The right to self-representation and its challenges to the administration of fair trial at the International Criminal Tribunal for the Former Yugoslavia: Lessons for the International Criminal Court

by

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Declaration

I, Duncan Gaswaga do hereby declare that the work presented here is my own. Where any part of this work has been obtained from the work of other authors, it has been duly acknowledged.

I also declare that this work has never been presented anywhere for the award of any degree.

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Signature:.....

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Submitted with my consent

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Signature:.....

Date:.....

Dedication

I dedicate this book to the memory of my deceased parents: His Worship John William Gaswaga and Mrs Nakayima-Gaswaga for their sacrifice and relentless efforts to educate me. It is unfortunate that they did not live long to see and enjoy the fruits of their sweat!

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Abbreviations

ACHPR:	African Charter on Human and Peoples' Rights
ECHR:	European Convention for Human Rights
ICC:	International Criminal Court
ICCPR:	International Covenant on Civil and Political Rights
ICJ:	International Court of Justice
ICTR:	International Criminal Tribunal for Rwanda
ICTY:	International Criminal Tribunal for the Former Yugoslavia
ILC:	International Law Commission
RPE:	Rules of Procedure and Evidence
SCSL:	Special Court for Sierra Leone
SPSCU:	Special Panel for Serious Crimes Unit in East Timor
STL:	Special Tribunal for Lebanon
USA:	United States of America

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Abstract

Although the prosecution of international crimes is complex and relatively new with voluminous technical evidence and a blend of common law and civil law principles not familiar to many lawyers, some defendants, especially former political and army leaders, have insisted on self-representation thereby waiving their right to counsel. Consequently, such trials have been muddled up and inordinately delayed due to impunity and obstructionist behaviour of the defendants, and caused harm to all those involved as well as the international criminal justice system. The study examines the challenges to the implementation of self-representation and the administration of fair trials at the International Criminal Tribunal for the Former Yugoslavia (ICTY), and draws lessons for future trials at the International Criminal Court (ICC). In response to the challenges and problems caused by self-representation, some authors have advocated for the total abolition of this right while others support the appointment of amicus curiae or standby counsel and or court appointed counsel to assist the defendant in addition to other administrative facilities.

The researcher argues that rights, including that to self-representation, are attachments to human beings and cannot be revoked or restricted lightly. Further, that the above modalities of representation are insufficient to assist a self-represented defendant to attain a fair trial. Instead, it is recommended that a hybrid scheme of representation be introduced where the defendant is allowed to fully participate in the defence of his case in conjunction with a counsel to be appointed on full time basis, from beginning to end of the case, to assist him in securing a fair trial, even if such appointment may be against the will and wishes of the defendant. Further, that a legislative reform be effected to incorporate the above proposals in the ICC legal framework.

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Chapter One

1.0 Introduction and Background to the Study

> *"It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A Magistrate says to a man: 'you may ask any questions you like;' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?"*[1]

A new generation of international and internationalized criminal justice bodies designed to address the weaknesses of both international and domestic criminal courts emerged recently to prosecute suspects of international crimes. This is a post-World War Two international criminal justice mechanism established to handle heinous crimes in post conflict and transitional societies where rule of law institutions have collapsed or are unable to deal with high profile offenders. The right to counsel, regarded as a crucial guarantee to a fair trial to create and maintain standards for human rights and the quality of justice at the international as well as the national level, has grown and evolved and found its way into a number of international human rights instruments[2] as well as those establishing and governing proceedings before these international criminal adjudicating bodies.

According to the International Covenant on Civil and Political Rights (ICCPR), everyone charged with a criminal offence is *"...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*

[1] Lord Denning in *Pett vs. Greyhound Racing Association* (No.1) [1968] 2 ALL E.R. 545, at 549.
[2] See The Universal Declaration of Human Rights 1948. (Universal Declaration), The International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and People's Rights (ACHPR).

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."[3]

However, self-representation, although not an absolute right yet forms part and parcel of the package of rights to be enjoyed by defendants, still remains as a right to be exercised at the discretion of the accused.

It is noteworthy that the International Criminal Court (ICC) is not only the standard-bearer for the promotion of international accountability for the most egregious of fundamental human rights but also the court aspiring to a more advanced degree of fundamental fairness, efficiency, respect and integrity. Therefore, equality of arms, where, just like the prosecution, the defendant is represented by a host of well qualified and facilitated counsel whose paramount duty is to ensure that all the other rights deemed essential to criminal due process are observed, is crucial and unavoidable if this mandate is to be achieved by the ICC in future prosecutions.

After the dissolution of the Socialist Federal Republic of Yugoslavia, several republics were created with the assistance of the army, and within these republics, religious and ethnic groups continued to fight for independence.[4] This research looks into the impact or effects of

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[3] Article 14 (3) (d) of The International Covenant on Civil and Political Rights (ICCPR), General Assembly Resolution 2200A (XXI) of 16th December, 1966 (entered into force on 23rd March, 1976).

