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The Right to Self-representation in  
International Criminal Trial:  
Interaction with the Principle to an  
Expeditious Trial – Case Study: The  
International Criminal Tribunal for  
former Yugoslavia

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# Contents

<b>PREFACE</b>	<b>1</b>
<b>ABBREVIATIONS</b>	<b>3</b>
<b>1 INTRODUCTION</b>	<b>4</b>
1.1 Background of the Study	4
1.2 Aim and Purpose of the Study	4
1.3 Methodology	5
1.4 Limitations	5
1.5 Structure	5
1.6 The Theory of Balancing Rights and Principles	6
<b>2 RIGHT TO SELF-REPRESENTATION IN INTERNATIONAL CRIMINAL LAW</b>	<b>8</b>
2.1 Article 14(3)(d) of the ICCPR	8
2.2 Article 6 (3)(c) of the European Convention on Human Rights (ECHR)	9
2.3 Right to self-representation-International Criminal Tribunal for Rwanda (ICTR)	12
2.4 Right to self-representation - Special Court for Sierra Leone (SCSL)	14
2.5 Right to self-representation - International Criminal Tribunal for Former Yugoslavia (ICTY)	16
<b>3 EXPEDITIOUSNESS OF INTERNATIONAL CRIMINAL TRIAL</b>	<b>19</b>
<b>4 INTERACTION OF THE RIGHT TO SELF-REPRESENTATION WITH THE PRINCIPLE TO AND EXPEDITIOUS TRIAL</b>	<b>26</b>
4.1 Prosecutor vs. Slobodan Milosevic (Milosevic Case)	26
<b>5 CONCLUDING ANALYZES AND RECOMMENDATION</b>	<b>36</b>
5.1 Concluding Analyzes	36
5.2 Recommendations	43
<b>TABLE OF CASES</b>	<b>46</b>

# Preface

On 25 May 1993, the United Nation Security Council took the extraordinary and unprecedented step to establish the International Criminal Tribunal for the Former Yugoslavia (ICTY) as means for restoration and maintenance of international peace and security. This was a major event for the all those who are concerned about serious breaches of international humanitarian law and the introduction of laws designated to protect human rights. No doubt, people of the former Yugoslavia are beneficiaries of the ICTY. Armed conflicts in that region made many people suffer, being victims of the horrific atrocities. While the world saw that on television, I was growing up with the fear and threat of armed conflicts in the region. Starting from Croatia, Bosnia, Kosovo and the last one that I experienced, the internal armed conflict in Macedonia. During these conflicts thousands of people were killed, many injured, millions left their homes as refugees or internal displaced people. Their homes were the mountains and the open sky, or the refugee camps. I still remember the year of 1999 when half of million people from Kosovo became refugees in Macedonia. My parent's house was overcrowded with relatives from Kosovo, forcefully deported from the Serbian forces in there. People were telling what they have seen, and what they have suffered. Some of them lost their brothers, sisters, mother, father, sons and daughters. Their life changed forever, they had to gain forces to live the life without their most loved one. The conflict in Bosnia was even more horrific, with more than 100 000 people murdered. The world was in shock after the Srebrenica massacre, the Europe's worst massacre after the Holocaust where more than 7000 Muslim men were killed. Overall, the conflicts in former Yugoslavia did make victims and perpetrators from all sides, Bosnian, Serbian, Croatian, Albanian from Kosovo etc. Families of the victims were seeking for justice, looking forward to see justice be done. People who live and lived there after witnessing and being victims of the horrific atrocities have to put their lives there together. The ICTY was established with the belief that bringing to justice persons responsible for alleged crimes committed in the former Yugoslavia. The ICTY achieved a tremendous results, first, by prosecuting the alleged perpetrators has removed the criminal element from the region. Many political and military leaders, the rank and common criminals were indicted, and second, it has provided a forum for the suffering of the victims to be recorded and revealed.

Beside the achievements, still there is a criticism that criminal trials are lasting forever; many victims have not seen yet the justice to be done. The lengthy trials in ICTY contributed to the disappointments of the victims. This dissatisfaction of the victims was expressed most recently after the appearance in the trial in Hague of the Bosnian Serb leader Radovan Karadzic. In the end of October 2009 Karadzic did not appear in the courtroom in Hague while asking for more extra time to prepare his defence as he was determined to defend himself. The international media were showing the protest of the Mothers of victims of Srebrenica protesting in

front of the ICTY headquarters in Hague. The Times newspaper on 27 October 2009 brought some of protesters disappointments from the fear of repeat of the trial of former President of Serbia, Slobodan Milosevic who, died in the ICTY detaining cell in 2006, after four years trial with many delays. As one of the mothers on protest said, “They cannot do this like Milosevic, he died and justice died with him. We know there is enough evidence against Karadzic and we pray it will not take time because we need justice.”

Justice is necessary for everyone; justice is most important for the victims and for all people in that region. Justice must be delivered on time, thus victims can see that justice is done and not denied as many scholars argue, “delayed justice is denied justice”.

# Abbreviations

ECHR	European Convention on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
RPE	Rules of Procedure and Evidence
SCSL	Special Court for Sierra Leone

# 1 Introduction

## 1.1 Background of the Study

International Criminal Tribunals established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of former Yugoslavia and violations committed during the Rwanda civil war, have made a substantial contribution to the jurisprudence in enforcing the international humanitarian law. There were many persons indicted, some sentences and some others acquitted. Some of the accused persons happened to be high ranked government officials. One of the accused was Jean-Bosco Barayagwiza by the Rwanda Tribunal. Barayagwiza was lawyer by training and a former high-level government official, closely associated with the persons in power, such as colonel Bagosora, the president Sindikubwabo and others. When Barayagwiza trial started, he chosen to not defend himself through a legal counsel, but rather he chosen the right to self-representation. The ICTR was the first international tribunal to face the question of a defendant's right to self-representation after his attempt to obstruct the proceedings. The issue of the self-representation in international criminal trial became even more controversial during the Slobodan Milosevic trial in front of the ICTY. His trial was the first trial of former head of state by an international criminal tribunal. Milosevic lawyer by training as Barayagwiza, a President of Yugoslavia persistently expressed that he will not appoint a counsel for his defence, but rather use his right to self-representation. Due to that, self-representation has been considered as one of the reasons his trial to become one of the most complex and lengthy war-crimes trial in history. After Milosevic, other accused persons use to represent their self. Vojslav Seselj and most recently Radovan Karadzic did the same. Their trials, seems to be more likely as Milosevic's, complex and lengthy.

## 1.2 Aim and Purpose of the Study

An international criminal trial first of all should be fair but extremely important is to be expeditious as well. That is an obligation enshrined in the Statutes of all International Tribunals. The Aim of the study is to examine the right to self-representation how is regulated in international criminal law and how this right interacts with the principle of the expeditious trial. The purpose is to identify and analyze the existing tension of the right to self-representation with the principle of expeditious trial. How these two features of criminal trial are stipulated in the existing norms regulating the subject matter? Is there a need for changing the norms, or is there a problem in the interpretation approach taken by Judges of the Tribunals? These are some of the questions that this research seeks to find the answers.

## 1.3 Methodology

This research is based on classical legal method. Mainly the research work is done by using most relevant international instruments regulating the issue of legal representation in criminal trial and the issue of an expeditious trial, starting with International Covenant on Civil and Political Rights, European Convention on Human Rights, the Statutes of International Criminal Tribunals. The important part is the case law developed by the European Court of Human Rights, case law developed by the International Criminal Tribunals, where the *Milosevic* Case takes the biggest part of this research. The researcher has also involved analysis of existing academic literatures, textbooks, journals and research studies in the subject matter.

## 1.4 Limitations

Due to time limitations, in this research were excluded cases that might had been relevant for the subject matter, such as the ICTY Cases; *Seselj* Case (IT-03-67) and *Karadzic* Case (IT-95-5/18-I). The reason to choose *Milosevic* Case as representative case of the research, was the consideration taken that the Case represents in more appropriate manner of how the right of the accused to self-representation interacts with the principle of expeditious trial.

## 1.5 Structure

The research is divided into five chapters, first chapter as introduction, which contains a short description of legal theory of balancing rights and principles in general. The second chapter looks how the right to self-representation is regulated within the scope of international criminal law. Is it an absolute right of the accused, or is it qualified right that can be restricted by the criminal Chambers? The third chapter deals with the principle of expeditious trial. Following the same methodology as in the second chapter, in the third chapter will be examined how the this principle is regulated in the existing legal norms, and partially will try to find the link between the fair trial rights in general with principle of expeditious trial. The fourth Chapter will analyze the *Milosevic*'s Trial decision on assigning a legal counsel for his defence. *Milosevic* Case will help to find the link and the interaction of the right to self-representation with the principle of expeditious trial. In this chapter, it would be more clear the existing tension as two competing features of the international criminal law. The last chapter is the conclusion, which contains a concluding analyze of the chapter two, three and more deep analyze of the chapter fourth withdrawn by the *Milosevic* Case. Finally, this chapter ends with the recommendations.

## 1.6 The Theory of Balancing Rights and Principles

In the focus of this research would be the tension between the right of the accused to self-representation and the principle of an expeditious trial in international criminal law. Before going to examine this relationship of two competing features of international criminal trial, I found relevant to say something in general about the distinction between the legal rules and legal principles. As the right of the accused person to self-representation might constitute a rule the expeditiousness of the trial stands as a principle. The distinction between rules and principles in general is not new. But in spite its age, it is still dogged by confusion and controversy.

According to Alexy Robert, distinguished German legal scholar, the rules and principles are to be brought together under the concept of norm; they are both norms because they both say what ought to be case, both can be expressed using the basic expressions of command, permission and prohibition. Thus, the distinction between rules and principles is a distinction between two types of norms. Alexy Robert in its book “A theory of Constitution Rights” in the chapter “Structure of Constitutional Right Norms”, makes an analyze of the distinguishing the constitutional rules from constitutional principles. Even though, his analyze deals with a national law such as Constitution, still the analyze can be applicable for the examining an International legal instrument such as the Statute of International Criminal Tribunal. Both the Constitution and Tribunal contain rules and principles. The relationship between these two norms in similar way is constructed.

Principles require that something be realized to the greatest extent legally and factually possible. They are thus not definitive but only prima facie requirement. It does not follow from the fact that principle is relevant to the case that what the principle requires actually applies.

This is quite different in the case of rules. In that rules insist that one does exactly as required, they contain a decision about what is to happen with the realm of legally and factually possible. In this view seems that the principles have a prima facie character and rules have definitive character.

In this regard, Alexy states that this model is simplistic and needs more to be nuanced. The need for more nuanced model he considers the fact that it is possible to incorporate an exception into a rule on particular case and when this occurs, the rule loses its definitive character for the case. The incorporation of an exception can be based on some principle. The exception to rule based on principle would give more weight to the principle and this would contribute weakening the definitive character of the rule. However, this is the only side of the coin. But the other side of the coin is that strengthening the prima facie character of the principle does not give the same definitive character as a rule.

Alexy Robert by taking an example of the German court decision regarding unfitness of the accused to stand trial gives a better picture how the tension between the rules and principles might occur. The court decision concerning the unfitness to stand trial concerned the permissibility of the trial of an

accused person, who was in danger of suffering a stroke and heart attack from the stress of the trial. The Court established that in such cases there was a tension between the duty of the state to maintain a properly functioning criminal justice system and the interest of the accused in his constitutionally guaranteed rights. Those the principles can be related both to the individual right and to collective interests. In this case, the conflict was to be resolved by balancing the conflict of interest. In this balancing process the question was, which of the requirements had the greater weight in the concrete case: 'if this balancing process leads to the conclusion that the interests of accused weight obviously and significantly more heavily than requirements indicating the need for state intervention, state action undertaken in spite of this would breach the principle of proportionality and hence the accused person's constitutional rights'.

By this example, Alexy Robert argues that both norms guaranteeing individual constitutional rights and norms requiring the pursuit of common interest can be seen as principles. One could create a burden of argumentation in favour of the first type and to detriment of the second type of principle, in other words a burden of argumentation in favour of individual and to the detriment of collective interests. However, in addition to that, Alexy Roberts states that the assumption of burdens of argumentation in favour of certain principles does not give them the same *prima facie* character as rule. Thus, even a burden of argumentation does not relieve us of the need to establish condition of precedence in any given case. But, it merely has the consequence that where reasons are equally strong, or in case of doubt one principle takes precedence over the other.

