosing; … and to have legal assistance assigned to him, in any case where the interests of justice so require' (emphasis added). In almost identical wording, the right to conduct one's own defence is enshrined in various human rights instruments.[4] Whilst acknowledging that this right should be respected, international criminal courts have not granted any accused this right without assigning some additional form of legal assistance to supplement his defence. Moreover, this right has been limited, refused and even revoked to prevent delay or disruptions of trial proceedings. Since there were no provisions on how to deal with an accused choosing to represent himself, different kinds of substitutes for defence counsel (*amici curiae*, standby counsel, and court assigned counsel) were introduced to the justice system of international criminal courts. Their tasks were set out in individual and specific court orders.

What should not be underestimated is that the final approach regarding this issue bears important consequences not only for the rights of the accused, but also for the position of 'imposed' counsel. These lawyers have to assist an accused who will not accept any help, and who refuses to provide any instructions. Undoubtedly, that will have an impact on the normal exercise of the counsel's functions. Counsel is bound to have difficulties with adhering to the Tribunals' codes of professional conduct meant for "regular" defence counsel. If it is impossible for them to guarantee an effective defence, the very existence of such "imposed" counsel might harm the integrity of the legal profession and, more broadly, the fairness of the proceedings.

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[1] A previous version of this Chapter was published in the JICJ under the title: 'Assisting an Accused to Represent Himself: Appointment of *Amici Curiae* as the Most Appropriate Option', 4 *Journal of International Criminal Justice (JICJ)* 1 (March 2006), pp. 47-63.

[2] See Scharf, Michael P., 'Do Former Leaders Have an International Right to Self-Representation in War Crimes Trials?', 20 *Ohio State Journal on Dispute Resolution* (2005), pp. 3-41.

[3] The text of Article 20(4)(d) ICTR Statute and Article 17(4)(d) SCSL Statute is almost identical.

[4] See Article 6(3)(c) ECHR and Article 14(3)(d) ICCPR. Cf. also Human Rights Committee (HRC), CCPR General Comment No. 13, 13 April 1984.

Therefore, it is important to determine what would be the most desirable form of additional legal assistance to supplement the defence of an accused who wishes to represent himself. The most appropriate solution should be respectful of the rights of the accused[5] and, at the same time, should have due regard for the position of and consequences for defence counsel.

7.2 Procedural Approaches to the Right to Self-Representation

As discussed in Chapter IV, international criminal procedure can be considered a mixture of common law and civil law concepts, in which common law elements prevail. Nevertheless, it has been argued that mechanically incorporating national legal concepts or ideas into international criminal proceedings would be inappropriate.[6] Unless these concepts represent an internationally recognised norm,[7] domestic concepts should be modified along with the 'contextual and teleological requirements of the Tribunal'.[8]

Generally speaking, in civil law countries, criminal procedure tends to be somewhat 'paternalistic', leaving the accused with few choices. The legal incompetence of the accused is one of the main reasons for assigning counsel, even against his will. This is considered to be in his best interest. Moreover, mandatory representation is often prescribed by the law, especially in complicated cases or before appellate or cassation courts.[9] On the other hand, in common law countries the situation is different. Although it is acknowledged that the accused might be better off with a defence counsel acting on his behalf, the accused receives significant leeway in exercising his right to self-representation and is granted a substantial amount of autonomy. Accused persons are allowed to represent themselves as long as they are able to understand the consequences of their choice to waive legal representation,[10] and do not simply aim to cause delay or to disrupt the proceedings. It is the

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[5] The accused's perspective has been clarified sufficiently by others. See, e.g., Damaška, Mirjan R. 'Assignment of Counsel and Perceptions of Fairness', 3 *JICJ* (2005), pp. 3-8; Jørgensen, Nina H.B.J. 'The Right of the Accused to Self-Representation before International Criminal Tribunals', 98 *American Journal of International Law* (2004), pp. 711-726; Koskenniemi, Martti, 'Between Impunity and Show Trials', 6 *Max Planck Yearbook of United Nations Law* (2002), pp. 1-35; Sluiter, Göran, 'Fairness and the Interests of Justice: Illusive Concepts in the Milošević Case', 3 *JICJ* (2004), pp. 1-11; Scharf, *supra* note 2; Haveman, Roelof, 'De dwangverdediging van Milošević', *Strafblad* (2005), pp. 204-212.

[6] See ICTY App. Ch., Judgment, Separate and Dissenting Opinion of Judge Cassese, *Erdemović* (Case No. IT-96-22-A), 7 October 1997, § 4.

[7] *Ibid.*

[8] P. Robinson, 'Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia', 11 *European Journal of International Law* (2000), pp. 569-589, p. 580.

[9] Cf. s. 41 of the Austrian Code of Criminal Procedure; Article 317 of the French Code of Criminal Procedure; s. 140 of the German Code of Criminal Procedure; Article 97 of the Italian Code of Criminal Procedure. See Prosecution's Submissions on Self-Representation, *Krajišnik* (Case No. IT-00-39-T), 31 May 2005, §§ 42 *et seq.*

[10] Judges must confirm that the accused resorts to his right to self-representation 'voluntarily and intelligently'. *Faretta v. California*, 422 U.S. 806 (1975), at 807. Moreover, there are no high demands for procedural capacity: when an accused is mentally competent to stand trial, he is competent to choose self-representation. See *Godinez, Warden v. Moran*, 509 U.S. 389 (1993), at 399 and 400.

responsibility of the individual to weigh his rights according to his preferences and make the risk assessment.

Given the divergent approaches to the accused's right to self-representation in civil law and common law systems,[11] and since human rights courts have not dealt extensively with this right,[12] it is not simple to determine what approach should be followed in the international criminal law context.