[4] M. Cherif Bassiouni & Peter Manikas, The Law of The International Criminal Tribunal for the Former Yugoslavia 1 & n.1 (1996). The Commission of Experts which gathered and analysed the evidence established that these conflicts had led to the commission of illegal acts including torture and relocation of civilians, ethnic cleansing, rape and sexual assault, the restraint of delivery of humanitarian aid and shelling of cities as well as illegal imprisonment by both Serbs and Croats. Final Report of the Commission of Experts (for the UN Secretary General) Established Pursuant to Security Council Resolution 780 (1992), at 33, para. 130, U.N. Doc. S/1994/674 (1994). See generally M. Cherrif Bassiouni, The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in The Former Yugoslavia, 5 Crim. L.F. 279 (1994). See also Security Council Resolution 771, which is the genesis of the

the right to self-representation on fair trials in international criminal prosecutions especially at the International Criminal Tribunal for Yugoslavia (ICTY) which was subsequently mandated to deal with those grave breaches of international humanitarian law since 1991.[5] Several defendants, starting with Milosevic, waived their right to counsel and opted for self-representation. The research therefore is out to demonstrate that exercising the longstanding and sacred right to self-representation especially in complex international crimes compromises the equality principle and ultimately the right to fair trial. The experiences and lessons learnt from these trials will be used to inform and assist the ICC avoid such pitfalls as those encountered by the ICTY in dealing with self- represented defendants so as to better the delivery of justice at the ICC. Arguably, the overall interests of justice are best met by the appointment of skilled and effective counsel. As an exception to this general rule, some defendants who are not even legally trained have succeeded in defending their cases effectively against experienced State lawyers, especially in domestic courts[6] as compared to international criminal courts. Vide an oral motion by Radovan Karadzic, the ICTY acquitted him on charges of genocide.[7] However, these are very rare to find and the court has to step in at every other stage of the trial to offer guidance on the substantive law and procedure.

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tribunal and instructs States and international humanitarian organizations to report violations of international humanitarian law to the Security Council. Resolution 780 then established a Commission of Experts to investigate and accumulate evidence regarding "grave breaches of the Geneva Conventions and other violations of international humanitarian law" occurring within the former Yugoslavia. Resolution 827 which was unanimously passed on 25th May, 1993 finally established the tribunal.

[5]See Security Council Resolution 808, U.N. SCOR, 48th Session, 3175th Meeting at 2, U.N. Doc. S/RES/808 (1993).

[6]*Godfrey Miyanda vs. Attorney General of Zambia*, ZMSC 19, 1985 Z.R 185 (S.C) (31 July 1985). The defendant had been dismissed as a Brigadier General from the Zambian army and charged with treason among other offences. In all the charges brought against him and those cases he filed against the State he represented himself up to the Supreme Court and won all of them. Brigadier General Miyanda had spent a considerable amount of time in the law library of the University of Zambia researching in preparation of all the cases.

[7]ICTY Press Release, The Hague, 28 June 2012, CS/1513e.

A fair trial is 'a hearing by an impartial and disinterested tribunal that renders judgment only after inquiry and consideration of evidence and facts as a whole.'[8] Further, the accused's legal rights must be safeguarded and respected[9] and ideally, sufficient and equal amount of legal counsel for all parties would be required. Various rights associated with a fair trial are explicitly proclaimed in numerous instruments and Constitutions in the world.

However, certain minimum procedural rights for an accused are recognized as "minimum guarantees" or basic rights necessary to a fair trial, by a number of major human rights and humanitarian law instruments.[10] These guarantees create a baseline below which a court cannot go without compromising fairness and effectiveness – the cardinal goals of the ICC. In some cases, more than the "minimum guarantee" may be necessary to provide a fair trial.[11] Although the list is non-exhaustive, the Rome Statute enunciates a number of "necessary" minimum guarantees recognized by the international community as including the following rights of the accused to be applied with "full equality"[12]: the right to be "tried without undue delay;"[13] to be present at trial;[14] to conduct a defence;[15] to counsel, assigned and paid for by

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[8] Black's Law Dictionary 596 (6th ed. 1990).
[9] *Id.* (citing Raney v. Commonwealth, 153 S.W.2d 935, 937-38 (1941) (Ky.))
[10] Commentary to the International Law Commission (ILC) Draft recognizes the standards for fair trial found in Articles 9, 14, and 15 of the International Covenant on Civil and Political Rights (ICCPR). *See* International Covenant on Civil and Political Rights, Dec. 16, 1966, arts. 9, 14, & 15, 999 U.N.T.S. 171. International standards are also enumerated in a number of international documents including: The African Charter on Human and People's Rights, June 27, 1981, arts. 3, 6, & 7, 21 I.L.M. 59 [hereinafter Banjul Charter]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 7, 1978, art. 75 (Fundamental Guarantees).
[11] *See* Frances C. Jacobs & Robin C.A. White, The European Convention on Human Rights 124 (2d ed. 1996) ("Compliance with Article 6 [ECHR] alone will not guarantee that there has been a fair trial.'); Harris, *supra* note, 1, at 376.
[12] Rome Statute of the International Criminal Court, Art. 67(1) (Rights of the accused). See also Article 14 of the ICCPR.
[13] *Id.* Art. 67(1) (c).
[14] See id. Art. 67(1) (d). This right is qualified by Article 63(2), which reads:
If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.
[15] *See id.* Art. 67(1) (d) ("in person or through legal assistance"). The right to present a defence includes the right to "raise defences and to present other evidence admissible under [the] Statute." *Id.* Art. 67(1) (e).