By *Fitness to Stand Trial Judgment*, the rights to life and bodily integrity competed with principle of maintaining a functioning criminal justice system – a principle that serves a collective interest. As stated above the focus of this research is the interaction of the right of the accused person to self-representation with the principles of expeditious trial. It would be interesting to examine how these two competing interest are balanced in international criminal trials. The important issue in the process of balancing two legal norms, as was mentioned is the principle of the proportionality. Which norm takes precedence over the other, shall be weighted by the significance and burden that those norms have for the case.

How the principle of proportionality is used in balancing the right to self-representation with the principle of expeditious trial in jurisprudence of the International Criminal Tribunals? Is it possible the burden of argumentation in favor of certain norm to call for a need to establish condition of precedence? Can the principle of expeditious trial, be weighted while weakening the right of the accused to self-representation? These are questions that the research will try to answer, and if need to give a recommendations for changes.

## 2 Right to Self-representation in International Criminal Law

It is crucial to first look what is the meaning of the right to self-representation within the scope of international criminal law. By doing so, it is necessary to look to the respective international human rights legal instruments.

Echoing the wording of Article 14 of the International Covenant on Civil and Political Rights (hereinafter, ICCPR or the Covenant)<sup>1</sup> and European Convention on Human Rights (ECHR), the statutes of all the modern international criminal tribunals provide that the defendant has the right ‘to defend himself in person or through legal assistance of his own choosing’.<sup>2</sup> By looking at these international instruments, will examine that the right to self-representation is not constructed as an absolute right of an accused, but rather is qualified under certain circumstances and conditions.

### 2.1 Article 14(3)(d) of the ICCPR

In order to locate the true meaning of the provisions contained in Article 14(3) (d) of the ICCPR it is useful to examine the drafting history of the respective article. Michael P. Scharf in its Article “Self-Representation versus Assignment of Defence Counsel before International Criminal Tribunals” has made a significant description of the process of negotiations between State parties in the drafting of this article. The United States provided the first substantive contributions to the First Session of the Drafting Committee of the Universal Declaration of Human Rights held from 9 to 25 June 1947.<sup>3</sup> These provisions later became part of Article 14 of the ICCPR, but were originally aimed to be included in the proposed Article 6 and 27 of the Declaration.<sup>4</sup> Scharf in his article by examining the drafting history of Article 14 of the ICCPR quoted D.Weissbrodt.<sup>5</sup> The initial proposal for the text that eventually became Article 14 of the ICCPR included only the right to consult with and represented by counsel; there was no mention of a right to self-representation.<sup>6</sup> At the Second Session of the Drafting Committee, the United States introduced a revised draft Article, which provided that everyone is entitled to the aid of counsel. It was not

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<sup>1</sup> International Covenant on Civil and Political Rights, Art.14(3)(d) ”In the determination of any criminal charges against him, everyone shall be entiteled .... to be tried in his presence, and to defend himself in person or through legal assistance of his own chooisng ... ”

<sup>2</sup> M. P. Scharf, Self-Representation versus Assignment of Defence Counsel before International Criminal Tribunals, *Journal of International Criminal Justice* 4 (2006), 31-46, p.31.

<sup>3</sup> *Ibid.* p.34.

<sup>4</sup> *Ibid.*

<sup>5</sup> D.Weissbrodt, “*The Right to a Fair Tarial under the Universal Declaration of Human rights and the International Covenant on Civil and Political Rights: Background, Development and Interpretations*”, Cambridge, MA: Martinus Nijhoff Publishers, 2001

<sup>6</sup> *See supra* note 2.

until the draft wording at the end of the Committee's Fifth Session that the eventual Article 14 of the ICCPR added that, in the determination of any criminal charge, one is entitled '[t]o defend himself in person or through legal assistance which shall include the right to legal assistance of his own choosing, or, if he does not have such, to be informed of his right, and, if unobtainable by him, to have legal assistance assigned'.<sup>7</sup>

At the sixth session, the Commission discussed three principal issues as to the right to counsel: (1) the right to access to counsel; (2) the choice of the counsel; and (3) who pays for the counsel if the defendant could afford to do so.<sup>8</sup> According to the official records, no discussion ensued concerning an absolute right to represent oneself; rather, the delegates were solely concerned about the right to access counsel, the choice of counsel and who pays for counsel if the defendant is indigent.<sup>9</sup>

While looking on the interpretations of the Article 14 (3)(d) of the ICCPR by the Human Rights Committee (HRC) established by the ICCPR it was hard to find any Case related particularly to the right of self-representation. The Committee on different cases looked upon the right to select counsel as Article 14(3)(d) provides that an accused has the right to defend him/herself personally or through legal assistance of his/her choosing. The Committee has established that an accused must be allowed to have legal counsel where the charges involve the death penalty.<sup>10</sup> The legal counsel must be willing and able to defend the accused and the counsel must be changed if the accused so request.<sup>11</sup> This interpretation of the HRC is in accordance with the Article 14(3)(d) which provides that a person charged with criminal offences has the right "to have legal assistance assigned to him, in any case where the interest of justice so requires"

## **2.2 Article 6 (3)(c) of the European Convention on Human Rights (ECHR)**

Article 6 (3)(c) of the European Convention on Human Rights (ECHR) provides that 'everyone charged with criminal offence' has three minimum rights: (1) to defend himself in person, or (2) to defend himself through legal assistance of his own choosing, and (3) if he has not sufficient means to pay for legal assistance, to be given it free when the interest of justice so requires. The aim of this provision is to ensure that defendants have the possibility of presenting an effective defence.<sup>12</sup>

What is more important for my thesis research is the right for the accused to defend himself in person.

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<sup>7</sup> See *supra* note 2, p.34.

<sup>8</sup> See *supra* note 5, p.57.

<sup>9</sup> See *supra* note 2, p.34.

<sup>10</sup> See *supra* note 5, p.116.

<sup>11</sup> *Ibid.*

<sup>12</sup> C.Ovey and C.A.White; Jacobs and White, *The European Convention on Human Rights*, Oxford University Press, 2002, Third Edition, p.183

The Right for the accused to defend himself in person is subject to restriction by national law and judicial authorities concerned.<sup>13</sup> The Court accepted in the *Gillow* case the requirement of the representation by a lawyer to lodge an appeal as ‘as common feature of the legal system in several Member States of the Council of Europe’.<sup>14</sup> From paragraph 3(c) it then results that, if national law stipulates or the judicial authorities decide that the accused must be assisted by a lawyer, he must be able himself to choose this lawyer. In case of inability to pay for such legal aid, must have a lawyer assigned to him; indeed, in that case such legal aid is evidently considered necessary by the national law or judicial authorities in the interest of justice.<sup>15</sup>

Although some restrictions to the right of the accused to defend himself in person are permitted, these restrictions cannot go so far that the protection offered by Convention becomes illusory.<sup>16</sup> In *Kremzow* Case, the situation at issue was that national legislation granted the right of a detained person to be present at the hearing of an appeal against sentence only if the person concerned made a request to this effect in his appeal.<sup>17</sup> Nevertheless, because the applicant risked a substantial increase of his sentence of imprisonment, the Court held that the national authorities had been obliged to enable the applicant to be present at the hearing and to ‘defend himself in person’.<sup>18</sup> The failure to fulfil this duty amounted to a breach of paragraph 6(1) in conjunction with the provision under (c).<sup>19</sup>

I consider important in the further examination to have a look how the Court deals with the right of the accused to have legal representation of own choosing. Generally, problems will arise where in proceedings, which determine a criminal charge; the applicant is denied the right to be legally represented.<sup>20</sup> The right to legal assistance free or otherwise does not confer an absolute right to choose counsel. Domestic courts may override even the choice of the counsel paid for by the applicant, where there are relevant and sufficient grounds for holding this necessary in the interests of justice.<sup>21</sup>

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<sup>13</sup> P.van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, Kluwer Law International, The Hague, 1998, Third Edition, p.469

<sup>14</sup> *Gillow v. The United Kingdom*, Judgment of 24 November 1986, ECHR, No. (9063/80), A.109, p.27.

<sup>15</sup> *Supra* note 13.

<sup>16</sup> *Ibid*

<sup>17</sup> *Kremzow v. Austria*, Judgment of 21 September 1993, ECHR, No. (12350/86), A.268-B, p.45.

<sup>18</sup> *Supra* note 13.

<sup>19</sup> *Ibid*

<sup>20</sup> *Ezeh and Connors v. The United Kingdom*, Judgment of 9 October 2003, ECHR, No. (39665/98 and 40086/98), para.131 and 134.

<sup>21</sup> K. Reid, *A Practitioner’s Guide to the European Convention on Human Rights*, Sweet & Maxwell, London, 2<sup>nd</sup> edition, 2004, p.140.

Courts may also appoint defence counsel, which an accused considers unnecessary or objectionable. Where in *Croissant Case*<sup>22</sup>, the applicant had appointed two counsels and objected to the third appointed by the courts, the Court found that the domestic court's reasons were relevant and sufficient, namely serving the interest of justice by avoiding interruptions or adjournments.<sup>23</sup>

Generally, the seriousness of the offence and the severity of the sentence at stake are crucial issues in the assessment of whether the interests of justice require legal representation.<sup>24</sup> In the *Twalib Case* paragraph 53 the Court stated "An additional factor is the complexity of the cassation procedure. It involved a challenge to the fairness of the trial proceedings, which required him to adduce legal arguments, which would convince the Court of Cassation that his defence rights had been vitiated. It is to be noted that the complexity of cassation proceedings is confirmed by the requirement that the parties must be represented by counsel at the hearing before the Court of Cassation. Further, the preparation of a notice of appeal must also be considered to require legal skills and experience and in particular, knowledge of the grounds on which an appeal can be brought. It is noteworthy that the applicant, of foreign origin and unfamiliar with the Greek language and legal system, was unable to indicate any grounds of appeal in his written notice of appeal and that this failure resulted in his appeal being declared inadmissible"<sup>25</sup>

An accused person who lawfully chooses to defend himself in person waives his right to be represented by a lawyer,<sup>26</sup> and, as the result, the state is entitled to expect that he will exhibit a degree of diligence, failing which the state will not be responsible for any resulting deficiencies in the proceedings.<sup>27</sup> Whatever the means of the applicant, the state is not required to provide legal aid lawyers unless it is in the interests of justice to do so. The Court has made its own assessment on the facts.<sup>28</sup> The test as whether provisions of legal aid is in the 'interests of justice' is not that that presentation of the defence must have sustained actual prejudice, but whether it appears 'plausible in particular circumstances'<sup>29</sup> that a lawyer would be of assistance on the facts of the case.<sup>30</sup> The following circumstances are relevant:<sup>31</sup>

- The complexity of the case;<sup>32</sup>

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<sup>22</sup> *Croissant v. Germany*, Judgment of 25 September, 1992, ECHR, No. (13611/88), A.237-B.

<sup>23</sup> *Supra* note 21

<sup>24</sup> *Ibid*

<sup>25</sup> *Twalib v. Greece*, Judgment of 9 June, 1998, ECHR, No.(42/1997/826/1032), para.53.

<sup>26</sup> *Melin v. France*, Judgment of 22 June, 1993, ECHR, No.(12914/87), A.261-A.

<sup>27</sup> *Ibid*.

<sup>28</sup> *Quaranta v. Switzerland*, Judgment of 24 May, 1992, ECHR, No. (12744/87), A.2005

<sup>29</sup> R. Clayton and H. Tomlinson, *Fair Trial Rights*, Oxford University Press, 2001, p. 119.

<sup>30</sup> *Artico v. Italy*, Judgment of 13 May 1980, ECHR, No. (6694/74), A.037

<sup>31</sup> *Supra* note 29, p.120

<sup>32</sup> *Supra* note 28

- The contribution that the particular accused could make if he defended himself
- The seriousness of the offence with which the accused is charged and the potential sentence involved.

Where the deprivation of liberty is at stake, ‘the interests of justice in principle call for legal representation’.<sup>33</sup> Where the effective exercise of the right of appeal under national law requires legal assistance, legal aid must be provided, no matter how slight the accused’s chances of success.<sup>34</sup>

The reason why I brought up the legal assistance of the accused of his own choosing guaranteed by Article 6(3) (c) and if he has not sufficient means to pay for legal assistance, to be given it free when the interest of justice so requires, is to give more better picture how wide is the margin of appreciation of the State Members upon this issue. Even though we can make a define the three elements of the Article 6(3) (c) of the Convention, this does not mean that these provision do not interact with each other. Neither of the rights guaranteed in the Article 6(3) (c) is an absolute right of the accused.

## 2.3 Right to self-representation- International Criminal Tribunal for Rwanda (ICTR)

Article 19(1) of the ICTR Statute, entitled ” Commencement and Conduct of Trial Proceedings” provides: “The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, *with full respect for the rights of the accused* and due regard for the protection of victims and witnesses.”<sup>35</sup>

Article 20, entitled “Right of the Accused”, states in relevant part:

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

.....