7.3 An Effective Exercise of the Right to Self-Representation

An accused representing himself before an international criminal tribunal is unlikely to provide for the same standard of representation as a qualified defence counsel. However, when an accused, upon making it unequivocally clear that he wishes to represent himself,[13] is allowed to defend himself in person, that does not automatically entail that he has no additional legal assistance or special facilities at all. After being granted the right to represent himself, the accused should be enabled to make use of this right in the most efficient way. Because they are usually incarcerated, the accused persons will not have the freedom of action or facilities available to counsel. International criminal courts have nevertheless tried to find appropriate solutions.

Accused persons have been provided with office equipment such as computers, stationary and telephones. Those facilities were provided for either in their cells,[14] or in a secure room in the Detention Unit, where the accused could interview

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[11] For a thorough analysis, see Damaška, Mirjan R., *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986), pp. 83, 90, 94, 105, 106, 142, 153 and 174.

[12] HRC, *Hill v. Spain,* CCPR/C/59/D/526/1993 (2 April 1997); ECHR, *Melin v. France* (Appl. No. 12914/87), 22 June 1993.

[13] So far, international criminal courts have made an effort to ascertain whether an accused's request for self-representation was unequivocal and made knowingly and voluntarily, as required under common law. *E.g.* ICTR App. Ch., Judgment, *Kambanda* (Case No. ICTR-97-23-A), 19 October 2000, §§ 16 *et seq.*; ICTR App. Ch., Judgment, *Akayesu* (Case No. ICTR-96-4-A), 1 June 2001, § 65; ICTY Tr. Ch., Reasons for Oral Decision Denying Mr Krajišnik's Request to Proceed Unrepresented by Counsel, *Krajišnik* (Case No. IT-00-39-T), 18 August 2005 (hereinafter: Reasons for Oral Decision); ICTY Tr. Ch., Decision following Registrar's Notification of Radovan Stankovic's Request for Self-Representation, *Janković and Stanković* (Case No. IT-96-23/2-PT), 19 August 2005 (hereinafter: Decision following Registrar's Notification), §§ 16-18; SCSL Tr. Ch., Decision on the Application of Samuel Hinga Norman for Self Representation under Article 17(4)(d) of the Statute of the Special Court, *Norman, Fofana and Kondewa* (Case No. SCSL-04-14-T), 8 June 2004 (hereinafter: Decision on the Application), § 20; SCSL Tr. Ch., Decision on Application for Leave to Appeal Gbao - Decision on Application to Withdraw Counsel, *Sesay, Kallon and Gbao* (Case No. SCSL-2004-15-T), 4 August 2004, § 56; SCSL App. Ch., Gbao - Decision on Appeal against Decision on Withdrawal of Counsel, *Sesay, Kallon and Gbao* (Case No. SCSL-04-15-AR73), 23 November 2004, § 49.

[14] SCSL Tr. Ch., Decision on Request by Samuel Hinga Norman for Additional Resources to Prepare his Defence, *Norman, Fofana and Kondewa* (Case No. SCSL-04-14-T), 23 June 2004 (hereinafter: Decision on Request), §§ 12-16. For security reasons, Norman had no access to materials from the internet or the SCSL Network, other than through his standby counsel or the Defence Office.

and proof witnesses and review materials.[15] Moreover, upon being allowed to represent themselves, most accused could also have some additional assistance. For example, in *Milošević*, the ICTY appointed someone to liaise between Milošević and the Victims and Witnesses Section.[16] Furthermore, Milošević could have privileged communication with three legal associates, who would normally not be present in the courtroom. The Trial Chamber considered it 'in the interests of a fair trial for the accused to meet with and be able to communicate freely with persons for legal advice'.[17] Another accused was also allowed to have extra counsel for legal advice and to enjoy counsel-client privilege with such counsel.[18] To make sure that such advisors can help the accused to make informed decisions about his defence, the ICTY has ruled that they should satisfy the Tribunal's requirements for defence counsel.[19] The issue of who bears financial responsibility for these provisions - the accused or the court - seems to be arranged on a case-by-case basis. Although Milošević is not indigent, the ICTY paid for his facilities, with the exception of the costs of contacting potential witnesses.[20] In *Norman*, the phone costs are also paid for by the SCSL.[21] Seen in this light, it is rather inconsistent that the ICTY Registry in *Krajišnik* maintained that if opting for self-representation, the accused would be obliged to bear all the costs of his defence.[22] The Trial Chamber considered that this approach was justified because a partially indigent accused could otherwise opt for self-representation 'to avoid the obligation of a financial contribution to his defence.'[23]

Generally speaking, the situation in which an accused can defend himself in person only if he is able to afford it should be avoided.

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[15] ICTY Tr. Ch., Order Concerning the Preparation and Presentation of the Defence Case, *Milošević* (Case No. IT-02-54-T), 17 September 2003. Abuses in the use of these facilities has provoked their removal, *e.g.* Norman lost some of his facilities after he had contacted the press without the Court's consent. See SCSL Tr. Ch., Decision Prohibiting Visits, *Norman, Fofana and Kondewa* (Case No. SCSL-04-14-T), 8 November 2004.

[16] See ICTY Weekly Press Briefing of 3 March 2004.

[17] ICTY Tr. Ch., Order, *Milošević* (Case No. IT-02-54-T), 16 April 2002. Cf. ICTY Tr. Ch., Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, *Milošević* (Case No. IT-02-54-T), 4 April 2003 (hereinafter: Reasons for Decision on the Prosecution Motion), § 5.

[18] ICTY Tr. Ch., Decision on Motion Number 21, *Šešelj* (Case No. IT-03-67-PT), 27 October 2003 (hereinafter: Decision on Motion). However, the Tribunal does not recognise Šešelj's legal advisor and legal assistant and refuses to have them attend all hearings. ICTY Tr. Ch. II, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence, *Šešelj* (Case No. IT-03-67-PT), 9 May 2003 (hereinafter: Decision on Prosecution's Motion), § 23.

[19] *Ibid.*

[20] See ICTY Weekly Press Briefing, *supra* note 16.