the tribunal (court) if necessary;[16] to examine, or have examined, the witnesses against him or her and obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;[17] to have the assistance of an interpreter;[18] and "not to be compelled to testify or confess to guilt."[19] Additionally, the Rome Statute provides for the right of the accused to a fair[20] and public hearing;[21] to be protected from more than one trial on the same charges,[22] and not to be found guilty of conduct which, at the time it took place, was not a crime within the court's jurisdiction.[23] It provides further safeguard that earlier drafts did not contain which strengthens the protection of the accused. A striking inclusion is the right to remain silent, "without such silence being a consideration in the determination of guilt or innocence."[24] The Statute also elevates the responsibility of the Prosecutor in relation to the accused, providing that a Prosecutor shall "disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.[25] These guarantees are individually expounded upon in Chapter Two (b).

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[16] *See Rome Statute,* Art. 67(1) (d).
[17] *Id.* Art. 67(1) (e).
[18] *See id.* Art. 67(1) (f).
[19] *See Id.* Art. 67(1) (g). Article 67 contains additional safeguards that I do not classify as necessary under international standards since they are not consistently found in leading human rights documents, including the right to remain silent "without such silence being a consideration in the determination of guilt or innocence," the right "to make an unsworn oral or written statement in his or her defence," and the right "[not] to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal." *Id.* art. 67(1).
[20] *See id.* Arts. 64(s), 67(1).
[21] *See Rome Statute*, Arts 64(2), 67(1). The court may decide that "special circumstances" require that portions of the trial are closed, to protect victims and witnesses or the confidentiality of information admitted into evidence. *Id.* art 6497).
[22] *See id.* Art. 20. Exceptions to this rule exist if previous proceedings "(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice." *Id.*
[23] *See id.* Art. 22.
[24] *Id.* art. 67(1) (g).
[25] Rome Statute, Art. 67(2).

According to Cassese,[26] the principle of fair trial is articulated into three main standards: 'equality of arms'[27]; 'publicity of proceedings' – to allow public scrutiny of the trial; and 'expeditiousness of proceedings' since the accused enjoys the presumption of innocence until he is found or pleads guilty.[28] Under the adversarial system it is indispensable for both parties, or contestants to have the same rights, otherwise there is no fair fight.[29] It implies that the accused may not be put at a serious procedural disadvantage with respect to the prosecutor. Similar worries do not exist in inquisitorial systems of justice, where proceedings are conceived of as an "official inquiry".[30]

[26] See Antonio Cassese, International Criminal Law, Second Edition, 2008, at 383.

[27] The question may also arise before national courts dealing with international crimes. It bears mentioning in this respect the decision of the Hague Court of Appeal in *Van Anraat*. The defence had claimed that the principle of equality of arms had been breached, for their financial means in the case had been largely insufficient (the defendant was assisted by his two counsels on the basis of assignment of legal assistance). The defence claimed that the lack of financial means was serious because the case concerned offences allegedly committed approximately 20 years earlier in another part of the world with a totally different culture and because the investigation had been carried out in many countries all over the world; for that reason, the defence had not had a reasonable chance to conduct an independent investigation. The Court dismissed the claim, noting that the defence counsel had had ample opportunity to make investigations and develop their legal points. The Court conceded that 'the present criminal case has exceptional proportions, partly because of its international dimensions and the fact that the offences (serious international crimes) would have taken place decades ago and mainly in a non-European country. In hearing such a case, especially when the police and the Public Prosecution Service apparently have ample (extra) financial means available for the execution of their tasks, one should make sure that the defence does not end up in a relatively disadvantageous position. This could be true if the present rules for financed legal aid should not acknowledge the special nature of this case. According to the Court, from this special nature arises the need for a defence carried out by two counsels working closely together, which indeed they did, also during the hearings. Moreover the defence brought forward, in general terms, a number of other aspects that hindered them in the performance of their duties, for lack of financial room' (§6.1).

[28] See the statutes of ICTY (Article 21(3), ICTR (Article 20(3), and the ICC (Article 66). See also Antonio Cassese, supra at 380 and 387.

[29] Two different notions of equality of arms exist. First, there is the concept developed in the case law of the European Court of Human Rights over the years. This applies to the accused only not to be put at a disadvantage vis-à-vis the prosecutor: human rights treaties do not guarantee the prosecutor the right to be put on a par with the defence. On the other hand, human rights treaties do not forbid, and sometime even require, the accused to be put in a 'better' or more advantageous position than the prosecution in order to preserve an overall balance in the proceedings (the prosecutor normally being better equipped than the defence for the collection of evidence). Secondly, fairness, which works both ways, must be emphasized so that the spectators of the contest or 'fight' are convinced by the proceedings as well as the outcome.