(d) To be tried in his or her presence, and to *defend himself or herself in person* or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; *and to have legal assistance assigned to him or her, in any case where the interest of justice so require*, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;<sup>36</sup>

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<sup>33</sup> Supra note 31

<sup>34</sup> *Boner v. The United Kingdom*, Judgment of 28 October 1994, ECHR, No. (18711/91), A.300-B

<sup>35</sup> The Statute of International Criminal Tribunal for Rwanda, website: <http://www.icttr.org/>

<sup>36</sup> ICTR Statute, supra note 35, Article 20.

Article 19 and 20 together are often referred to as the “fair trial provisions” of the Statute. Article 20 (d) entitles an accused to defend himself, or to be assisted in his defence by a counsel of his own choosing (in practice, if he can pay for this legal assistance); or, if he is indigent and the interest of justice so require to have legal assistance provided free of charge. An additional provision in its Rules of Procedure and Evidence (RPE), Rule 45 *quater*, “Assignment of Counsel in the Interests of Justice,” provides: “The Trial Chamber may, if decides that is it is in the interest of justice, instruct the Registrar to assign a counsel to represent the interest of the accused.”<sup>37</sup>

According to Nina H. B. Jørgensen, article: “The Right of the Accused to Self-Representation before International Criminal Tribunals”<sup>38</sup> this provision was added as a response to the specific experience of the ICTR, and for the time when her article was published that was the only such provision in the rules of procedures and evidence of an international criminal tribunal. As later will see, the ICTY has adopted identical provision. According to Nina H.B. Jørgensen, the reasoning behind this provision it seemed to be to enable a proper image of the Tribunal to be conveyed even if an accused decided to remain completely silent or refused to appear before the court at all.<sup>39</sup> On its face, the text does seem to allow counsel to be appointed over the objections of the accused whenever it would be in the interests of justice.<sup>40</sup> The rule was intended to formalize a prerogative that the Tribunal had previously exercised under its inherent powers<sup>41</sup> “in cases where an accused person has either declined to engage a lawyer to defend him or her, or is indigent and has declined counsel assigned by the Tribunal.”<sup>42</sup> Mr. Kingsley Chiedu Moghalu, Legal Advisor and Spokesman for the International Tribunal while introducing the New Rule 45 *quater* added “ You will recall that, in the ongoing “Media Trial “ of three former senior Rwandan media executives at the ICTR, Trial Chamber I instructed the Registrar to assign a counsel to represent the interests of one of the three defendants, Mr. Jean Bosco Barayagwiza, in these circumstances. By way of comparative illustration also, you are aware that, at the ICTY, Mr Slobodan Milosevic declined to formally appoint a lawyer or accept the assignment of a lawyer by that Tribunal to represent his interests, hence the appointment by that Tribunal of a number of lawyers as *amicus curiae* (Friend of the Court) to perform similar roles. The New Rule 45 *quater* of the ICTR is the first such provision in the Rules of Procedure and Evidence of an international criminal tribunal.”<sup>43</sup>

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<sup>37</sup> ICTR, Rules of Procedure and Evidence, June 29, 1995, Rule 45 *quater*, as amended March 14, 2008.

<sup>38</sup> Nina H. B. Jørgensen, The Right of the Accused to Self-Representation before International Criminal Tribunals, [\*The American Journal of International Law\*](#), Vol. 98, No. 4 (Oct., 2004), pp. 711-726, p.713.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> Press Briefing by the Spokesman of the ICTR, Doc. ICTR/INFO-9-13-22.EN, Arusha (July 8, 2002).

<sup>43</sup> *Ibid.*

To understand more the jurisprudence of the ICTR regarding the right to self-representation it's necessary to look at the Barayagwiza Case.<sup>44</sup>

The ICTR was the first international tribunal to face the question of a defendant's right to self-representation, holding in the case of Jean-Bosco Barayagwiza that Defence Counsel could be assigned over the objection of the accused.<sup>45</sup> Barayagwiza was a lawyer by training and a former high level government official, closely associated with the persons in power, such as colonel Bagosora, the president Sindikubwabo and others.<sup>46</sup> Referring to Michael P. Scharf's<sup>47</sup> research about Barayagwiza's case which I found very relevant for my research, the ICTR Trial Chamber took the right to self-representation as articulated in the Statute as a starting point, but noted that according to international (and some national) jurisprudence, this right is not absolute. The Registrar declined Barayagwiza's request on 5 January 2000 for the withdrawal of his counsel, J.P.L. Nyaberi. Barayagwiza sought the withdrawal, citing reasons of 'lack of competence, honesty, loyalty, diligence, and interest'. The Registrar's decision was confirmed by the President of the ICTR on 19 January 2000, but, on 31 January 2000, the Appeals Chamber ordered the withdrawal of Barayagwiza's Defence Counsel, J.P.L. Nyaberi, and ordered the assignment of new counsel and co-counsel for Barayagwiza. Barayagwiza declined to accept the assigned counsel, and instructed them not to represent him at the trial. The ICTR Trial Chamber ordered counsel to continue representing Barayagwiza. Counsel filed a motion to withdraw on 26 October 2000, given their client's instructions not to represent him at trial, which was denied on 2 November 2000, on the basis that the ICTR Trial Chamber had to ensure the rights of Barayagwiza. The ICTR Trial Chamber held Barayagwiza's behavior to be 'an attempt to obstruct proceedings. In such a situation, it cannot reasonably be argued that Counsel is under an obligation to follow them, and that [sic.] not do so would constitute grounds for withdrawal'. The Chamber also referred to the 'well established principle in human rights law that the judiciary must ensure the rights of the accused, taking into account what is at stake for him'. The ICTR Trial Chamber further noted that assigned counsel 'represents the interest of the Tribunal to ensure that the Accused receives a fair trial. The aim is to obtain efficient representation and adversarial proceedings'.

## **2.4 Right to self-representation - Special Court for Sierra Leone (SCSL)**

On 16 January 2002 the United Nations and the Government of Sierra Leone signed the agreement on establishing the Special Court for Sierra

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<sup>44</sup> The ICTR, Jean Bosco Barayagwiza (ICTR-97-19). All documents from this case are available through the ICTR website:<http://www.ictr.org> (accessed 20 April 2010)

<sup>45</sup> Supra note 2, p.41

<sup>46</sup> Supra note 44, (Amended Indictment, para.4.3).

<sup>47</sup> Supra note 2, Supra note 44.

Leone in accordance with the request of the Security Council Resolution of 1315 (2000) of August 2000;”to create an independent special court to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law”.<sup>48</sup>

The SCSL Statute has a similar provision concerning the right to counsel.<sup>49</sup> ”In a recent decision, a SCSL Trial Chamber found that the defendant, Samuel Hinga Norman, could not represent himself without the assistance of standby counsel. Norman, who, like Milosevic, is a lawyer by training and a former high-level government official, indicated in a letter of 3 June 2004, after the opening statement of the Prosecutor, that he wished to represent himself and that he was dispensing of his Defence Counsel that had been acting on his behalf since March 2003.

In requiring the appointment of standby counsel, the SCSL Trial Chamber sought to distinguish Norman’s situation from that of Milosevic in two respects. First, the SCSL noted that Norman is being tried with two co-defendants. Secondly, Norman did not signal his intention to represent himself from the outset.”<sup>50</sup> The SCSL Trial Chamber then turned to the factors of the trial that made it impossible for Norman to represent himself.

Trial Chamber in its decision of 8 June 2004<sup>51</sup> stated:” The philosophy of the Chamber on this crucial issue compels us to factor into equation, certain critical issues namely: (i) that the right to of counsel which is statutorily guaranteed by Article 17(4)(d) of our Statute is predicated upon the notion that representation by Counsel is an essential and necessary component of fair trial. (ii) The right to counsel relieves trial Judges of the burden to explain and enforce basic rules of courtroom protocol and to assist the accused in overcoming routine and regular legal obstacles which the accused may encounter if he represents himself, for, the Court, to our mind, is supposed, in the adversarial context, to remain the arbiter and not a proactive participant in the proceedings. (iii) Given the complexity of the trial in the present case, it cannot be denied that a joint trial of such magnitude, having regard to the gravity of the offences charged, and considering the number of witnesses to be called by the Prosecution and the Defence; make for trial fraught with a high potential of complexities and intricacies typical of evolving international criminal law. (iv) There is also the public interest, national and international, in the expeditious completion of the trial. (v) Furthermore, there is the high potential for further disruption to the Court’s timetable and calendar, which we are already witnessing in this case. In fact, 2 Prosecution witnesses who the Chamber insisted should testify on the 3-rd

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<sup>48</sup> Agreement between the United Nations and the Government of Sierra Leone on the Establishment of Special Court for Sierra Leone, 16 January 2002.

<sup>49</sup> The SCSL Statute , Article 17(4)(d)

<sup>50</sup> M P. Scharf, *supra* note 2, p.42

<sup>51</sup> Decision on the Application of Samuel Hinga Norman for Self-Representation Under Art.17(4)(d) of the Statute of the Special Court, Sam Hinga Norman (SCSL-04-14-T), Trial Chamber, 8 June 2004. Para. 26

of June, after the opening statements ceremonies, were taken back without achieving this objectives. Given the time-limited mandate of the Court, this creates a serious cause for concern. (vi) The tension between giving effect to the 1-st Accused's right to self representation and that of his co-accused, to a fair and expeditious trial as required by law.”

Furthermore, the Trial Chamber stated that they “cannot allow the integrity of its proceedings to be tarnished or to be conducted in a manner that is not in conformity with the aspirations, of the norms of judicial process. As matter of law, it is our duty as a Chamber at all times, to protect the integrity of the proceedings before us and to ensure that administration of justice is not brought into disrepute. This can we achieve by ensuring, among other measures, that persons who are accused and indicted for serious offences such as these, are properly represented by Counsel because this safeguard is very vital in ensuring that the overall interests of justice are served and the Rule of Law, upheld.”<sup>52</sup>

”However, on September 20, 2004, Norman informed the court that he would not attend any further proceedings until determinations were made on certain outstanding issues and he instructed his standby counsel not to appear in court in his absence. Because of Norman's subsequent failure to appear, the trial chamber ruled orally that standby counsel would represent Norman as "Court Appointed Counsel." In its written ruling on the matter, the trial chamber found that a trial in the absence of the accused could be permitted in certain circumstances, including when an accused deliberately obstructs the judicial machinery by being absent after initially appearing at the trial. Echoing the view of the trial chamber in the Milosevic case, the trial chamber stated, “The exercise of the right to self-representation should not become an obstacle to the achievement of a fair trial." Norman's right to self-representation was consequently revoked and his trial continued in his absence with representation by court appointed counsel.”<sup>53</sup>

## **2.5 Right to self-representation - International Criminal Tribunal for Former Yugoslavia (ICTY)**

The ICTY Statute has similar provision as the ICTR and the SCSL Statute concerning the right of the accused. In its Article 20 (1) the ICTY Statute states: “The Trial Chambers shall ensure that a trial is fair and expeditious

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<sup>52</sup> Ibid, para. 29.

<sup>53</sup> N. H. B. Jørgensen, The Right of the Accused to Self-Representation before International Criminal Tribunals, *The American Journal of International Law*, Vol. 99, No. 3 (Jul., 2005), pp. 663-668, p.666. The relevant parts of the case are taken from Prosecutor v. Norman, Fofana, and Kondewa, Ruling on Non-Appearance of First Accused, Second Accused, and Third Accused at Trial Proceedings, No. SCSL-04-14-PT (Oct. 1, 2004). Paragraph 17 and 23.

All documents from this case are available through the SCSL website: <http://www.sc-sl.org/> (accessed 20 April 2010)

and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses”<sup>54</sup>

Article 21, entitled “Right of the Accused”, states in relevant part:

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

.....

(d) To be tried in his or her presence, and to *defend himself or herself in person* or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; *and to have legal assistance assigned to him or her, in any case where the interest of justice so require*, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it.”<sup>55</sup>

An additional provision in its Rules of Procedure and Evidence (RPE), Rule 45 (A), provides: “Whenever the interests of justice so demand, counsel shall be assigned to suspects or accused who lack the means to remunerate such counsel. Such assignments shall be treated in accordance with the procedure established in a Directive set out by the Registrar and approved by the permanent Judges.”<sup>56</sup> It is worth noting that the Rule 45(A) of the ICTY Rules of Procedure and Evidence only allows for the assignment of counsel in the interests of justice when the accused is indigent.