[21] See Decision on Request, *Norman, Fofana and Kondewa*, *supra* note 14, § 15.

[22] Reasons for Oral Decision, *Krajišnik supra* note 13, § 33.

[23] *Ibid.*, footnote lxi.

7.4 VARIOUS FORMS OF MANDATORY LEGAL ASSISTANCE

7.4.1 Introduction

International criminal courts do not readily accept a complete waiver by the accused of his right to legal assistance, even if he took such decision knowingly and unequivocally. The appointment of standby counsel, court assigned counsel or *amici curiae* has been justified on the basis of the courts' overarching duty to ensure fair trials and to maintain the integrity of their proceedings. It is debatable whether the drastic measure of imposing a defence counsel, even in cases of deliberate misbehaviour,[24] should be applied in international criminal proceedings. Since respect for the individual is the 'lifeblood of the law',[25] an accused's right to self-representation should not be limited beyond 'the minimum extent necessary to protect the Tribunal's interest in assuring a reasonably expeditious trial.'[26]

It may well be contended that an accused lacks the capacity to represent his own interests effectively. While such a view might be reasonable, international criminal courts need to take into account that 'imposed' legal assistance may simply be a fiction that does not render the defence of an accused more effective. Whether counsel's actions will even have a positive effect on the accused's defence is uncertain.[27] The main issue is whether counsel is able to act on his client's behalf without being recognised by him and whether he is able to conduct a defence properly in the absence of the accused's instructions. The difficulty in facing this dilemma may also explain why, so far, international criminal tribunals have resorted to a variety of options.

7.4.2 Amici Curiae

In the common law system, courts may appoint an *amicus curiae* to assist the court, usually on points of law. Rule 74 of the ICTY Rules of Procedure and Evidence (RPE) provides that 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.' Opting for *amici curiae* and not imposing legal representation on *Milošević* resulted from the Tribunal's aspiration to respect the accused's right to self-representation as much as possible, in accordance with the adversarial nature of its trial proceedings. The Tribunal also wanted to ensure that Milošević would receive a fair trial. It has been argued that judges, as 'the ultimate guardians of justice', will manage to ensure a fair trial without

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[24] In *Stanković*, the Chamber insisted that counsel would be imposed, because of the accused's 'deliberate and serious misbehaviour' before the Tribunal. Decision following Registrar's Notification, *Janković and Stanković*, *supra* note 13, § 25.

[25] Concurring Opinion of Mr. Justice Brennan, in *Illinois v. Allen*, 397 U.S. 337 (1970), at 350–351.

[26] ICTY App. Ch., Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, *Milošević* (Case No. IT-02-54-AR 73.7), 1 November 2004 (hereinafter: Decision on Interlocutory Appeal), § 17.

[27] For instance, the *amici curiae* in the *Milošević* case filed a Rule 98*bis* motion (similar to a "no case to answer" procedure) on their own initiative. Although it is open to them to make any submission that Milošević might make, it will remain unknown whether such and other filings would interfere with Milošević's own defence strategy.

the assistance of *amici curiae*.[28] However, in an adversarial procedural setting, where there is no extensive dossier to fall back on, and there is heavy reliance on live evidence, judges particularly need the parties' assistance to present the evidence to them, in order to come to informed decisions on facts and law. Due to the complexity of the cases dealt with at international criminal tribunals, judges are accustomed to having at their disposal a defence team consisting of a lead counsel, a co-counsel and an accused,[29] opposite a multi-member prosecution team. It may therefore be difficult for judges to obtain all information on the defence side from just one person who is not trained to do the job. The *amici curiae* could thus provide them with a broader range of arguments on the defence. Milošević, even though he was a lawyer, did not fulfil the requirements for defence counsel under Rule 44 ICTY RPE. Therefore, it is understandable that the Trial Chamber considered it 'desirable and in the interests of securing a fair trial' to assign *amici curiae* to the case, 'not to represent the accused but to assist in the proper determination of the case'.[30] The *amici curiae* were explicitly instructed on how to assist the Trial Chamber. As long as they acted in an appropriate way in order to secure a fair trial, they could undertake anything to assist the judges. Like Milošević, the *amici* could make submissions as to preliminary or other motions, object to evidence or point out exculpatory or mitigating evidence to the Chamber.[31] In addition, they should draw the judges' attention to defences open to the accused or point out witnesses for the Chamber to call.[32] They could even cross-examine witnesses.[33] Very specifically, the Trial Chamber asked for their submissions to the relevance of the NATO air campaign in Kosovo.[34] These instructions illustrate that judges may have difficulties in interpreting the legal relevance of all that is put forward by an accused who represents himself.

Although the *amici* had been able to provide 'quite a bit of service',[35] and their role was altered throughout the trial;[36] the Trial Chamber considered further expanding and redefining their role to enable them 'to represent actively for the defendant'. In the view of one of the judges, the *amici* had played 'a role that is similar to that of a Defence counsel already'.[37] Such similarity has rightly been denied by the *amici* themselves: '…the *Amici Curiae* have not been representing the Accused, receiving instructions from him or advancing a positive case confirmed by him upon instruction.'[38] An *amicus curiae's* essential function is being a friend of the court, not of the accused. An *amicus* is not a party to the proceedings and 'is not legally competent

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[28] Zappalà, Salvatore, *Human Rights in International Criminal Proceedings* (Oxford: Oxford University Press, 2003), p. 63.

[29] In addition, defence teams usually have at their disposal one legal assistant and one investigator.

[30] ICTY Tr. Ch., Order inviting Designation of *Amicus Curiae*, *Milošević* (Case No. IT-02-54-T), 30 August 2001.

[31] *Idem.*

[32] ICTY Tr. Ch., Order concerning *Amici Curiae*, *Milošević* (Case No. IT-02-54-T), 11 January 2002.

[33] Order inviting Designation of *Amicus Curiae*, *Milošević*, *supra* note 30.

[34] Order concerning *Amici Curiae*, *Milošević*, *supra* note 32.