[30] In the ICTY case of *Zlatko Aleksovsi* (Decision on Prosecutor Appeal on Admissibility of Evidence) (§§22-8), the Appeal Chamber refused to apply more lenient standards of admissibility to (hearsay) evidence presented by the defence, stating that the prosecution is also entitled to a fair trial within the meaning of human rights conventions. This confusion in case law may be due to the fact that the two different conceptions of procedural equality may in certain situations clash.

The main focus of this work is to explore modalities of how an accused who waives his right to counsel can best be assisted to attain a fair trial in international criminal prosecutions. The application of the right to self-representation *vis-à-vis* the right to counsel will be examined as provided for and in light of the Statute and Rules of Procedure and Evidence (RPE) of the ICTY as well as the other rights availed to an accused person at trial with a view to strengthening of the administration of fair trials through legal representation. The best practices and lessons learnt to ensure fair trials through representation at the ICTR, ICTY and the Special Court for Sierra Leone (SCSL) shall be reviewed for the benefit of the conduct of trials at the ICC. The practice of the right to self-representation will also be discussed in this chapter broadly as dealt with by the various international criminal tribunals but specifically, in the following chapters, by the ICTY and prospectively for the ICC. Accordingly, I shall state what exists now in the first three chapters then make recommendations of new concepts in the last chapter.

1.1 Statement of the Problem

Given the complex nature of international crimes, the volume of technical evidence, the hybrid legal system and procedures involved, self-representation may not guarantee the right to a fair trial in international criminal prosecutions. An unrepresented (self-represented or *pro se*) defendant cannot measure up and may not get a fair trial as opposed to one properly represented by defence counsel since they both have to face a competent, adequately facilitated and well prepared team of prosecutors. Even defendants who are lawyers by profession are incapable of adequately defending themselves because of the volumes of technical evidence to be analysed and also having a vested interest in the case which impairs their objectivity and reasoning. A self-represented defendant lacks the skills to examine and cross-examine witnesses, and the courtroom tactics to forcefully put his case; as well as

identify the weaknesses in the prosecution case, point out the defects in the charge and confirm whether all due process rights are in place.

Of much importance to note here and precisely the more reason for representation is that, in such criminal prosecutions, an individual is arraigned against the whole might of the international community. States have all the required resources for the prosecution of domestic and international crimes; to investigate, accuse and prosecute one who is no longer in influential position or with access to limitless resources, such as former State leaders like Slobodan Milosevic, Radovan Karadzic, Charles Taylor, Jean-Paul Akayesu etc. or army commanders, following their deposition, arrest and arraignment.

Though provided for under Articles 21(4) (d) of the ICTY Statute and 67 (1) (d) of the Rome Statute, self-representation would to a large extent defeat the purpose of the ICC: to do justice to all through fair trials. Hence, such non-representation and or any representation of low quality amounts to no representation at all and to convictions of the innocent, which would ultimately call into question, the legitimacy of criminal convictions and the integrity of the ICC and the international criminal justice system as a whole.

The research was intended to provide modalities for the full enjoyment of the right to a fair trial by defendants, whether indigent or otherwise, and whether represented by counsel or not, appearing before the ICC without burdening the system with the challenges of self-representation. It will, accordingly, strengthen the defence at ICC and generally contribute to knowledge in the area of human rights, and specifically in administration of international criminal justice.

1.2 Research Questions

i. Does self-representation sufficiently ensure the right to fair trial in international criminal prosecutions?

ii. Can counsel imposed on an unwilling and uncooperative defendant, and therefore appearing without instructions, effectively defend and assist the accused to get a fair trial?

iii. Are the modalities of representation available in international criminal prosecutions (Amicus curiae, Standby counsel and Court appointed counsel) adequate to assist a pro se defendant to realise the right to a fair trial?

iv. What are the challenges at the ICC precipitating the need for an urgent review of the existing legal framework to more effectively secure the rights of pro se defendants?

1.3 Hypotheses

This study was conducted on the assumptions that:

i. a self-represented defendant may not receive a fair trial in international criminal prosecutions as compared to one who is duly represented by competent defence counsel.

ii. the assistance of a self-represented defendant with the services of amicus curiae, stand-by counsel, court appointed counsel or a team of behind-the-scenes counsel on an ad hoc basis may not be equated to the services rendered by defence counsel.

iii. since self-representation is harmful to the defendant, co-accused, the Bar and Bench and the entire international criminal justice system, a defence counsel should be imposed on a pro-se defendant all through the trial even without the authority or against the wishes of the defendant.

iv. international criminal tribunals being courts applying common law and civil law principles, a hybrid mechanism of representation allowing the participation of both

the defendant and defence counsel should be adopted by the ICC legal regime for future trials.