According to Nina H. B. Jørgensen’s, article: “The Right of the Accused to Self-Representation before International Criminal Tribunals”<sup>57</sup> the part when she explains about the reasoning of adding the Rule 45 *quater* to the Rules of Procedure and Evidence of the ICTR; she noted that that provision was added as a response to the specific experience of the ICTR, and for the time when her article was published that was the only such provision in the rules of procedures and evidence of an international criminal tribunal. The reasoning behind this provision it seemed to enable a proper image of the Tribunal to be conveyed even if an accused decided to remain completely silent or refused to appear before the court at all.<sup>58</sup> This would allow the Trial Chamber to appoint a counsel, over the objections of the accused whenever it would be in the interests of justice.<sup>59</sup> The rule was intended to formalize a prerogative that the Tribunal had previously exercised under its inherent powers<sup>60</sup> “in cases where an accused person has either declined to engage a lawyer to defend him or her, or is indigent and has declined

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<sup>54</sup> The ICTY Statute, Article 20(1), website: <http://www.icty.org> (accessed 20 April 2010)

<sup>55</sup> Supra note 54, The ICTY Statute, Article 21(4)(d).

<sup>56</sup> The ICTY, Rules of Procedure and Evidence, Adopted 11 Feb 1994, Amended 14 July 2000, amended 12 Apr 2001, website: <http://www.icty.org/> (accessed 20 April 2010).

<sup>57</sup> Supra note 38

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid

counsel assigned by the Tribunal.<sup>61</sup> Into the same line was the statement made by Mr. Kingsley Chiedu Moghalu, Legal Advisor and Spokesman for the ICTR while introducing the New Rule 45 *quater* by adding: “You will recall that, in the ongoing “Media Trial “ of three former senior Rwandan media executives at the ICTR, Trial Chamber I instructed the Registrar to assign a counsel to represent the interests of one of the three defendants, Mr. Jean Bosco Barayagwiza, in these circumstances. By way of comparative illustration also, you are aware that, at the ICTY, Mr Slobodan Milosevic declined to formally appoint a lawyer or accept the assignment of a lawyer by that Tribunal to represent his interests, hence the appointment by that Tribunal of a number of lawyers as *amicus curiae* (Friend of the Court) to perform similar roles”<sup>62</sup>

Following the same logic, the ICTY on 4 November 2008 adopted a similar provision, the Rule 45 *ter* of its Rules of Procedure and Evidence entitled: “Assignment of Counsel in the Interests of Justice” which states: “The Trial Chamber may, if it decides that it is in the interests of justice, instruct the Registrar to assign a counsel to represent the interests of the accused.”<sup>63</sup>

The adoption of Rule 45 *ter* eventually brings the rules of the ICTY in conformance with rules and practice of other international tribunals such as the ICTR, the ICC and the SCSL and incorporates existing case law of the ICTY into a common rule. The ICTY has acknowledged limitations of the right to self-representation in a number of cases.<sup>64</sup>

According to M. Cherif Bassiouni, the right to self-representation complements the right to counsel and is not meant as a substitute thereof.<sup>65</sup> Bassiouni added that representation of counsel is not only a matter of interests to the accused but is also paramount to due process of the law and to the integrity of the judicial process, therefore the court should appoint professional counsel to supplement self-representation whenever it is in the best interests of justice and in the interest of adequate and effective representation of the accused.<sup>66</sup>

However, in this part of the paper, I will not go deep further to examine how the right to self-representation was interpreted and used during the ICTY trials. This will be more explained and examined partly in the next chapter, and more detailed in the fourth one where I will look and make a case analyzes of the Milosevic Case.

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<sup>61</sup>Supra note 42, Press Briefing by the Spokesman of the ICTR, Doc. ICTR/INFO-9-13-22.EN, Arusha (July 8, 2002), website: <http://www.ictr.org/> (accessed: 20 April 2010)

<sup>62</sup> See supra note 42.

<sup>63</sup> The ICTY, Rules of Procedure and Evidence, Rule 45 *ter* Adopted 4 November 2008.

<sup>64</sup> M. E. Badar and N. Karsten, Current Developments at the International Criminal Tribunals (2008), *International Criminal Law Review* 9 (2009) 227–251, p.242.

<sup>65</sup> M. Cherif Bassiouni, Introduction to international Criminal Law, Transnational Publishers, Inc., 2003, p.617.

<sup>66</sup> Ibid. p.618.

### 3 Expeditiousness of International Criminal Trial

“The issue of the fairness of a trial intersects with its expedition. The right to an expeditious trial has been said to have its roots at the foundation of criminal proceedings, and the US Supreme Court has traced its roots back to the twelfth century. The right to an expeditious trial is reflected in the major human rights instruments (for example in Article 14(3)(c) of the ICCPR<sup>67</sup>, Article 6(1) of the ECHR<sup>68</sup> and Article 7(5) of the ACHR<sup>69</sup>) and is reflected in the Statutes of all of the international criminal courts and tribunals. It is generally interpreted as requiring that an accused person be tried within a reasonable period of time, although before human rights adjudicating bodies the circumstances falling within that concept of reasonableness have been given broad interpretation and extensive periods of pre-trial and pre-judgment detention have been considered reasonable.”<sup>70</sup>

Antonio Cassese in its book, “International Criminal Law” states: “One of the obvious requirements of a fair trial is that trial proceedings be as speedy as possible. Plainly, as the accused enjoys the presumption of innocence until found guilty, it is only rational and appropriate to establish whether he is innocent or guilty as rapidly as possible.”<sup>71</sup> Further Cassese explains: “Very often for practical reasons, it is difficult or inappropriate for international criminal courts to release the accused person on bail; hence, frequently the accused is in prison, from his arrest until conviction or acquittal”<sup>72</sup> Therefore, this frequently feature of international trials renders expeditiousness of proceedings all the more necessary.<sup>73</sup> One should also add that often the defendants tend not to plead guilty; were they use this

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<sup>67</sup> Article 14 (3). In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

.....

(c) To be tried without undue delay;

<sup>68</sup> Article 6 (1) In its relevant part states: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

<sup>69</sup> Article 7 (5).. ”Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.”

<sup>70</sup> G.Boas, The MilosevicTrial: Lessons for the Conduct of Complex International Proceedings p.64

<sup>71</sup> A. Cassese, International Criminal Law, Oxford University Press, 2003, p.398

<sup>72</sup> Ibid

<sup>73</sup> Ibid.

means, they would avoid commencement of trial proceedings proper, or terminate them, if guilty the guilty pleas is entered after commencement of trial.<sup>74</sup> They do so either because they are innocent, or because even guilty, they prefer to take the chance of a lengthy trial.<sup>75</sup> They hope that the evidence will be insufficient to establish guilty; thus, being acquitted, they will avoid the stigma attaching to international crimes, which renders perpetrators more odious than authors of common offences.<sup>76</sup>

Gideon Boas, in its book “The Milosevic Trial: Lessons for the Conduct of Complex International Criminal Proceedings” while writing about the complexities of international criminal trial, states” Fair trial rights, strictly speaking, belong to an accused and are applied as a guarantee to ensure he or she receives a fair trial. Expedition, on the other hand, is a consideration, which reflects more the interest of the community (the international community in the case of international criminal trials) in seeing proceedings brought to a conclusion in an acceptable time. But in reality these sets of interests are composite in nature, such that both the accused and the international community have a stake.”<sup>77</sup>

Rightly Gideon Boas, who was, until October 2006, a Senior Legal Officer of the International Criminal Tribunal for the former Yugoslavia and the Senior Legal Adviser to the Chamber on the Milosevic case describes that: “An overly long trial threatens its fairness, because it can be unmanageable for an accused for a variety of reasons. Furthermore, if any aspect of a fair trial is not properly respected then the whole process of international criminal justice suffers and, therefore, the community interest in the proper functioning of the trial process. It is not simply a case of asserting that an accused wants a fair trial but that the international community wants a trial that is expeditious.”<sup>78</sup>

The scope of the right to a fair trial is very broad and incorporates many features of international criminal proceeding. Due to the limitations of my research, it is impossible to look upon all of those features. The length of the trial might depend from variety of reasons and involvements of all aspects of fair trial right. As stated above the all International Criminal Tribunals in their respective statutes reflect these rights, and often those rights are referred as “fair trial provisions” The same provisions exist in the ICTY Statute, in its Article 20 and Article 21. Article 20(1) of the ICTY Statute states: “The Trial Chambers shall ensure that *a trial is fair and expeditious* and that proceedings are conducted in accordance with the rules of procedure and evidence, *with full respect for the rights of the accused* and due regard for the protection of victims and witnesses.” Where, the rights of the accused are numbered in Article 21, which reads<sup>79</sup>:

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<sup>74</sup> Ibid

<sup>75</sup> Ibid

<sup>76</sup> Ibid

<sup>77</sup> Supra note 65, p.13.

<sup>78</sup> Ibid, p.14

<sup>79</sup> Similar provisions are enshrined it the ICTR Statute in its Article 20.

1. All persons shall be equal before the International Tribunal.
2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute
3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
  - (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
  - (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
  - (c) to be tried without undue delay;
  - (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
  - (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
  - (g) not to be compelled to testify against himself or to confess guilt.

As we can see the right to a fair trial is very broad, starting with the right to a public hearing, presumption of innocence until proved guilty, the right of the accused to be informed promptly in the language which he understands of the nature and cause of the charges against him or her, adequate time for preparation of his defence, communication with the counsel of his own choosing. These rights usually may be triggered in during pre-trial proceedings. Furthermore, as stated in Article 21(4)(c), as one of the minimum guarantees the accused has a right to be tried without undue delay. This provision is applicable in both pre-trial and as well during trial proceedings. The right to be tried in his presence is one of the crucial rights of the accused. The right to defend himself in person or through legal means is already explained in Chapter 2 of this paper as one of core rights of the accused. The right to examine, or have examined, the witnesses is one of greatest importance rights of the accused.

It is important to note that Article 20 of the ICTY Statute should be read in conjunction with Article 21 of the Statute, which it means that Trial Chamber shall ensure that *a trial is fair and expeditious* and that proceedings are conducted in accordance with the rules of procedure and evidence, *with full respect for the rights of the accused* that are enshrined in Article 21. It is Chambers duty to make a balance of these two competing features of international criminal trial. The rights of an accused person in international criminal law are distinct from but interrelated with the expeditiousness of the trial process.<sup>80</sup> Fairness and expedition are composite rights or interests, because they involve both the accused and the international community, although clearly, to differing degrees.<sup>81</sup> These rights are subject to interpretation in the broader context of the international criminal trial process.

There are legal scholars who argue pro and contras about the status of fair trial rights enshrined in the Article 21 of ICTY Statute and the role of the Trial Chamber in ensuring those rights as fundamental guarantees of the accused person.

G. Boas argues, “The right of an accused to cross-examine witnesses against him or her has been subjected, in some circumstances, to the discretion of a court which will determine whether that right can be exercised in the particular circumstances of the evidence in question. It is not, therefore, absolute. The right to self-representation is, likewise, not an absolute right. The right to a public trial is also subjected to exceptions or derogations where the appropriately balanced interests of victims and witnesses prevail. It is with this understanding that the following rights are considered. The particular rights discussed below are not exhaustive of all rights and interests in the international criminal trial process, but rather are some of the key rights that inform the inquiry into how best to structure and conduct an international criminal trial. Other rights, such as the right to silence, the right to be informed promptly of the charges against an accused, the right to the assistance of an interpreter or the right not to be compelled to testify against oneself, are not discussed because they have thrown up less difficulty or controversy in the practice of international criminal law...”

The Appeal Chamber in its Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel<sup>82</sup> in *Prosecutor vs. Milosevic* Case stated “Upon Assigned Counsel’s motion, the Trial Chamber certified an interlocutory appeal of its decision to impose counsel. Applying Rule 73(B) of the Rules of Procedure and Evidence, the Trial Chamber reasoned that the assignment of counsel could significantly *affect the fair and expeditious* conduct of the proceedings or outcome of the

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<sup>80</sup> Supra note 68, p.21

<sup>81</sup> Ibid.

<sup>82</sup> The ICTY, *Prosecutor v. Milosevic*, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, IT-02-54, 1 November 2004, para. 8.

trial, and that an immediate resolution of Milosevic's challenge would materially advance the proceedings. This appeal followed swiftly on the heels of certification" and in the next paragraph the Appeal Chamber in its standard of review noted by explaining that "As the Appeals Chamber has previously noted, a Trial Chamber exercises its discretion in "many different situations – such as when imposing sentence, in determining whether provisional release should be granted, in relation to the admissibility of some types of evidence, in evaluating evidence, and (more frequently) in deciding points of practice or procedure." A Trial Chamber's assignment of counsel fits squarely within this last category of decisions. It draws on the Trial Chamber's organic familiarity with the day-to-day conduct of the parties and practical demands of the case, and requires a complex balancing of intangibles in crafting a case-specific order to properly regulate a highly variable set of trial proceedings. The Appeals Chamber therefore reviews the Trial Chamber's decision only to the extent of determining whether it properly exercised its discretion in imposing counsel on Milosevic."<sup>83</sup>

By doing so, the Appeal Chamber confirmed the right of the Trial Chamber as a discretion right to make a balance of the competing features of the international trial such a fair trial rights and expeditiousness of the trial and to properly regulate a high variable set of the trial proceedings.