[35] As concluded by Kay. See Transcript, *Milošević* (Case No. IT-02-54), 2 September 2004, p. 32387.

[36] *Ibid.*, p. 32387.

[37] *Ibid.*, Judge Kwon, p. 32388.

[38] *Amici Curiae* Submissions in Response to the Trial Chamber's "Further Order on Future Conduct of the Trial Concerning Assignment of Defence Counsel" Dated 6 August 2004, *Milošević* (Case No. IT-02-54), 13 August 2004 (hereinafter: *Amici Curiae* Submissions), § 18(iii)(a).

to act as counsel for the accused'.[39] In court, it might appear that acts of *amici curiae* are similar to those of defence counsel. However, the *amici's* primary duty of providing the judges with legal information on defence issues, and the defence counsel's fundamental duty to vigorously defend the accused's interests and represent him on his behalf, lie far apart from each other. One of the major advantages of the *amici curiae* is that they should assist the judges, without representing the accused. Since they are not formally part of the defence, they can act independently of the accused, without being reliant on his instructions, or having to follow his strategy. In this respect, even communication between them and the accused is not necessary. The absence of a client-counsel relationship between the accused and the *amici curiae* enables them to contribute to the proceedings without having to violate their professional obligations.

According to the Registrar, the *amici curiae* were bound by the Code of Professional Conduct for defence counsel.[40] However, considering they did not even fulfil the primary obligation of defence counsel, to 'advise and represent a client', as Article 8 of the Code prescribes, it is doubtful to what extent this code should indeed apply to *amici curiae*. The Trial Chamber did not refer to the Code of Conduct when it revoked the appointment of an *amicus* who had made statements to the press that were unfavourable to Milošević. The Trial Chamber argued: 'Implicit in the concept of an amicus curiae is the trust that the court reposes in "the friend" to act fairly in the performance of his duties.'[41] An *amicus curiae* should 'discharge his duties … with the required impartiality.'[42] Thus, the *amici* are independent, and have an obligation toward the accused not to act contrary to his interests. The Registrar did refer to the Code with regard to the surrendering of documents and an *amicus*'s duty of confidentiality at the termination of his function.[43] To strengthen their position when appointed to a case of an accused conducting his own defence, the extent to which the Code of Conduct for defence counsel binds such *amici curiae* needs to be defined. Since the Tribunals' codes prevail over national codes,[44] a clear-cut role in the international criminal legal order might also protect *amici curiae* from unexpected allegations from national disciplinary organs.[45]

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[39] ICTY App. Ch., Decision on the Interlocutory Appeal by the *Amici Curiae* against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, Separate Opinion of Judge Shahabuddeen, *Miloševic* (Case No. IT-02-54-AR73.6), 20 January 2004, §§ 1, 2, and 11.

[40] ICTY Code of Professional Conduct for Counsel Appearing before the International Tribunal (hereinafter: ICTY Code of Conduct). See, *e.g.* ICTY Reg., Decision, *Milošević* (Case No. IT-02-54), 11 October 2002.

[41] ICTY Tr. Ch., Decision Concerning an *Amicus Curiae*, *Milošević* (Case No. IT-02-54-T), 10 October 2002.

[42] *Idem.*

[43] Decision, *Milošević*, *supra* note 40. For instance, the former *amicus* remained under a duty of confidentiality, in accordance with the Code of Conduct.

[44] Article 19 ICTR Code of Professional Conduct for Defence Counsel; Article 4ICTY Code of Conduct.

[45] Cf. Dutch Disciplinary Appeals Tribunal (Case No. 3884), 12 March 2004. Cf. *supra* Chapter VI, note 351.

7.4.3 Standby Counsel

Although no provisions specifically provided for "standby counsel", an ICTY Trial Chamber held that 'Article 21 of the Statute, and the jurisprudence of this Tribunal and the Rwanda Tribunal, leave open the possibility of assigning counsel to an accused on a case by case basis in the interests of justice.'[46]

The notion of standby counsel in international criminal law first came up at the ICTR in *Barayagwiza*.[47] According to Judge Gunawardana, Article 20(4)(d) of the ICTR Statute[48] permitted the appointment of standby counsel in the interests of justice, even against the wishes of the accused. Such counsel would serve the interests of the accused, as well as the due administration of justice.[49] Moreover, both civil law and common law allowed for such an appointment. In *McKaskle v. Wiggins*, the appointment of a standby counsel to familiarize an accused who represented himself with the basic trial procedures to relieve the judges of such task, was deemed legitimate.[50] Standby counsel's participation should not interfere with the accused's actual control over his defence.[51] In *Faretta*, it was argued that:

> '[A] State may - even over objection by the accused - appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary. […] The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law.'[52]

Generally speaking, in international criminal proceedings, standby counsel have been appointed to accused persons who wished to represent themselves, but tended to be uncooperative with the court. In *Šešelj*, for example, the core reason to appoint standby counsel was the disruptive behaviour of the accused.[53] At the SCSL, when

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[46] Decision on Prosecution's Motion, *Šešelj, supra* note 18, § 20. According to the Trial Chamber, in 'the interests of justice' is included 'the right to a fair trial, which is not only a fundamental right of the Accused, but also a fundamental interest of the Tribunal related to its own legitimacy. In the context of the right to a fair trial, the length of the case, its size and complexity need to be taken into account. The complex legal, evidential and procedural issues that arise in a case of this magnitude may fall outside the competence even of a legally qualified accused, especially where that accused is in detention without access to all the facilities he may need. Moreover, the Tribunal has a legitimate interest in ensuring that the trial proceeds in a timely manner without interruptions, adjournments or disruptions.' (§ 21).

[47] Without wishing to represent himself, Barayagwiza had instructed his lawyers not to appear in court to represent him.

[48] This provision is equal to Article 21(4)(d) ICTY Statute and Article 17(4)(d) SCSL Statute.