1.4 Objectives of the study

The study sought:

i. to analyse and evaluate the necessity and adequacy of the right to self-representation vis-à-vis the right to be defended by counsel in the proper conduct of international criminal trials.

ii. to critically examine the Statute and RPE of the ICTY, providing for the right to self-representation, in comparison to those of the ICTR, SCSL, ICC and Special Tribunal for Lebanon (STL).

iii. to examine the effects and challenges posed by self-represented defendants to achieving fair trials at the ICTY.

iv. to derive lessons and experiences from other international criminal tribunals to strengthen the conduct of future trials at the ICC.

1.5 Justification of the study

The study sought to provide an in-depth understanding and the importance of the right to self-representation as well as the right to counsel and further, whether the right to self-representation will guarantee fair trials to accused persons and or their co-accused arraigned before the ICC. The literature available on this topic was rather general with a holistic approach and mostly about the ICTY, ICTR and SCSL. This work specifically aimed at looking into the problems and challenges caused by self-represented defendants to the administration of fair trials at the ICTY, and in that regard, find appropriate modalities to ensure that pro se defendants get a fair trial in future at the ICC.

This subject had not been examined before from this angle yet international criminal trials, since the Second World War, are new therefore requiring constant critical review for the jurisprudence to develop. The research will not only strengthen the defence but also go a long way in guiding proceedings before the ICC and ensure orderly, timely and fair trials.

1.6 Scope of the study

The scope of the study was limited to the review of the decisions as well as those provisions of the Statute and Rules of Procedure and Evidence of the ICTY catering for self-representation and the right to counsel with a view to borrowing a leaf of good practices from the ICTR, SCSL and STL for the betterment and strengthening of the provision of legal representation services at the ICC in future trials. The research also involved analysis of judgments in domestic jurisdictions, expounding on the development, application, merits and challenges of the right to self-representation.

1.7 Research methodology

The study was essentially based on desk research considering a comparative and analytical methodology in addition to informal and unstructured discussions with very experienced Judges, prosecutors, defence counsel and amicus curiae of international criminal tribunals and courts.

The desk research method was the most suitable and preferred one, given that the disruptive behaviour of a defendant is usually unpredictable and unforeseen, and where it has happened, the whole spectacle and the decision of the court on the matter has been well captured in the record of proceedings. Therefore, visiting the court to attend the trials was not necessarily considered to be of much assistance to such a study dealing with what had already happened in ICTY trials regarding the right to self-representation, whose resolutions and lessons were intended to be applied prospectively by the ICC.

Further, the practice of international criminal law is highly specialised and presently at a magnitude unprecedented. The calibre of practitioners from amongst whom the study drew respondents was of such high quality that it was possible to adequately process the relevant questionnaire without necessitating a presence of the researcher in the field.

1.8 Literature review

Debate on the right to self-representation has been on-going for several years. Although a lot has generally been written on the subject as well as the right to counsel, there still remain some specific unanswered questions such as the topic under examination. Authors have written, touching lightly, on the topic.

Cerruti, in "Self-Representation in the International Arena: Striking a False Right of Spectacle", examines the origins and historical perspective of the application of the right to self-representation.[31] Considering self-representation to be a right without a reason, Cerruti contends that it has outlived its usefulness which only occurred during the early days of jury and adversarial trials in a Common Law system and should be revoked so as not to wreak havoc on the integrity and efficiency of the operations of the ICC. Pointing out the errors occasioned by the Faretta v. California[32]case to those involved in the trial and to the system itself, Cerruti contends that the practice of self-representation is utterly ill-conceived as an adopted right within the normative and structural matrix of the contemporary institutions of international criminal justice. This was clearly brought out in the recent cases of: Milosevic at ICTY,[33] Seselj, [34]Jean-Paul Akayesu, [35]Barayagwiza, [36]Ntahobali[37] at ICTR and, Gbao[38] and

[31]Eugene Cerruti (1989), "Devils Advocates: The Unnatural History of Lawyers 2. In: Andrew Roth & Jonathan Roth, Vol. 2, Pages 43-44, 46-47 & 49-52.
[32]*Faretta vs. California*, 422 United States Reports (US) 806 (1975).
[33]*Prosecutor vs. Milosevic*, Case No. IT-02-54
[34]*Prosecutor vs. Seselj,* Case No. IT-05-67
[35]*Prosecutor vs. Jean-Paul Akayesu,* Case No. ICTR-96-4-A
[36]*Prosecutor vs. Jean-Bosco Barayaguiza*, Case No. ICTR-97-19-T
[37]*Prosecutor vs. Arsene Shalom Ntahobali*, Case No. ICTR-97-21-T
[38]*Prosecutor vs. Augustine Gbao,* Case No. SCSL-04-15-T

Norman Hinga[39] at SCSL. The author does not however suggest any modalities on how a pro se defendant could be assisted to attain a fair trial in international criminal prosecutions but advocates for the right to self-representation to be struck off the Rome Statute of the ICC.