However, not all scholars agree in that way. Tiphaine Dickson and Aleksandar Jokic in their article "Hear no Evil, See no Evil, Speak no Evil: The Unsightly Milosevic Case"<sup>84</sup>, disagree by noting that the Milosevic right to self-representation, as one of most important rights of the accused had been violated by pointing "This remarkable perspective on basic fair trial rights invites discretionary "adjustments" or "balancing" of the other enumerated rights, since they are at a "structural par" with the right to self-representation. In other words, if all these rights have the same value, what prevents a Trial Chamber from violating them equally, as they have done with the right to self-representation, which the Appeals Chamber has upheld? This "discretion" will further be employed to severely curtail the duration, scope and subject matter of questions, as well as the very possibility of calling certain witnesses altogether"<sup>85</sup>

To my opinion, T. Dickson and A. Jokic took a very narrow interpretation of the Article 21 of the ICTY Statute and more likely without any consideration of the Article 20 of the Statute which authorize the Trial Chamber to ensure that "*a trial is fair and expeditious*". If that is the right interpretation what T. Dickson and A. Jokic are claiming, then one might question "what is the purpose of the provision '*to ensure fair and*

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<sup>83</sup> Ibid. para. 9.

<sup>84</sup> T. Dickson and A. Jokic, "Hear no Evil, See no Evil, Speak no Evil: The Unsightly Milosevic Case", *International Journal for the Semiotics of Law, Revue Internationale de Sémiotique Juridique* (2006) 19: 355–387

<sup>85</sup> Ibid. p.383

*expeditious*' in Article 20 of the Statute, if it is not the discretion right of the Trial Chamber.

However, in the next Chapter the interaction of the fair trial right or specifically the interaction of the right to self-representation with the principle of expeditious trial it is going to be more detailed analyzed and examined.

It is important to note that beside the features of the fair trial right, the actual speed of the trial is determined by a host of factors, including the scope of the indictment, the breadth of the dispute between the parties, and the complexity of the facts.<sup>86</sup> It is crucial to emphasize that the nature of international criminal trials must be taken into account and as Judge Richard May and Marieke Wierda noted that "is not entirely appropriate to use national criminal trials as a basis for comparison."<sup>87</sup> In international criminal trials, the parties are generally responsible for the collection and introduction of evidence to the courts, save for the defense's reliance on evidence discovered by the prosecution and made available to it.<sup>88</sup> This feature of international criminal trial is due to the adversarial nature of the international criminal trial. Hence, this contributed to their length at ICTY and ICTR.<sup>89</sup> Conclusively, Judge May and Wierda noted that "In international criminal trials, the Trial Chamber is empowered to assume a more active role than is usual in common law trials in order to regulate the conduct of the proceedings."<sup>90</sup> In this regard, ICTY has adopted considerable amendments in its Rule of Procedure and Evidence (RPE), prompted by concerns about the length of the trial. The Appeal Chamber in its Judgment of *Prosecutor vs. Jelusic*, July 5, 2001 observed, "In long and complicated cases, such as most of those which come to the Tribunal, it is necessary for the Trial Chamber to exercise control over the proceedings."<sup>91</sup> The RPE of the ICTY today direct the Chambers to:<sup>92</sup>

- set number of the witnesses the parties may call (although a party may apply to reinstate witnesses);<sup>93</sup>
- determine the time available to the parties for presenting evidence (although more time may be granted in the interests of justice);<sup>94</sup>

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<sup>86</sup> M. Cherif Bassiouni, Introduction to international Criminal Law, Transnational Publishers, Inc., 2003, p.647. Referring to Judge Richard May and Marieke Wierda, International Criminal Evidence, Transnational Publishers, Inc., 2002, p.279.

<sup>87</sup> Judge R. May and M. Wierda, International Criminal Evidence, Transnational Publishers, Inc., 2002, p.279.

<sup>88</sup> Supra note, 84.

<sup>89</sup> Supra note 85.

<sup>90</sup> Ibid.

<sup>91</sup> The ICTY, *Prosecutor vs. Jelusic*, Appeals Chamber Judgment, IT-95-10-A, July 5, 2001, para. 16.

<sup>92</sup> Supra note 85.

<sup>93</sup> The ICTY, Rules of Procedure and Evidence, Rule 73 *bis* (C) and (D), 73 *ter* (C) and (D).

<sup>94</sup> The ICTY, Rules of Procedure and Evidence, Rule 73 *bis* (E) and (F), 73 *ter* (E) and (F).

- Exercise control over the interrogation of witnesses to ascertain the truth and avoid needless consumption of time.<sup>95</sup>

The Rule 45 (A)<sup>96</sup> was part of the RPE before Milosevic was transferred into custody of the ICTY, but still Judge Richard May, who served as presiding judge in the proceedings in the trial of Slobodan Milosevic, in his book with Wierda did not find relevant to mention the right to self-representation as one of fundamental features of fair trial right, and neither the role of the Rule 45 (A) of RPE of the ICTY.

Another implication that can shorten the length of the international criminal trial and make the trial expeditious is the importance to take into the consideration the interest of the victims, as part of the Article 20 (1) of the ICTY Statute and 19 (1) of ICTR Statute. The process of according witness protection entails a balance between “full respect” for the rights of the accused, and “due regard” for the protection of the victims. It is not hard to judge that victims are seeking for an expeditious trial and as well the interest of international community that justice must not only be done, but must seen to be done.

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<sup>95</sup> The ICTY, Rules of Procedure and Evidence , Rule 90 (F).

<sup>96</sup> The ICTY, Rule of Procedure and Evidence, Rule 45 (A)

## 4 Interaction of the Right to Self-representation with the Principle to and Expeditious Trial

In this chapter, I will look into the most comprehensive international criminal trial in front of the ICTY, the Milosevic Case. As it happened and still happening, former leaders standing trial for war crimes may seek to act as their own lawyers in order to transform the proceedings into a political stage. Is this a necessary evil attendant to the right to a fair trial under conventional and customary international law, as Judge Richard May, who presided over the trial of Slobodan Milosevic, concluded?<sup>97</sup> Alternatively, can the Covenant international law and the Statutes of international tribunals be read as permitting an international criminal tribunal to appoint counsel over the objections of the defendant? How long can an accused object to be represented by a counsel, in what circumstances? In addition, how the right to self-representation contributes to the length of the international criminal trial?

As matter of examination, I will take the most representative case dealing with high ranked and most influenced State representative during the wars in Ex-Yugoslavia, Slobodan Milosevic Case, who chooses to be self-represented during the trial procedure in front of ICTY.

### 4.1 Prosecutor vs. Slobodan Milosevic (Milosevic Case)

On Saturday 11 March 2006, Slobodan Milosevic was found lifeless on his bed in his cell at the United Nations Detention Unit in Scheveningen.<sup>98</sup> At the time, he had been on trial for 66 count of genocide, crimes against humanity, grave breaches of the Geneva Conventions and violations of the laws and customs of war.<sup>99</sup> The alleged conduct encompassed more than 7,000 allegations of wrongdoing over eight years of conflict in the former Yugoslavia.<sup>100</sup>

Slobodan Milosevic was elected President of the Presidency of Serbia on 8 May 1989 and re-elected on 5 December that same year. After the adoption of the new Constitution of Serbia on 28 September 1990, he was elected to the newly established office of President of Serbia in multi-party elections

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<sup>97</sup> M. P. Scharf, *supra* note 2

<sup>98</sup> The ICTY, Press Release, The Hague, 11 March 2006, website: <http://www.icty.org> (accessed, 5 May 2010)

<sup>99</sup> *Supra* note 68, p.1

<sup>100</sup> *Ibid.*

held on 9 and 26 December 1990; he was re-elected on 20 December 1992.<sup>101</sup> After serving two terms as President of Serbia, Slobodan Milosevic was elected President of the Federal Republic of Yugoslavia (hereinafter FRY) on 15 July 1997 and he began his official duties on 23 July 1997. Following defeat in the September 2000 FRY Presidential elections, Slobodan Milosevic stepped down from this position on 6 October 2000.<sup>102</sup> On 29 June 2001, the ICTY press release announced that ICTY welcomes the transfer of Slobodan Milosevic into its custody who arrived in ICTY's Detention Unit during the early hours of the same day.<sup>103</sup>

On 3 July 2001 during the Initial Appearance of Milosevic in his case upon his transfer to the Tribunal, Judge May made it known to the Milosevic that he has the right to defend himself and as well that he has the right counsel by noting:

"Mr. Milosevic, I see that you're not represented by counsel today. We understand that this is of your own choice. You do have the right, of course, to defend yourself. You also have a right to counsel, and you should consider carefully whether it's in your own best interest not to be represented. These proceedings will be long and complex and you may wish to reconsider the position. In these circumstances, if you wish to have time to consider whether you want to have counsel or not, we would be prepared to give it to you. Now, do you want some time to consider now whether you wish to be represented?"<sup>104</sup>

As we already know, that Milosevic rejected the possibility of being represented by legal counsel since the beginning and did so until the end when he was found dead in the custody cell. Milosevic well known statement as respond to Judge May question was clear, by following:

"I consider this Tribunal a false Tribunal and the indictment a false indictment. It is illegal being not appointed by the UN General Assembly, so I have no need to appoint counsel to illegal organ."<sup>105</sup>

Like that, Milosevic since the first day in front of the Trial Chamber proceedings made it clear that his intention is to challenge the legitimacy of the Tribunal. Considering it as a political body rather a judicial body, while directing to the Judge May Milosevic stated: "I have put forth here with respect to the illegality of this Tribunal, which was set up of by a Resolution of the UN Security Council, which does not have any jurisdiction to do so and who was not able to transfer the competencies to anybody. And as legal

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<sup>101</sup> The ICTY, Amended Indictment *Prosecutor v. Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic and Vlatko Stojiljkovic*, IT-99-37-I, para.3.

<sup>102</sup> Ibid, para.4.

<sup>103</sup> The ICTY, Press Release, The Hague, 29 June 2001.

<sup>104</sup> The ICTY, *Prosecutor v. Milosevic* (IT-02-54), Transcripts 3 July, 2001, website: <http://www.icty.org> (accessed, 5 May 2010).

<sup>105</sup> Ibid.

men yourselves, you know that you can't transfer rights that you do not yourself possess”<sup>106</sup>

However, due to the limitations of this research and the complexity of the Milosevic Case, it would be impossible to go through all transcripts of the ICTY in case to give clearer picture about the Milosevic behavior in the trial proceedings. I assume that those facts are known in a large extent to all people with interest in Milosevic Case and in general to the audience that followed the ICTY work. Further in this paper I will be concentrated in the most relevant parts of the case dealing with the issue of the self-representation and expeditiousness of the trial.

As noted above, “on 3 July 2001, the Accused informed the Trial Chamber in writing and during his initial appearance that he did not want to be represented by a lawyer for the purposes of the court proceedings, and on 30 August 2001, during the first Status Conference, the Trial Chamber noted that the Accused was entitled to represent himself. In order to ensure him a fair trial and to ensure that his rights are fully respected, the Trial Chamber decided to invite the Registrar to appoint *Amici Curiae* to assist it in the proper determination of the case. The Trial Chamber rejected the Prosecution’s suggestion that it should assign a Defence Counsel for the Accused, stating that in accordance with the Statute and the Rules of the International Tribunal “the Accused has a right to counsel, but he also has a right not to have counsel.”<sup>107</sup> “On 8 November 2002, the Prosecution filed a Motion entitled “Submission of the Office of the Prosecutor on the Future Conduct of the Case in the Light of the State of the Accused’s Health and Complexity of the Case” (“Prosecution’s Motion”) to propose that the Trial Chamber appoint Defence Counsel for the Accused. The Accused rejected the suggestion in court on 11 November 2002 (“Accused’s Submission”).<sup>108</sup>

The Prosecution in its submission stressed that “the public interest demands a comprehensive prosecution of the indictment and that neither the international community nor the Prosecution could accept the curtailment of the case in a situation where the Accused, by declining to avail himself of the benefit of Counsel, has exacerbated his health problems”. It submitted that there is no norm of customary international law prohibiting the imposition of Counsel on an accused who wants to represent himself. It submitted that the Statute allows a Chamber to impose Defence Counsel on an accused and relied *inter alia* on the opinion of Judge Gunawardana in the *Barayagwiza* case in which the assignment of Counsel was envisaged “where the interests of justice so require”. In the Prosecution’s view, Article 21(4)(d) “also envisages the assignment of Defence Counsel in the present circumstances, where the health of the Accused, the complexity of the case

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<sup>106</sup> The ICTY, *Prosecutor v. Milosevic* (IT-02-54), Transcripts 09 January 2002 Open Session, Pre-Trial Conference, website: <http://www.icty.org> (accessed, 5 May 20010).