[49] ICTR Tr. Ch., Decision on Defence Counsel Motion to Withdraw, Concurring and Separate Opinion of Judge Gunawardana, *Barayagwiza* (Case No. ICTR-97-19-T), 2 November 2000.

[50] *McKaskle v. Wiggins*, 465 U.S. 168 (1984), at 183 and 184. Cf. also Judge Gunawardana in *Barayagwiza*, *supra* note 49, and Decision on the Application, *Norman, Fofana and Kondewa*, *supra* note 13, § 22.

[51] *McKaskle v. Wiggins*, *supra* note 50, at 185.

[52] *Faretta v. California*, *supra* note 10, at 835.

[53] See Decision on Prosecution's Motion, *Šešelj, supra* note 18, §§ 22-26.

appointing standby counsel to Norman,[54] the Trial Chamber also took into account the interests of the co-accused, and the fact that he had opted for self-representation relatively late in the proceedings.[55]

The standby counsel is generally required to be engaged actively in the case 'in order always to be prepared to take over from the accused at trial'.[56] If the accused behaves badly, the Chamber could order the counsel to question witnesses on his behalf as a protective measure, in particular in the case of a sensitive or protected witness.[57] According to the Trial Chamber in *Šešelj* that 'would be less intrusive than the alternative option of interrupting and discontinuing the examination of the accused himself'.[58] In such a case, the accused would retain his right to control the examination's content. Moreover, under exceptional circumstances, if the accused's behaviour requires his removal from the courtroom, standby counsel should take over the conduct of his defence completely.[59]

The ICTY judges emphasized that 'standby counsel is not an *amicus curiae* but an assistant operating in the sphere of the accused only'.[60] Standby counsel, contrary to *amici curiae*, form part of the defence and they should safeguard a fair and expeditious trial to the accused,[61] even if the accused opposes their appointment.

Accordingly, in *Šešelj* and *Norman*, the accused persons have been granted privileged communication with standby counsel.[62] Standby counsel are to receive copies of all materials handed out to the accused and attend courtroom proceedings. Counsel should help the accused prepare his case upon his request, and address the court upon the accused's or the Chamber's request. On his own initiative, counsel could offer the accused advice, particularly on evidential and procedural issues.[63] Yet, this advisory function seems hardly practicable in cases in which an accused is determined not to accept the counsel's help. Advising an accused who refuses to communicate is virtually impossible.

In addition, beside the specific provisions contained in each individual order assigning standby counsel,[64] the relevant provisions on the obligations and

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[54] SCSL Tr. Ch., Consequential Order on Assignment and Role of Standby Counsel, *Norman, Fofana and Kondewa* (Case No. SCSL-04-14-T), 14 June 2004 (hereinafter: Consequential Order on Assignment).

[55] Decision on the Application, *Norman, Fofana and Kondewa*, *supra* note 13, § 19.

[56] Consequential Order on Assignment, *Norman, Fofana and Kondewa*, *supra* note 54; Decision on Prosecution's Motion, *Šešelj*, *supra* note 18, § 30.

[57] Cf. also Decision following Registrar's Notification, *Janković and Stanković*, *supra* note 12, § 21.

[58] Decision on Prosecution's Motion, *Šešelj*, *supra* note 18, footnote 56.

[59] *Ibid.*, § 30.

[60] Decision on Prosecution's Motion, *Šešelj*, *supra* note 18, § 28.

[61] Consequential Order on Assignment, *Norman, Fofana and Kondewa*, *supra* note 54; Decision on Prosecution's Motion, *Šešelj*, *supra* note 18, § 28.

[62] *Ibid.*

[63] Consequential Order on Assignment, *Norman, Fofana and Kondewa*, *supra* note 54; Decision on Prosecution's Motion, *Šešelj*, *supra* note 18, § 30.

[64] The position of standby counsel is subject to change and safeguards to the advantage of the accused can be removed on a case-by-case basis. Initially, in *Šešelj,* standby counsel was required to speak the accused's language. When Šešelj protested against his second standby counsel's failure to meet this requirement, the majority of the Judges simply decided to remove it. See Decision on Prosecution's Motion, *Šešelj, supra* note 18; ICTY Tr. Ch. II, Decision on the Accused's Motion to

qualifications of defence counsel have been held applicable to standby counsel.[65] However, in view of the duties of a defence counsel towards his client, it seems impossible for a standby counsel to act in accordance with his obligations under the court orders and, at the same time, with the code of conduct for defence counsel. Given that the accused is his client and the standby counsel is required to act in his best interests, acting without his client's instructions, and against his explicit will, would put the counsel in breach of his obligations as prescribed by professional codes of conduct.[66]

When an accused disrupts his trial to such an extent that he must be removed from the courtroom, the standby counsel's conduct of the defence on behalf of an accused, from whom he does not receive any instructions, amounts to a mere legal fiction.[67] By formally acting on behalf of the accused and forming part of "the defence", where the accused would rather have acted on his own behalf, standby counsel, in practice, acts as a full "officer of the court" rather than as an assistant to his client.

In this respect, it is perplexing that standby counsel have also been ordered to 'refrain from conduct that may directly or indirectly impact adversely on the exercise of the accused's right of self-representation'.[68] In particular, it is doubtful whether standby counsel can adhere to this requirement. If counsel has to take over an accused's defence completely, and represent the accused on his behalf against his will, it cannot be said 'that the accused's right to defend himself is left absolutely untouched.'[69]

In *Šešelj*, after two years, the Appeals Chamber concluded that the use of a standby counsel had not been satisfactory, given the accused's persistent refusal to cooperate.[70] If it is clear from the outset that an accused will refuse to even communicate with standby counsel, it might be more productive and have fewer ethical implications for the counsel involved that the court appoints *amici curiae*, as an alternative to appointing standby counsel.[71] Not only the accused, but also the judges

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Re-examine the Decision to Assign Standby Counsel, *Šešelj* (Case No. IT-03-67-PT), 1 March 2005; Dissenting Opinion of Judge Antonetti, appended to same Decision.