Scharf, in "Self-Representation versus Assignment of counsel before International Criminal Tribunals" makes out a case for former leaders, like Milosevic and Saddam Hussein, that to be given fair trials would best be guaranteed by appointing distinguished counsel to defend them and not by permitting them to act as their own lawyers.[40] Discussing case law of the ICTR, ICTY and SCSL, the author cites two reasons in support of this position: (i) the likelihood of a defendant to act in a disruptive manner and publicly challenge the court's authority, and (ii) the complexity of the case and the need for an orderly trial. The paper also traces and examines the history of Article 14 of the ICCPR, which lays down a defendant's right 'to defend himself in person or through legal assistance of his own choosing' as being the vehicle to ensure a fair trial. It was argued that the right to self-representation is absolute, complements the right to counsel and is not meant as a substitute thereof. In the same vein, the author contends that a court should appoint professional counsel to supplement self-representation. Conversely, whenever it is in the best interest of justice and in the interest of adequate and effective representation of the accused, the court should disallow self-representation and appoint professional counsel. Without concrete reasons, the author suggests that self-representation should be disallowed despite the fact that it's a right properly provided for in international legal instruments. He does not also show in what ways a defence counsel could be appointed and imposed even against the wishes of the accused, which is always the case where self-representation is preferred.[41]

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[39] *Prosecutor vs. Sam Hinga Norman,* Case No. SCSL-2004-14-T

[40] Michael P. Scharf (2006), "Self-representation versus Assignment of Counsel Before International Criminal Tribunals" Journal of International Criminal Justice, Oxford University Press Vol.4, no.1, Pages 31-46. Retrieved 08/05/2011 from URL: http://publicinternationallawandpolicygroup.org/library/law-articles/review

[41] Ibid.

Nsereko, in his article, "The Right to Self Representation before the International Criminal Tribunal for the Former Yugoslavia", describes the participation of a lawyer in any criminal proceedings on behalf of a suspect or accused person as being essential to a fair trial.[42] The author enumerates reasons why legal representation would particularly be vital under the adversarial as opposed to inquisitorial system of justice, and further, before international tribunals which he says deal with lengthy and complex matters involving hundreds of witnesses, masses of technical evidence that may not be intelligible to someone not knowledgeable in law. In light of the topic at hand, the author does not discuss how a self-represented defendant could be assisted to get a fair trial especially if he rejects to engage defence counsel.

In USA v Ali Hamza Ahmad S. Bahlul,[43] the defendant, while appearing before the United States Military Commission, rejected the detailed defence counsel and insisted on representing himself, if not, by a Yemeni attorney of his own choosing. He argued that the very law which established a defendant's fundamental right to represent himself also provided for the concurrent right to refuse the services of appointed defence counsel. The Commission observed that although the right to counsel is not absolute, forcing a lawyer on an unwilling and uncooperative pro se defendant would only lead him to believe that the law contrives against him since the right to defend is personal. Further, that the defendant's choice must be honoured out of 'that respect for the individual which is the lifeblood of the law. 'The authority is relevant only that it does not look at the challenges of self-representation.

[42] Daniel D. Ntanda Nsereko (2004), "The Right to Legal Representation before the ICTR. Pp. 20-21,available at http://www.isrcl.org/Papers/2004/Nsereko.pdf
[43]Memorandum of law 2/9/2004

Hashimoto, in "Defending the right of self-representation: An empirical look at the pro se felony defendant", defends the right to self-representation, states that incompetence and distrust of the appointed counsel are some of the reasons why defendants waive the right to counsel even when the United States Supreme Court has assumed that this right in practice hurts, rather than helps such defendants and disputes the adage that "he who represents himself has a fool for a client."[44] Citing Faretta, the author concludes that the right of self-representation is not necessarily inconsistent with the due process of right to a fair trial, and in practice, it protects the interest of defendants in presenting their cases as effectively as possible although the potential for its abuse still remains.[45] Hashimoto goes on to suggest several modifications to the existing structures to protect the constitutional rights of defendants seeking to invoke the right of self-representation such as; Court offering counsel before allowing the accused to knowingly and intelligently waive his right to counsel, and to appoint standby or advisory counsel whose roles are to be clearly set out to assist the defendants. However, Hashimoto's empirical study is based on domestic criminal prosecution which may not present the challenges that international criminal prosecutions pose.

Romano et al in "Internationalized Criminal Courts"[46]examine the main practical, legal and procedural problems, including representation, as well as managerial and financial aspects with which internationalized courts and tribunals may have to come to grips with since they impact on the fairness of the trials. Though relevant to the subject matter, the authors do not discuss the challenges posed by self-represented defendants, which is at the heart of this research.

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[44]Erica J. Hashimoto (2007),"Defending the Right of Self-representation: An Empirical Look at the Prose Felony Defendant." UGA Legal Studies Research Paper No.06-002. North Carolina Law Review, Vol.85, No.2 Pages 423-487. Retrieved 11/05/2011 from URL: http://papers.ssrn.com

[45]*Faretta v. California* (1975) 422 (US) 806 at 807

[46] Romano. C, Nollkaemper, A. and Kleffner, J. (2004) (Eds). Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia. New York: Oxford University Press.