<sup>107</sup> The ICTY, *Prosecutor v. Milosevic* (IT-02-54), Reason for Decision on the Prosecution Motion Concerning Assignment of Counsel, 4 April 2003, Trial Chamber (Judges May, Robinson and Known)

<sup>108</sup> *Ibid*

and the public interest in the completion of this trial combine, with the result that it is in the interest of justice to assign legal Counsel”. The Prosecution also submits that Article 20 of the Statute necessitates that the imposition of Defence Counsel on the Accused in order to ensure a fair and expeditious trial”<sup>109</sup>

“On 18 November 2002, the *Amici Curiae* (Mr. Steven Kay QC, Mr. G. Branislav Tapuskovic and Professor Mischa Wladimiroff) filed “Observations by the *Amici Curiae* on the Imposition of Defence Counsel on Accused (“*Amici Observations*”). The *amici curiae* relied on Article 21(4)(d) of the Statute, Article 6(3) of the European Convention on Human Rights, and Article 14(3)(d) of the International Covenant on Civil and Political Rights (“ICCPR”) which provisions in their view explicitly protect the Accused’s right to defend himself in person. They stated that “[a]ny imposition of counsel upon the Accused against his wishes would constitute a breach of his guaranteed rights.”<sup>110</sup> Further, “The *Amici curiae* pointed out that the examples of mandatory provision of Defence Counsel given by the Prosecution are drawn from inquisitorial systems, where the functions of Defence Counsels are very different from those in the adversarial form of trial adopted at the International Tribunal, the latter requesting the Defence Counsel to “put the case” before the court . They submitted that therefore “[n]o meaningful trial would be possible if the advocate was not instructed by the Accused”<sup>111</sup> “As regards the opinion of Judge Gunawardana, the *amici curiae* noted that Barayagwiza chose not to attend his trial and, crucially, that he did not assert his right to self-representation, whereas in the present case the Accused has consistently asserted his right to represent himself.”<sup>112</sup> Finally the *amici curiae* submitted that in their opinion “the interests of justice do not require the assignment of Counsel, which would deprive the Accused of his right to conduct his own defence”<sup>113</sup>

As we can see from the *Amici curiae* submission, they interpreted the right to self-representation as a absolute right of an accused and did not even try to make any balance between the fair trial rights (in this case the right to self-representation) and the principle of expeditious trial.

However, on 18 December 2002, the Trial Chamber rejected the Prosecution’s Motion and stated that “Defence Counsel will not be imposed upon the Accused against his wishes in the present circumstances. By adding that, is not normally appropriate in adversarial proceedings such as these.”<sup>114</sup> In the part of the self-representation and the obligation to ensure a “fair and expeditious” trial, The Trial Chamber finally addressed the Prosecution’s submission that Article 20 of the Statute requires the imposition of Defence Counsel on the Accused in order to ensure a “fair and

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<sup>109</sup> Ibid

<sup>110</sup> Ibid

<sup>111</sup> Ibid

<sup>112</sup> Ibid

<sup>113</sup> Ibid

<sup>114</sup> Ibid

expeditious” trial. The Trial Chamber acknowledged that a Trial Chamber has to ensure that a trial is fair and expeditious, especially when the health of the Accused is at issue. However it made clear that, as stated in that same article, “While ensuring that the trial is fair and expeditious, a Trial Chamber must also ensure that the rights of the accused, as set out in Article 21 of the Statute, are not infringed.”<sup>115</sup>

Conclusively, even though the Trial Chamber presided by Judge May made an effort to give legal arguments in regard to not impose a counsel to Milosevic, still acknowledged that it is Trial Chamber obligation to ensure that trial is expeditious while taking into the consideration the rights of the accused. However, the Trial Chamber found that “the right to defend oneself in person is not absolute.” It further held that “there may be circumstances [...] where it is in the interests of justice to appoint counsel”. It found that no circumstances have “as yet” arisen in this trial but underlined that it will “keep the position under review.”<sup>116</sup>

On 22 September 2004, with the Milosevic trial about to begin the defence phase, the Trial Chamber (now composed of Patrick Robinson, presiding, O-Gon Kwon and Iain Bonomy, who replaced the deceased Richard May) decided to revisit Judge May’s ruling that Slobodan Milosevic had a right to represent himself in the courtroom,<sup>117</sup> by giving an oral ruling on 2 September 2004 and later on 22 September 2004 set out its written reason for the assignment of counsel.<sup>118</sup> The Trial Chamber was concerned about health condition of the Milosevic which as well contributed to many delays during the proceedings, “the trial had been interrupted during the course of the Prosecution’s case over a dozen times on account of the ill-health of the Accused, thereby losing some 66 trial days. The defence case, scheduled to start on 8 June 2004, was postponed on five occasions, again on account of the ill-health of the Accused.”<sup>119</sup> While interpreting the Article 21 (4) the Trial Chamber noticed, “It is a universally recognized fundamental principle that no person accused of a crime should be convicted without trial. It is equally fundamental that the trial should be fair.”<sup>120</sup> Followed, “Within the ambit of fairness fall a number of rights, all intended to achieve for the accused a fair trial. For the work of this Tribunal, they are enshrined in Article 21(4) of its Statute. The Trial Chamber reads Article 21(4) of the Statute as setting out a bundle of rights, which are embraced within the principle that the accused must have a fair trial, which is itself set out in Article 21 (2) of the Statute. The concept of fairness not only includes these specific rights but also has a much wider ambit, requiring that in all aspects the conduct of the trial must be fair to the accused. Hence, the specific rights

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<sup>115</sup> Ibid

<sup>116</sup> Ibid.

<sup>117</sup> M. P. Scharf, Self-Representation versus Assignment of Defence Counsel before International Criminal Tribunals, *Journal of International Criminal Justice* 4 (2006), 31-46, p.48.

<sup>118</sup> *Prosecutor v. Milosevic*, Reasons for Decision on Assignment of Defence Counsel, No. IT-02-54-T, Trial Chamber, September 22, 2004.

<sup>119</sup> Ibid, para.11.

<sup>120</sup> Ibid, para.29

are described as “minimum guarantees”. Fairness is thus the overarching requirement of criminal proceedings,”<sup>121</sup> thus, “the minimum guarantees set out in Article 21(4) of the Statute are elements of the overarching requirement of a fair trial”<sup>122</sup> The Trial Chamber stated that, “in that context that the Accused’s right to defend himself in person, or through legal assistance of his own choosing, as set out in Article 21(4)(d), must be read.”<sup>123</sup>

The Trial Chamber went further by interpreting Article 21 (4)(d) in the context of Milosevic Case by stating “whether by way of self-representation or legal assistance, the purpose of the provision is to secure for an accused the right to a defence, which is a prerequisite for a fair trial. Defence “in person” or “through legal assistance of his own choosing” are simply means whereby the minimum guaranteed right to “defend himself”, *i.e.*, to a defence, may be exercised. In the event that self-representation gives rise to the risk of unfairness to the accused, then steps must be taken, consistent with the provisions of Articles 20 and 21, to secure for an accused a fair trial; otherwise, the purpose of securing for the accused the right to a defence will be nullified. Fundamental to that is ensuring that he has the opportunity and facility to present his defence fully and effectively. However, that does not oblige the Trial Chamber to indulge the wish of an accused to conduct his own defence where his capacity to do so is so impaired that, were he to continue to do so, there would be a material risk that he would not receive a fair trial. The mere assertion on the part of the Accused of his right to defend himself does not ensure an effective defence in circumstances where he is seriously ill and regularly prevented for protracted periods from acting in his own defence.”<sup>124</sup>

The reason bringing up this interpretation as part of my paper is that, I fully agree with the stand taken by the Trial Chamber. To my opinion that is as well the most close interpretation of the identically worded clause contained in both ECHR and in the ICCPR, where negotiating record of these treaties indicates that the drafters’ concern was with effective representation, not self-representation.<sup>125</sup>

The Trial Chamber in its decision took into the consideration as well the obligation of to ensure and make a balance of the fair trial right with full respect of the rights of the accused enshrined in Article 21 of the Statute with the principle of the expeditious trial, as part and obligation stipulated in Article 20 (1) of the Statute. So, the Trial Chamber noted that “The fundamental duty of the Trial Chamber is to ensure that the trial is fair and expeditious. The concern of the Chamber was that, based on its findings above, the risk to the health, and indeed the life, of the Accused and the prospects that the trial would continue to be severely disrupted were so great as to be likely to undermine the integrity of the trial process. There was a real danger that this trial might last for an unreasonably long time or, worse yet, might not be concluded should the Accused continue to represent

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<sup>121</sup> Ibid.

<sup>122</sup> Ibid, para.32.

<sup>123</sup> Ibid

<sup>124</sup> Ibid.

<sup>125</sup> Supra note, 116, p.48

himself without the assistance of counsel. In the face of these circumstances, it would have been irresponsible to allow the Accused to continue to represent himself. No court, mindful of its duty to ensure a fair and expeditious trial and its inherent responsibility to preserve the integrity of its proceedings, could countenance this. On the other hand, the Chamber was satisfied that, if counsel was assigned to the Accused, measures could be devised to ensure that the trial continues in a manner that is both fair and expeditious.”<sup>126</sup>

The admittedly unprecedented justification for the imposition of counsel was exclusively Milosevic's health and its effect on the proceedings.<sup>127</sup> It is important to note that Trial Chamber even though did not based its decision on bases that the accused disrupts his trial by misbehavior, still stated that “wherever such a risk arises, it is necessary to take steps to avoid it. It is widely recognized in domestic jurisdictions that, where an accused who represents himself disrupts his trial by misbehavior, he may be removed from the court and counsel appointed to conduct his defence.”<sup>128</sup> As well the Trial Chamber expressed that “ There is no difference in principle between deliberate misconduct which disrupts the proceedings and any other circumstance which so disrupts the proceedings as to threaten the integrity of the trial.”<sup>129</sup> The Trial Chamber acknowledged that “ There are other cases in which the enjoyment of a right under Article 21(4) of the Statute must yield to the overarching right to a fair trial: for example, where the exercise of the right to self-representation becomes an obstacle to the achievement of a trial without undue delay, which is a specific right or minimum guarantee designed, *inter alia*, to maintain the integrity and fairness of the process. Should a trial not be conducted expeditiously, *i.e.*, without undue delay, the risk of unfairness will arise requiring the Trial Chamber to consider how that risk may be avoided.”<sup>130</sup>

To my opinion the reasoning of the Trial Chamber regarding the possible circumstances on imposing a counsel to Milosevic in regard to ensure a expeditious trial and achieving a trial without undue delay, made a strong ground to base their decision not only upon the Milosevic's health condition, but as well on the grounds of disruption of the trial; as the Prosecution suggested so in the submission 8 November 2002 in which the “proposed that the Trial Chamber should appoint defence counsel for the Accused in light of the disruption to the trial process due to the recurring ill-health of the Accused,”<sup>131</sup> which by declining to avail himself of the benefit of counsel, has exacerbated his health problems.<sup>132</sup>

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<sup>126</sup> Supra note, 123, para.64

<sup>127</sup> Nina H. B. Jørgensen, supra note 38, p.664

<sup>128</sup> Supra note, 125, para.33

<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid, para.19.

<sup>132</sup> Ibid.