[65] Consequential Order on Assignment, *Norman, Fofana and Kondewa*, *supra* note 54; Decision on Prosecution's Motion, *Šešelj, supra* note 18, §§ 27-28.

[66] Special Court For Sierra Leone Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone Adopted on 14 May 2005. This code also applies to prosecution counsel, *amicus curiae* and 'counsel representing a witness or any other person before the Special Court' (Article 1(A)).

[67] Cf. *Faretta*, where it was held: 'An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction. … the defense presented … is not his defense.' *Faretta v. California*, *supra* note 10, at 821.

[68] Consequential Order on Assignment, *Norman, Fofana and Kondewa*, *supra* note 54.

[69] Decision on Prosecution's Motion, *Šešelj*, *supra* note 18, § 28.

[70] See ICTY App. Ch., Decision on Appeal against the Trial Chamber's Decision on Assignment of Counsel, *Šešelj* (Case No. IT-03-67-AR73.3), 20 October 2006 (hereinafter: Decision on Appeal), § 50.

[71] Cf. Dissenting Opinion of Judge Antonetti, *Šešelj*, *supra* note 64, § 12. Jørgensen prefers to have both standby counsel and *amicus curiae* appointed to the accused. Jørgensen, *supra* note 5, p. 726. In *Šešelj*, the Chamber left open the possibility to appoint *amici curiae* in the course of the trial. See Decision on Prosecution's Motion, *Šešelj*, *supra* note 18, F. Disposition.

would benefit from such solution. *Amici curiae* - being more independent - might feel freer to make legal contributions without being requested to do so, and thus provide the judges with more information.

As argued above, considering the complexity of the cases dealt with by international criminal courts, obtaining all the information through the accused alone might reduce the chances of the judges being able to make a fully informed decision.

7.4.5 Court Assigned Counsel

In *Šešelj*, because of the accused's persistant disruptive behaviour, the Trial Chamber finally imposed counsel on the accused.[72] The Appeals Chamber reversed this decision, because the Chamber had not warned Šešelj sufficiently about the consequences of any disruptive behaviour for his right to self-representation. Before this right could be restricted, the accused should have received an explicit warning.[73] The Trial Chamber, however, imposed counsel again and *Šešelj* started a hunger strike. The ICTY Appeals Chamber again discharged those counsel and restored his right to self-representation.[74]

In *Milošević*, 'court assigned counsel' were assigned to the accused, because of his precarious physical condition. The counsel who accepted this job, up until that moment had been *amici curiae* in the case. As this was a new phenomenon and there were no provisions to regulate such counsel, the Trial Chamber issued a decision to establish their role.[75] Initially, the court assigned counsel were to represent Milošević fully. The counsel were required to establish how to present the case for the accused, determine what witnesses to call and to prepare and examine them, and to make submissions on fact and law. Additionally, they were to request the Chamber to issue subpoenas or order what would be necessary to properly present and conduct the accused's case, discuss the conduct of the case with the accused, 'endeavour to obtain' the accused's instructions and take account of his views. They were expected to do all this while retaining the right to determine what course to follow and act throughout in the accused's best interests. Milošević would need the Chamber's permission to 'participate actively in the conduct of his case'. If he gained permission to examine witnesses, the court assigned counsel would still conduct their examination first.[76] In other words, court assigned counsel were to take over the defence from Milošević almost completely, leaving just a shadow of his right to self-representation. In addition, the accused was encouraged to request full legal representation.[77]

The Appeals Chamber accepted the Trial Chamber's decision to impose court assigned counsel on Milošević, but judged the counsel's role to be disproportionate under the circumstances. It agreed with the Trial Chamber that, should self-representation have the impact of disrupting the proceedings and undermining the

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[72] See ICTY Tr. Ch., Decision on Assignment of Counsel, *Šešelj*, 21 August 2006.

[73] Decision on Appeal, *Šešelj*, *supra* note 70, § 26.

[74] ICTY App. Ch., Decision on Appeal against the Trial Chamber's Decision (NO.2) on Assignment of Counsel, *Šešelj* (Case No. IT-03-67-AR73.4), 8 December 2006.

[75] ICTY Tr. Ch., Reasons for Decision on Assignment of Defence Counsel, *Milošević* (Case No. IT-02-54-T), 22 September 2004 (hereinafter: Reasons for Decision on Assignment), § 69.

[76] *Idem*.

[77] For instance, the Chamber held that Milošević had 'the right, at any time, to make a reasonable request to the Trial Chamber to consider allowing him to appoint counsel.' Reasons for Decision on Assignment, *Milošević*, *supra* note 71, § 69.

integrity of a trial, 'it is open to the Trial Chamber to assign counsel to conduct the defence case, if the Accused will not appoint his own counsel. Disruption of a trial, *whatever the circumstances* [78] may give rise to the risk of a miscarriage of justice because the whole proceedings have not been conducted and concluded fairly.'[79] However, since Milošević was considered fit enough to represent himself at times, he did recover "the lead" in his case.[80] Court assigned counsel could only represent the accused if his health deteriorated. Nonetheless, under these circumstances counsel would inevitably encounter professional difficulties. The precarious role that the Trial Chamber had given court assigned counsel, made it impossible for them to abide by the rules governing defence counsel's conduct.[81] Not being informed by a client of his objectives and not receiving any instructions from him suggest that an important challenge for the court assigned counsel is working out how to represent an accused and conduct his defence effectively without his consent and help. Although lawyers are regularly described as the mouthpiece of the accused, without the accused providing him with the necessary information, or even worse, with no information at all, his role is eroded. When discussing the possible appointment of court assigned counsel, the *amici curiae* raised a similar argument: 'Without knowledge of the Accused's assertions as to what he believes to be the truth and his understanding of events, it is extremely difficult for an advocate to attempt to construct the thoughts and mindset of an Accused who is not his client.'[82] Referring to their inability to abide by their professional obligations as lawyers, the court assigned counsel requested their own resignation, even before the Appeals Chamber upheld the decision to appoint them. However, their request was rejected. As soon as Milošević became too ill to represent his own interests, the Tribunal would need court assigned counsel to represent him. Refusing to permit them to withdraw was considered 'plainly in the interests of justice' as their presence would be 'essential to ensure the fair and expeditious conduct of proceedings'.[83] It was simply not accepted that the court assigned counsel could terminate their activities unilaterally as provided for by Article 9(B) of the ICTY Code of Conduct. As the Appeals Chamber had confirmed the lawfulness of their assignment, the Trial Chamber deemed it justified to force the court assigned counsel to continue. President Meron resisted letting the court assigned counsel withdraw, as that would allow 'Milošević to render the Appeals Chamber's November 1 Decision nugatory by […] refusing to communicate or cooperate with any counsel'.[84] Apart from refusing to let them withdraw, President Meron also denied