Zappala, In "Human Rights in International Criminal Prosecutions," emphasises legal representation in international criminal trials because of the complexity of the applicable law and the difficulties linked to possible investigations which the defence should conduct on its own in the adversarial system.[47]He also discusses the situations where defence counsel and the different types of legal assistance, namely standby counsel, amicus curiae and court appointed counsel could be assigned to a defendant. However, his work does not look at the modalities of how a defence counsel could assist an unwilling accused to secure a fair trial.

Knoops in "Theory and practice of international and internationalised criminal proceedings" examines how the right to self-representation has been litigated before ICTY (Milosevic), and the assistance accorded to unrepresented defendants by the court to ensure a fair trial, as well as the distinct roles of standby counsel, amicus curiae and defence counsel.[48] Knoops' contention that the right to represent oneself in person is not absolute supports the hypothesis of this study. Be that as it may, the author does not articulate the extent to which self-representation impacts on the right to fair trial.

Kerr, in "Fair Trials at International Criminal Tribunals: Examining the parameters of the International Right to Counsel," offers a critical evaluation of the right to counsel and waiver of counsel, assignment of counsel, the principle of equality of arms and right to self-representation as practiced at and implemented by the ICTY, ICTR, SCSL, and the Special Panel for Serious Crimes Unit in East Timor.[49] She argues that because international tribunals such as the ICTY and ICTR were designed to be largely adversarial, the right to counsel was

[47] Salvatore Zappala (2003), "Human Rights in International Criminal Proceedings." Oxford: Oxford University Press, p 63.
[48] G. J. Alexander Knoops (2005)Theory and Practice of International and Internationalized Criminal Proceedings by at p. 69, and also Rule 80 (b) of ICTY Rules of Procedure and Evidence (RPE)
[49] Kate Kerr (2005), "Fair Trial at International Criminal Tribunals: Examining the Parameters of the International Right to Council." 36 Georgetown. Journal of International Law. 1227.

determined to be critical to guarantee fairness at the proceedings. The work shows how the tribunal established the parameters (representing the baseline standard for the international notion) of a model right to counsel through a decade of litigation which include; the determination of the point at which the right to counsel attaches, the standard for the waiver of an accused, the remedy to apply to evidence taken in violation of the right to counsel, the standards that defence counsel must meet in order to work at the tribunals and the limitations of the right to self-representation. Kerr also addresses the right to counsel in future courts and gives her views which will provide valuable guidance to this research. The author does not, however, offer any solutions with regard to imposition of counsel on unwilling defendant, and how self-representation affects the right to fair trial.

Gallant, in "The Role and powers of Defence Counsel in the Rome Statute of the International Criminal Court,"[50] analyses the role and adequacy of the powers of defence counsel and lambasts the ICC Statute for omitting provisions guaranteeing sufficient funding for fair defence investigations, privileges and immunities of defence counsel and staff to investigate facts of the case in the States in which evidence is or may be located or in which the alleged crimes occurred, thereby substantially undermining the principle of 'equality of arms' and consequently the right to counsel, which is a cornerstone of fair criminal justice. He advocates for the right to counsel to attach as soon as the accused is surrendered or voluntarily appears before the court. This work is relevant to the research but does not touch the main issues of self-representation and fair trial.

The Protocols Additional to the Geneva Conventions guarantee all necessary rights and means of defence to the accused before and during trial.[51]

[50] Kenneth S. Gallant (2000), "The Role and Powers of Defence Council in the Rome Statute of the International Criminal Court", the International Lawyer, Vol.34 NO.1 Pp. 21-44
[51] (12th August 1948) and that of 1977,

Article 9 of the Charter of the "International Military Tribunal for the Far East"[52]caters for a fair trial for the accused and Article 9 (c) guarantees the right to counsel of the accused's own choice. However, the Tribunal could only appoint counsel for an accused, if in its judgment, such appointment was necessary for a fair trial. Further, although self-representation was allowed, under Article 15 (f), "an accused was not allowed to address the Tribunal unless through his Counsel."

"The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal-the London Charter," provides for a fair trial for defendants as stipulated in Article 16 (d) "in no uncertain terms allowed the accused to conduct his own defence but with an option to have the assistance of counsel" and under Article 16 (e),"the accused himself could present evidence in support of his defence and cross-examine any witnesses called by the prosecution or do so through counsel."[53]

Article 20 (4) (b) of the Statute of the "International Criminal Tribunal for Rwanda (ICTR)" allows an accused person to communicate with and or be defended by a counsel of his or her own choosing while Article 20 (4) (d) provides for self-representation. If the accused does not have but desires legal assistance, he should be informed of this right and have legal assistance assigned to him or her where the interests of justice so require. The Amended Statute of the ICTY"[54] is worded in similar terms as that of ICTR with regard to the minimum guarantees for a fair trial. Both statutes, just like the London or Nuremberg

[52] Adopted 19th January 1946 (as amended on 25th April 1946)
[53] Adopted by the Big Four Powers in London on 8th August, 1945, 82 UNTS 279. Also referred to as the *Nuremberg Charter*.
[54] As amended on 17th May 2002.

Charter, permit an un-represented accused person to obtain the attendance and the examination of witnesses on his behalf as well as to cross-examine prosecution witnesses.