Finally, in the end following the Trial Chamber decision, Milosevic refused to accept and cooperate with the assigned counsel. Believing that they could not adequately represent the defendant without such cooperation, assigned counsel brought an interlocutory appeal to the ICTY Appeals Chamber (consisting of Theodor Meron, presiding, Fausto Pocar, Florence Mumba, Mehmet Guney and Ines Monica Weinberg de Roca).<sup>133</sup> On 1 November 2004, the Appeals Chamber affirms the Trial Chamber's imposition of defense counsel, but reverses its Order on Modalities.<sup>134</sup> The Appeal Chamber noted that "a Trial Chamber exercises its discretion in "many different situations – such as when imposing sentence, in determining whether provisional release should be granted, in relation to the admissibility of some types of evidence, in evaluating evidence, and (more frequently) in deciding points of practice or procedure."<sup>135</sup> Stipulating, "The Trial Chamber's assignment of counsel fits squarely within this last category of decisions."<sup>136</sup> As well, the Appeal Chamber recognized "that a defendant's right to represent himself is subject to some limitations, however, does not resolve this case. It must further be decided whether the right may be curtailed on the grounds that a defendant's self-representation is substantially and persistently obstructing the proper and expeditious conduct of his trial. The Appeals Chamber believes that, under the appropriate circumstances, the Trial Chamber may restrict the right on those grounds."<sup>137</sup> However, the Appeal Chamber do not give much explanation what do they mean with "appropriate circumstance" neither what might constitute a "substantial trial disruption" when noted, "Right to self-representation may thus be restricted on the basis of substantial trial disruption."<sup>138</sup> The Appeal Chamber however, stated that Rule 80(B) of the Rules of Procedure and Evidence allows a Trial Chamber to "order the removal of an accused from the courtroom and continue the proceedings in the absence of the accused if the accused has persisted in disruptive conduct",<sup>139</sup>

Consequently, what we can say is that for a Appeal Chamber "substantial disruption" means "persisted disruptive conduct." By Interpreting Rule 80 (B) that stipulates removal of an accused from the courtroom, the Appeal Chamber made a link of the defendant's right to be present for his trial and the right to self-representation. For the Appeal Chamber both these two rights can be restricted on the basis of substantial trial disruption.<sup>140</sup>

However, the Appeal Chamber did not see as a trial disruption the accused behavior that by declining to avail himself of the benefits of counsel has exacerbated his health problems. The Appeal Chamber in its decision had its own question by stating: "How should the Tribunal treat a defendant whose

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<sup>133</sup> Supra note 116, p.44

<sup>134</sup> *Prosecutor v. Milosevic*, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, Milosevic (IT-02-54-AR73.7), Appeals Chamber, 1 November 2004,

<sup>135</sup> Ibid. para.9

<sup>136</sup> Ibid

<sup>137</sup> Ibid. para.13

<sup>138</sup> Ibid.

<sup>139</sup> Supra note 136

<sup>140</sup> Ibid.

health, while good enough to engage in the ordinary and non-strenuous activities of everyday life, is not sufficiently robust to withstand all the rigors of trial work – the late nights, the stressful cross-examinations, the courtroom confrontations – unless the hearing schedule is reduced to one day a week, or even one day a month? Must the Trial Chamber be forced to choose between setting that defendant free and allowing the case to grind to an effective halt?”<sup>141</sup>

The Appeal Chamber in the end came to decision as stated above, to reverse the Trial Chamber decision in its Order on Modalities by noting that “the Order sharply restricts Milosevic’s ability to participate in the conduct of his case in any way. The Order makes his ability to participate at all contingent on a case-by-case, discretionary decision by the Trial Chamber. It implies that he would only occasionally – “where appropriate” – be permitted to examine witnesses. Moreover, it indicates that, even where he is permitted to examine a witness, he may do so only after Assigned Counsel had already completed their examination. In every way, then, the Order relegates Milosevic to a visibly second-tier role in the trial.”<sup>142</sup>

However, the Appeals Chamber felt that the Trial Chamber’s order requiring Milosevic to act through appointed counsel went too far, and that the proportionality principle required that a more ‘carefully calibrated set of restrictions’ be imposed on Milosevic’s trial participation.<sup>143</sup> Thus, “the Trial Chamber failed to recognize that any restrictions on Milosevic’s right to represent himself must be limited to the minimum extent necessary to protect the Tribunal’s interest in assuring a reasonably expeditious trial.”<sup>144</sup>

The Appeal Chamber stated that “The excessiveness of the Trial Chamber’s restrictions is apparent for at least three reasons: (1) the medical reports relied on by the Trial Chamber explicitly rejected the notion that Milosevic’s condition is permanent; (2) there was no evidence that Milosevic had suffered from any health problems since late July; and (3) Milosevic made a vigorous two-day opening statement without interruption or apparent difficulty. Despite these indications of possible improvement in Milosevic’s condition, however, the Trial Chamber failed to impose a carefully calibrated set of restrictions on Milosevic’s trial participation. Given the need for proper respect of a right as fundamental as this one, this failure was an improper exercise of the trial court’s discretion.”<sup>145</sup>

Therefore, the Appeal Chamber ruled that “ when Milosevic is physically able to do so, he must be permitted to take the lead in presenting his case, choosing which witnesses to present, questioning those witnesses, giving the closing statement and making the basic strategic decisions about the presentation of his defence: ‘ . . . if Milosevic’s health problems resurface with sufficient gravity, however, the presence of Assigned Counsel will

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<sup>141</sup> Ibid para.14.

<sup>142</sup> Ibid. para.16.

<sup>143</sup> M.Scharf, supra note 116, p.44

<sup>144</sup> Ibid. para 17.

<sup>145</sup> Ibid .para 17.

enable the trial to continue even if Milosevic is temporarily unable to participate.<sup>146</sup>

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<sup>146</sup> M. Scharf, *supra* note 142, *supra* note 144, para 19 and 20.

# 5 Concluding Analyzes and Recommendation

## 5.1 Concluding Analyzes

First, starting from the first chapter of this research, the right to self-representation of an accused, in international criminal law has been stipulated in most relevant international human right instruments as part of the fair trial rights. Article 14(3) (d) of ICCPR stipulates, “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality... To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.” The ICCPR recognizes the right of accused person to defend himself in person and to have legal assistance assigned to him in case where the interests of justice so require. As we saw in the first chapter examining the drafting history of the ICCPR, according to the official records, no discussion ensued concerning an absolute right to represent oneself; rather, the delegates were solely concerned about the right to access counsel, the choice of counsel and who pays for counsel if the defendant is indigent.<sup>147</sup> As well the interpretation of the Human Rights Committee given to the Article confirms that the right to self-representation is not an absolute one. The Committee has established that an accused must be allowed to have legal counsel where the charges involve the death penalty.<sup>148</sup> The interpretation follows the Article’s provision which states that the accused is entitled to have a legal assistance assigned to him... in any case where the interest of justice so requires. Seems that the criteria to assign a counsel depend on the seriousness of the offence with which the accused is charged and the potential sentence involved.

Echoing the Article 14 (3) (d) of the ICCPR, the ECHR in Article 6 (3)(c) contains same provisions regarding the right of the person charged with criminal offence to defend himself in person or to defend himself through legal assistance of his own choosing. As we saw from the Court jurisprudence developed by the case law, States enjoy large margin of appreciation regarding the issue to assign a legal assistance on accused person. As the Court stated in *Gillow Case*, if national law stipulates or the judicial authorities decide that the accused must be assisted by a lawyer, he must be able himself to choose this lawyer. In case of inability to pay for such legal aid, must have a layer assigned to him; indeed, in that case such

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<sup>147</sup> M. Scharf, *supra* note 2, p.34.

<sup>148</sup> See *supra* note 10.

legal aid is evidently considered necessary by the national law or judicial authorities in the interest of justice.<sup>149</sup> It is important to note that the Court implies the interest of justice as criteria to assign a counsel if the national law or judicial authorities consider it necessary. The test as whether provisions of legal aid is in the ‘interests of justice’ is not that that presentation of the defence must have sustained actual prejudice, but whether it appears ‘plausible in particular circumstances’.<sup>150</sup> As particular circumstances where seen the complexity of the case, the contribution that the particular accused could make if he defended himself and the seriousness of the offence with which the accused is charged and the potential sentence involved. Another implication to assign a counsel upon accused person in *Croissant* Case the Court considered that would serve the interests of justice by avoiding interruptions or adjournments.<sup>151</sup> Conclusively, the right of the accused to self-representation is clear that is not absolute, rather is qualified when the interests of justice requires so.

When it comes to the International Criminal Tribunals, as has been stated all the Tribunals, ICTR, ICTY and SCSL have in their Statutes enshrined, the right to self-representation as part of the accused rights.

The ICTR Statute in the Article 20 (4)(d) gives minimum guarantees to the accused person to be tried in his or her presence, and to *defend himself or herself in person* or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; *and to have legal assistance assigned to him or her, in any case where the interest of justice so require*, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it. The other relevant Provision regulating the issue of representation is the Rule 45 *quater* of the RPE that stipulates the “the Trial Chamber may, if it decides that it is in the interests of justice, instruct the Registrar to assign a counsel to represent the interests of the accused.”

The Barayagwiza Case was the first case in front of the International addressing the issue the defendant’s right to self-representation, however the Trial Chamber articulated that the right to self-representation is not an absolute while interpreting the Statute of ICTR and supporting the interpretation by international jurisprudence. Even though Barayagwiza declined to accept the counsel and instructed them to not represent him at the trial, still the Trial Chamber held that the accused behavior was an attempt to obstruct the proceedings, hence that assigned counsel ‘represents the interest of the Tribunal to ensure that the Accused receives a fair trial. As later, we saw that because of the legal difficulties to impose a counsel upon Barayagwiza, the ICTR adopted Rule 45 *quater* which purpose seems to allow the Chamber counsel to be appointed over the objections of the accused whenever it would be in the interest of justice.<sup>152</sup>

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<sup>149</sup> See supra note 13.

<sup>150</sup> See supra note 19.

<sup>151</sup> See supra note 23.

<sup>152</sup> Supra note 40.

The SCSL in the *Norman* Case while imposing a standby counsel to Samuel Hinga Norman the Trial Chamber based its decision upon number of factors such as: the complexity of the trial, the gravity of the offences charged, national and international public interests in the expeditious completion of the trial. Even though, Norman instructed his standby counsel not to appear in the court in his absence that did not made the Chamber to change its decision. Trial Chamber ruled that the trial could continue in his absence, since according to the Chamber a trial in the absence of the accused could be permitted in certain circumstances, including when an accused deliberately obstructs the judicial machinery.<sup>153</sup>

Before analyzing the ICTY jurisprudence and giving recommendations upon the issue of self-representation and the principle of expeditious trial, it is necessary to say some conclusive words about the principle of the expeditiousness in general and the tension that exists between right to self-representation and the principle of expeditious trial.

As is described in the Chapter 3 the principle of expeditious trial is reflected in the major human rights instruments (for example in Article 14(3)(c) of the ICCPR, Article 6(1) of the ECHR and Article 7(5) of the ACHR. The principle is reflected in the Statutes of all of the international criminal courts and tribunals as well. The ICTY Statute Article 20(1) states: “The Trial Chambers shall ensure that *a trial is fair and expeditious* and that proceedings are conducted in accordance with the rules of procedure and evidence, *with full respect for the rights of the accused* and due regard for the protection of victims and witnesses.” Where Article 21(4) (c) reads: “In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: *to be tried without undue delay*”. The right to be tried without undue delay is part of the minimum guarantees of the accused person as it is the right to self-representation enshrined in Article 21(4) (d) which usually is referred as fair trial rights. As was stated in Chapter 3, Fair trial rights, strictly speaking, belong to an accused and are applied as a guarantee to ensure he or she receives a fair trial. Expedition, on the other hand, is a consideration which reflects more the interest of the community (the international community in the case of international criminal trials) in seeing proceedings brought to a conclusion in an acceptable time.<sup>154</sup> Fairness and expedition are composite rights or interests, because they involve both the accused and the international community, although clearly, to differing degrees.