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[78] Emphasis added.

[79] Reasons for Decision on Assignment, *Milošević*, *supra* note 71, § 33. It is rather disturbing that both the Appeals and the Trial Chambers do not make a distinction between intentional and unintentional obstructions by the accused. Cf. Damaška, *supra* note 5, p. 6.

[80] He decided again which witnesses to present, and could question them before court assigned counsel; he could argue 'any proper motions'; give a closing statement, and make the basic strategic decisions about the presentation of his case. Decision on Interlocutory Appeal, *Milošević*, *supra* note 26, § 19.

[81] For the duties of defence counsel, see Article 8(B) ICTY Code of Conduct.

[82] *Amici Curiae* Submissions, *Milošević*, *supra* note 38, § 18(iii)(d).

[83] ICTY Tr. Ch., Decision on Assigned Counsel's Motion for Withdrawal, *Milošević* (Case No. IT-02-54-T), 7 December 2004, § 26.

[84] ICTY Pres., Decision Affirming the Registrar's Denial of Assigned Counsel's Application to withdraw, *Milošević*, (Case No. IT-02-54-T), 7 February 2005, § 10.

the applicability of the ICTY Code of Conduct to court assigned counsel.[85] It seems unfair and also ineffective to force the counsel to continue and refuse him the right to withdraw when he is professionally embarrassed.[86] Even if the court assigned counsel's appointment as such is deemed legal, this should not be used as a justification for refusing a particular counsel permission to withdraw on his own request. Not being bound by a code of conduct and having to act solely on the basis of court orders, which can easily change the role assigned to them, renders the court assigned counsel's position uncertain, just like that of the standby counsel. This restricts their freedom to act as counsel and makes them largely dependent on the court. In addition, being unable to withdraw unilaterally, endangers court assigned counsel's independence. Article 3(iv) of the ICTY Code of Conduct states that 'counsel have a duty of loyalty to their clients consistent with their duty to the Tribunal to act with independence in the administration of justice'. Article 10 (v) provides that counsel shall 'never permit their independence, integrity and standards to be compromised by external pressures.' Thus, compared with regular defence counsel, court assigned counsel are expected to sacrifice their independence to a significant extent. In addition, the independence of the court assigned counsel in *Milošević* might already be considered questionable because they were formerly *amici curiae* on the case. As they have been acting in the best interest of the court, it might be difficult for them to switch to the role of court assigned counsel, who are to act in the best interest of the accused, and keep up the appearance of being an independent lawyer.[87] It seems that practical reasoning – the *amici* knew the case thoroughly and would therefore be able to handle the case without wasting time in familiarization – has prevailed over setting an appropriate ethical standard. Although this choice indeed enabled the Tribunal to continue its most notorious trial,[88] it can also be interpreted as a missed opportunity to establish the highest fair trial standards for the accused.

This hands-on approach, and the ease with which court assigned counsel have been placed outside the ambit of codes of conduct, might license the court to change their role on a case-by-case basis. It might also push court assigned counsel to act against their own ethical standards as lawyers in a way that opposes the safeguards that defence counsel are supposed to provide. Just as forcing an accused to cooperate with his counsel seems counterproductive and could ultimately result in an unfair trial for the accused,[89] so might forcing a lawyer to continue to represent a person in a way that clashes with his professional standards hurt the integrity of the lawyers' profession. Not granting counsel the right to withdraw when their request originates from their

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[85] *Ibid.*, § 9.

[86] Also Article 18(B) SCSL Code of Conduct limits the possibilities for standby counsel to withdraw. Whereas in *Šešelj*, a standby counsel was allowed to withdraw because the accused had made allegations against him and his family.

[87] The *amici* themselves once submitted: '…conversion of the role of the *Amici Curiae* to imposed or assigned counsel would alter the original role considerably and could be interpreted as professionally embarrassing, given the *Amici Curiae*'s previous arguments upon the issue.' *Amici Curiae* Submissions, *Milošević*, *supra* note 38, § 18(iii)(b).

[88] Despite all this, Milošević's death terminated his trial after four years. See ICTY Tr. Ch., Order Terminating the Proceedings, *Milošević* (Case No. IT-02-54-T), 14 March 2006.

[89] Cf. Ntanda Nsereko, Daniel D., 'Ethical Obligations of Counsel in Criminal Proceedings: Representing an Unwilling Client', 12 *Criminal Law Forum* (2001), pp. 487-507.

inability to abide by their ethical obligations as lawyers makes them unreasonably dependent on the court. Arguably, it might make them appear to be a tool being used by the court to facilitate the cosmetic appearance of the court rendering "fair trials".

The shortcomings described above prove that if an accused persistently refuses to cooperate with counsel assigned to him, it is impossible for that counsel to be a true 'assistant to his client', which is a defence counsel's primary role in an adversarial justice system.[90] What needs to be examined is what role remains for such counsel, and whether or not that role would suffice to provide for an effective defence. Even though Milošević consistently refused to cooperate with counsel, the Trial Chamber considered it satisfactory if court assigned counsel would 'make determined efforts to discuss the presentation of the Accused's defence with him.'[91] It has been suggested that counsel imposed on the accused against his will could still, for instance, draw the court's attention to flaws in the indictment or to exculpatory materials.[92] The Trial Chamber in *Milošević* took a similar position, holding that 'counsel could continue to serve a valuable function in the filing of written legal submissions on matters such as *subpoenas* and binding orders in respect of certain witnesses, as well as other important aspects of the conduct of the defence case.'[93] Equally, President Meron encouraged the court assigned counsel 'to realize the breadth of activities that they can carry out even in the absence of Miloševic's cooperation.'[94] They should simply continue to make the best professional efforts possible on his behalf.[95] However, what had earlier prevented the Trial Chamber from assigning defence counsel to Milošević was that should he 'refuse to instruct him or her, the Trial Chamber could either: (a) not allow the Accused to make submissions and question witnesses, thereby effectively preventing the Accused from putting forward any defence; or, (b) it could allow him to make submissions and question witnesses, in which case, the defence counsel could do no more than the *Amici Curiae*.'[96] The functions that are suggested to be left for court assigned counsel bear suspicious resemblance to those initially assigned to the *amici curiae*. Thus, one might conclude that ever since the Appeals Chamber's decision to have the modalities of court assigned counsel's appointment reformed, there was no genuine need for court assigned counsel anymore. As argued above, *amici curiae* do not need to pretend to participate on the accused's behalf and can act without the accused's consent.[97] Therefore, having *amici curiae* complementing a self-representing accused's defence might render the defence more transparent and more effective than having court assigned counsel fulfil an almost ceremonial function that is far removed from the most basic tasks that defence counsel are supposed to perform.

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[90] See Damaška, *supra* note 11, p. 142.
[91] Reasons for Decision on Assignment, *Milošević*, *supra* note 75, § 70.
[92] Zappalà, *supra* note 28, p. 64.
[93] Decision on Assigned Counsel's Motion for Withdrawal, *Milošević*, *supra* note 83, § 32.
[94] Decision Affirming the Registrar's Denial, *Milošević*, *supra* note 84, § 13.
[95] *Idem.*
[96] Reasons for Decision on the Prosecution Motion, *Milošević*, *supra* note 17, § 38.
[97] Cf. Jørgensen, *supra* note 5, p. 726.

7.5 CONCLUSION

Since the right to self-representation is not only contained in all the international criminal courts' statutes, but also in the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR), an accused's entitlement to conduct his own defence cannot simply be ignored. It is important that such a right is respected as much as possible in international criminal justice as long as the accused's wish to represent himself is genuine and made in full knowledge of its consequences. However, providing the accused with an effective defence, while at the same time respecting his right to self-representation, may turn out to be, to a certain extent, a "mission impossible".

First of all, it is important that the accused persons who are allowed to conduct their own defence are equipped with the necessary facilities. As an extra precaution, the accused should be allowed recourse to one or two legal associates or advisors with whom he can have privileged communication.

Moreover, given the intrinsic complexity of the cases handled by international criminal tribunals, and the largely adversarial nature of their procedure, recognizing an absolute right of self-representation to the accused, without allowing extra legal assistance, could leave the judges with too little information to come to a just decision. The credibility and legitimacy of international criminal courts is mainly dependent on their ability to render fair trials.[98] Whether the approach taken to the accused's right to self-representation will enhance the fairness of its proceedings is also contingent on the consequences for counsel appointed to assist an accused who represents himself.

To avoid a court's dependence on the individual choices of an accused alone, the solution of appointing *amici curiae*, as initially decided in *Milošević*, will least interfere with the accused's right to represent himself. At the same time, from a legal professional perspective, since *amici curiae* are not supposed to represent the accused and act on his behalf, there would be considerably less chance of any conflict with their professional obligations. On the other hand, if standby or court assigned counsel are imposed on the accused, this solution could have negative implications both for the accused as well as imposed counsel. For example, it will be extremely problematic for these lawyers to act "on behalf of" an accused whilst not being mandated by him and without receiving any instructions. What illustrates the ambiguity of their position is also that their duties are prescribed by individual court orders. It will be difficult for such counsel to function independently of the court, and to safeguard more than a fiction of an effective defence. The *amici curiae* construction does not imply such legal fiction of representation of the accused. A proper client-counsel relationship is not necessary for the *amici* to function appropriately and they can still make a considerable contribution to the fairness of the trial.

[98] Cf. ICTY App. Ch., Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statements, *Milošević* (Case No. IT-02-54-AR73.4), 21 October 2003, § 22.

Finally, even in a situation in which an accused who represents himself misbehaves so badly that the only option left is to continue in his absence,[99] it is preferable to have *amici curiae* continue to make submissions on defence issues to advise the judges. The *amici curiae* are not party in the proceedings and they would not be 'representing the accused'; nonethess, they may still ensure that the interests of the accused are adequately taken into account by the judges, without the legal fiction of "imposed" defence counsel.

While the main purpose of any international tribunal is to bring to justice the worst perpetrators of international crimes, the conduct of international trials gives tribunals an opportunity to set paradigmatic fair trial standards.[100] It is unlikely that forcing counsel to represent the accused against his will, achieves that result.

[99] The Statutes allow counsel to be assigned in the interests of justice in such a case, see Article 21(4)(d) ICTY Statute, Article 20(4)(d) ICTR Statute and Article 17(4)(d) SCSL Statute See also Rule 45*quarter* ICTR RPE. See also Rule 60(B) SCSL RPE.

[100] Cf. Buisman, Caroline, Gumpert, Ben and Hallers, Martine, 'Trial and Error: How Effective is Legal Representation in International Criminal Proceedings?', 5 *International Criminal Law Review* (2005), pp. 1-82, p. 32.