The right to be tried without undue delay is a guarantee for the accused person as he enjoys the presumption of innocence until found guilty it would be only appropriate to establish whether he is innocent or guilty as rapidly as possible. This guarantee suppose to be for the interests of the accused, since usually it is difficult or inappropriate for international criminal courts to release the accused person on bail; hence, frequently the

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<sup>153</sup> See supra note 53

<sup>154</sup> See supra note 77.

accused is in prison, from his arrest until conviction or acquittal.<sup>155</sup> Nevertheless, what happens if the accused takes the chance of lengthy trial, which is the case with Milosevic? Where by claiming his right to self-representation he took the advantage to give more speeches that are political rather than trying to prove his innocence. No doubt that his ill-health condition contributed to many delays during proceedings.<sup>156</sup> If the accused wants a lengthy trial, this does not mean that the Trial Chamber has the duty to guarantee an absolute right to the accused to rule the proceedings such as to allow the integrity of its proceedings to be tarnished or to be conducted in a manner that is not in conformity with the aspirations, of the norms of judicial process.<sup>157</sup> The Chamber should be considering the fact that there is public interest, national and international, in the expeditious completion of the trial as the Trial Chamber stated in the *Norma* Case.<sup>158</sup> Obviously, there is a tension between the accused's rights and the principle to expedition trial, which reflects more the interests of the international community. As Gibson noticed, "An overly long trial threatens its fairness, because it can be unmanageable for an accused for a variety of reasons. Furthermore, if any aspect of a fair trial is not properly respected then the whole process of international criminal justice suffers and, therefore, the community interest in the proper functioning of the trial process."<sup>159</sup> The rights of an accused person in international criminal law are distinct from but interrelated with the expeditiousness of the trial process, Fairness and expedition are composite rights or interests, because they involve both the accused and the international community, although clearly, to differing degrees.<sup>160</sup> This research proves that in accordance with the Article 20(1) of the ICTY Statute and 19 (1) of the ICTR Statute, it is the Chambers duty to ensure that *a trial is fair and expeditious* and that proceedings are conducted in accordance with the rules of procedure and evidence, *with full respect for the rights of the accused* and due regard for the protection of victims and witnesses. As mentioned above the right of the accused enshrined in Article 21 of the ICTY Statute and 20 of the ICTR Statute, including the right to self-representation are not absolute, thus it is in Trial Chambers discretion power under some circumstances to restrict those rights. The ICTY, ICTR and the SCSL Trial and Appeal Chambers, in different cases have detected some of circumstances to restrict the rights of the accused. Such as: the accused behavior to be 'an attempt to obstruct proceedings,<sup>161</sup> on the grounds that a defendant's self-representation is substantially and persistently obstructing the proper and expeditious conduct of his trial,<sup>162</sup> the risk to health of the accused and indeed the life of the accused.<sup>163</sup>

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<sup>155</sup> See supra note 72.

<sup>156</sup> See supra note 119.

<sup>157</sup> See supra note 52.

<sup>158</sup> See supra note 51

<sup>159</sup> See supra note 78.

<sup>160</sup> See supra note 81.

<sup>161</sup> See supra note 47.

<sup>162</sup> See supra note 137.

<sup>163</sup> See supra note 126.

Finally, by looking at Milosevic Case, one might question how Milosevic after the Appeals Chamber decision of 1 November 2004,<sup>164</sup> regained his right to self-representation by taking the lead in presenting his case, choosing which witnesses to present, questioning those witnesses, giving the closing statement and making the basic strategic decisions about the presentation of his defence?<sup>165</sup> As to my opinion, he regained all “heavy weapons” for his defence, the “weapons” that much more contributed to the length of his trial. The Chamber knew his strategic decisions about presentation of his defence from very beginning of the trial. During his Initial Appearance on 3 June 2001, he made it clear that his strategy is to challenge the legitimacy of the Tribunal while most of his speeches were politically addressed to the international community as “creators of conspiracy theory” to destroy his country and Serbian nation. Hence, he referred to the Tribunal as a false organ while was not established by the UN General Assembly.

Did the judges had tight hands, from lack of legal framework in the Statute of the Tribunal and RPE, or did they interpreted the existing norms of the time such as not making appropriate balance of the rights of the accused in one hand and the principle of expeditious trial requirements?

What are the recommendations for the future?

To answer these questions I will bring some of the flaws that I see in the Appeals Chamber Decision of 1 November 2004, which ruled to reverse the Trial Chamber Decision for the assignment of the counsel (2 September 2004) in its Order and Modalities.

First, the reason to assign a counsel to Milosevic by Trial Chamber, were concerns about health conditions of the accused which as well contributed to many delays during the process. Based on the doctors examinations Trial Chamber reached the conclusion that if the accused was permitted to continue to represent himself, it was inevitable that his health would suffer, that his life could be at risk, and that he was unfit to continue to represent himself.<sup>166</sup> Where they took in consideration that “There was a real danger that this trial might last for an unreasonably long time or, worse yet, might not be concluded should the Accused continue to represent himself without the assistance of counsel.”<sup>167</sup> The reversed Appeals Decision in this regard was that (1) the medical reports relied on by the Trial Chamber explicitly rejected the notion that Milosevic’s condition is permanent; (2) there was no evidence that Milosevic had suffered from any health problems since late July; and (3) Milosevic made a vigorous two-day opening statement without interruption or apparent difficulty.<sup>168</sup>

On 11 March 2006, Milosevic was found dead on his bed cell due to the health heart problems that he suffered. In this regard, the Appeals Chamber, by giving the Milosevic the possibility to represent himself and giving more

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<sup>164</sup> *Prosecutor v. Milosevic* (IT-02-54), Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, Milosevic (IT-02-54-AR73.7), Appeals Chamber, 1 November 2004,

<sup>165</sup> See supra note 146

<sup>166</sup> Supra note 118, para.63

<sup>167</sup> Ibid. para. 65

<sup>168</sup> Supra note 145.

value to the rights of the accused (in this case the right to self-representation) in account to principle of expeditious trial, regardless of all indication that the health of the accused health will suffer and his life could be at risk, proved to be wrong. The Appeal Chamber did not ensured a expeditious trial, moreover took the side to even ruin the fairness of the trial, as the Trial Chamber noticed “whether by way of self-representation or legal assistance, the purpose of the provision is to secure for an accused the right to a defence, which is a prerequisite for a fair trial. Defence “in person” or “through legal assistance of his own choosing” are simply means whereby the minimum guaranteed right to “defend himself”, *i.e.*, to a defence, may be exercised. In the event that self-representation gives rise to the risk of unfairness to the accused, then steps must be taken, consistent with the provisions of Articles 20 and 21, to secure for an accused a fair trial; otherwise, the purpose of securing for the accused the right to a defence will be nullified...”<sup>169</sup>

To my opinion, assigning a counsel to Milosevic was in the accordance with the Article 21 (4) (d) which in its relevant part follows “and to have legal assistance assigned to him, in any case where the interests of justice so require” Obviously, in Milosevic the interest of justice required for an expeditious trial, as well appointing a counsel to him was in a line to represent his interest too. His health was suffering and his life was at risk. In regard to that, the new Rule 45 *ter* of RPE entitled: “Assignment of Counsel in the Interests of Justice” which states: “The Trial Chamber may, *if it decides that it is in the interests of justice*, instruct the Registrar *to assign a counsel to represent the interests of the accused.*” This rule as stated in Chapter 2 was adopted on 4 November 2008 (after Milosevic Trial). Here we can say, that the ICTY was bit late in adopting this Rule. If the Rule 45 *ter* was part of the RPE, assigning a counsel to Milosevic would had been more legally supported. Even though, this is a very important Rule for the development of the international criminal jurisprudence, this still does not mean that there was a lack of legal framework which made the Appeal Chamber to reverse the Trial Chamber’s decision. Based on these arguments, I can conclude that assigning a counsel was a matter of how the Appeal Chamber interpret the “the interests of justice”. Therefore, it is a matter of interpretation rather a matter of lack of legal framework to support that decision.

Secondly, the reason to reverse the Trial Chambers decision by the Appeals Chamber was the excessiveness of the Trial Chamber’s restrictions,<sup>170</sup> that the Trial Chamber’s order requiring Milosevic to act through appointed counsel went too far, and that the proportionality principle required that a more ‘carefully calibrated set of restrictions’ be imposed on Milosevic’s trial participation.<sup>171</sup> In the view of the Appeals Chamber any restrictions on Milosevic’s right to represent himself must be limited to the minimum extent necessary to protect the Tribunal’s interest in assuring a reasonably expeditious trial.<sup>172</sup>

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<sup>169</sup> Supra note 124.

<sup>170</sup> Supra note 145.

<sup>171</sup> Supra note 143.

<sup>172</sup> Supra note 144

Conclusively, Appeal Chambers view, in principle there is agreement with the Trial Chamber decision that the right to self-representation can be restricted but demanded Trial Chamber should craft a working regime that minimizes the practical impact of the formal assignment of counsel, except to the extent required by the interests of justice.<sup>173</sup> The Appeals Chamber recognizing a defendant's right to represent himself as subject to some limitations, but noted that this does not solve this case.<sup>174</sup> Once again, Appeals Chamber agrees that in principle, there is no legal obstacle to assign a counsel upon a defendant but this assignment should be decided on the circumstances of the case. This means that this is again matter of interpretation of the existing provisions regulating the issue of self-representation and the expeditiousness of the trial.

Finally, by its decision the Appeal Chamber as circumstances to assign a counsel to a defendant consider when a defendant's self-representation is substantially and persistently obstructing the proper and expeditious conduct of his trial.<sup>175</sup> As already has been explained Milosevic's not only health problems obstructed substantially the expeditious conduct of the trial, but as well his entire defence strategy about presentation of his defence from very beginning of the trial obstructed the it. The Trial Chamber in taking the decision to assign a counsel to Milosevic knew those circumstances. This is reflected in the Trial Chamber decision, which reads:<sup>176</sup>

"This Trial Chamber, and the International Tribunal as a whole, has gone to great lengths to accommodate the right of this Accused to represent himself. The Chamber, for its part, has upheld his strongly expressed desire to represent himself, even in circumstances where his health required substantial adjournments. The Chamber accommodated the assignment of three legal associates to assist the Accused outside of the courtroom in the preparation of his cross-examination of Prosecution witnesses, and preparations for the presentation of his defence; it also expanded the role of *Amici Curiae* to undertake substantial work in the character of defence counsel of which the Accused has clearly availed himself. The Chamber ordered the Registrar to provide the Accused with adequate facilities to conduct his defence. The Registrar has, in response, fully implemented these orders, making substantial facilities and resources available to the Accused so that he may have every opportunity to prepare and present his defence. Wide-ranging efforts have been made to assist the Accused. In the view of the Chamber, the time had come, however, to take further steps to ensure the fair and expeditious conclusion to this trial."

These circumstances and reasons given by the Trial Chamber did not convince the Appeal Chamber. After all accommodations made by the Trial in favor to help the accused to prepare his defence (accommodation of three legal associates outside the courtroom, *expanded role of Amici Curiae*), Appeal Chamber did not took this as criteria to measure the proportionality

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<sup>173</sup> Supra note 164, para. 19.

<sup>174</sup> Ibid. para.13

<sup>175</sup> Supra note 137.

<sup>176</sup> *Prosecutor v. Milosevic*, Reasons for Decision on Assignment of Defence Counsel, No. IT-02-54-T, Trial Chamber, September 22, 2004. para. 64.

principle in making balance between the right of the accused to defend on self, and the requirement of the interests of justice for expeditious trial.

## 5.2 Recommendations

After these above-mentioned reasons, based on the Milosevic Case analyze my conclusion is that assigning a counsel to a defendant on the ground on having an expeditious trial is in the discretion power of the Trial Chamber to ensure fair and expeditious trial. There is no legal gap in the Statute of the Tribunal to assign a counsel to the accused when the interests of justice require so. However, the “interest of justice requirement” enshrined in the Article 21 (4)(d) of the ICTY Statute, to my opinion it is very vague provision which gives to the Judges a wide margin of appreciation while interpreting the need to assign a counsel to the accused person in order to ensure an expeditious trial. This interaction between the expeditiousness and the interest of justice requirement puts the first one in the second order of importance in the interpretation of the Judges. The adoption of the Rule 45 *ter* of RPE by the ICTY in 2008 does not contribute much in solving the issue in the appropriate manner. The Rule 45 *ter*, which reads, “The Trial Chamber may, *if it decides that it is in the interests of justice*, instructs the Registrar *to assign a counsel to represent the interests of the accused*,” only confirms that Trial Chamber has a duty and discretion power to assign a counsel to the accused person to represent his interests. This confirms that the right to self-representation is not absolute, which was developed by the Tribunals jurisprudence. The rule partially adds a value to the Article 20(1) of the ICTY Statute and 19 (1) of the ICTR Statute, which states that Trial Chamber should ensure that *a trial is fair and expeditious... with full respect for the rights of the accused* and due regard for the protection of victims and witnesses. Partially because the Rule refers assigning a counsel to represent the interests of the accused, but do not explicitly; mention the expeditiousness of the trial, which is in the interests of the accused but also in the interests of the international community and the victims of the armed conflicts

Therefore, the recommendation of this research is that there is a need to amend the Rule 45 *ter* of the ICTY’s RPE, in order to make an equal balance between the fair trial requirements and the expeditious trial. Hence, according to me the Rule 45 *ter* should read:

“The Trial Chamber in *ensuring expeditious trial*, *if decides that is in the interests of justice*, instruct the Registrar to assign a counsel to represent the interests of the accused”

Putting the expeditiousness of the trial into the wording of this provision, first that would contribute to put the current case law developed by jurisprudence of the International Tribunals within the legal framework. Second, the Rule would explicitly recognize the principle of expeditious trial as ground of the interests of justice. Finally, this would ensure that Trial Chamber has a duty more closely to examine the circumstances that contribute to the non-expeditiousness of the criminal trials.

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