The Rome Statute establishing the ICC is not an exception to the provision of the above minimum guarantees to a fair trial.[55] Article 67(1) (d) thereof is a replica of Article 20 (4) (d) of the ICTR Statute, Article 21 (4) (d) of the ICTY Statute and Article 16(4) (d) of the Statute of the Special Tribunal for Lebanon (STL). Article 63 (2) forms an exception to the effect that the court shall make provision for an accused who continues to disrupt the trial to be removed but allowed to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. This, although not expressly provided for in the Statute, presupposes that the accused must be legally represented at all times. It also stands to reason that if a pro se defendant is removed under such circumstances then he will not have any representation in the court.

From the literature review analysed, it is very clear that although the problems caused by self-representation have been outlined and acknowledged, none of the authors has discussed the effects of self-representation on the attainment of the right to fair trial in international criminal prosecutions, let alone concrete solutions to the problems, which forms the subject of discussion in this research. Whereas some authors argue that the right to counsel is very critical to such proceedings and that the right to self-representation should be struck off the ICC statute, as was the case in the Saddam Hussein trial, others also contend that self-representation is an indispensable human right. Further, although the pieces of legislations, reviewed above, expressly provide for the right to self-representation, they fail to prescribe the procedure to be followed while exercising the said right in order for the defendant to attain a fair trial. The lack of a clear legal framework on the matter is what has led to the

[55] (as corrected on 10th November 1998 and 12th July 1999)

difficulties cited herein below and abuses by some defendants directed to the authority and integrity of the court. The above failures or limitations leave a glaring gap and a host of unanswered or inadequately answered questions in the literature available on the subject, issues which this research sets out to address.

1.9 Synopsis

The study comprises of four chapters.

Chapter One is an introduction and background to the study. Included in this chapter also is the statement of the problem and objectives, research questions, scope and justification of the study, as well as research methodology, literature review and the synopsis.

In Chapter Two, the study focuses on the concept of self-representation as well as the practice of the right to self-representation and the right to counsel in light of the other fair trial rights enjoyed by a defendant in international criminal prosecutions.

Chapter Three looks into the challenges posed by self-represented defendants in the realization of the right to fair trial at the ICTY.

Chapter Four considers suitable recommendations and a conclusion.

1.10 Conclusion

Following the above discussion and analysis of self-represented defendants in international criminal prosecutions, and the conclusion on the inadequacy of available literature, it is pertinent, in the next chapter, to further delve into the concept of the right to self-representation and its operation in light of the other fair trial rights.

Chapter Two

The conceptual context of the right to self-representation and its practice in light of the other fair trial rights

2.0 Introduction

> *"It is clear that in an area of law so thoroughly politicized, culturally freighted and passionately punitive as war crimes, there is a need for even greater protections for the accused."*[56]

In this chapter, the study focuses on the discussion of practice of the right to self-representation, the fair trial rights, the right to counsel and the different types of legal assistance a pro se defendant may benefit from when charged with serious crimes.

The chapter is divided into three major parts. Part A examines the concept, definition, nature and scope of the right to self-representation as well as its evolution from a historical to contemporary perspective. The reasons for and or causes of self-representation are outlined and discussed. In addition, analytical arguments are made in respect of the right to self-representation. In part B, the practice of the right to self-representation is discussed in light of the other due process rights enjoyed by a defendant but with a view to ensuring fair trials. This encompasses an examination of the right to fair trial, bearing in mind the relevant benchmarks, and some of its constituent rights such as the right to: equal treatment for all before the law, be tried without undue delay, be present at trial, presumption of innocence, a fair and public hearing by a competent and independent court, to information about the charge and time and facilities to prepare the defence, conduct a defence in person or by counsel - assigned and paid for by the court if necessary, call and examine witnesses, have

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[56] G.J. Simpson, 'War Crimes, A Critical Introduction', in T.L.H. McCormack and G.J. Simpson (eds.), *The Law of War Crimes*, The Hague, Kluwer Law International, 1997, pp. 1-30,p.15.

the assistance of an interpreter, not to be compelled to testify or confess to guilt, to remain silent etc. Part C examines the right to counsel and also covers the different methods and types of legal assistance that may benefit a defendant in criminal proceedings namely amicus curiae, standby counsel and or court appointed counsel. Modalities of representing an unwilling and uncooperative defendant are also examined. Finally, this part includes a conclusion of the chapter. I shall now proceed to elaborate on each of these matters herein below.

2.1 The concept and scope of the right to self-representation

The right to self-representation is examined in its evolution from a historical to contemporary perspective. The study then makes different analytical arguments regarding the right to self-representation, its causes as well as context and nature. The domestic case law referred to may not necessarily be directly relevant but in one way or another touches upon some aspects under discussion.

2.1.1 Historical perspective of the right to self-representation

In ancient times, every great civilization had its dispute resolution mechanisms and laws and pro se litigants used to be the only litigants all over the world. There was not a single lawyer to be found on the globe. Those involved in law suits or accused of crimes represented themselves.[57] The end of the 17th Century saw the breakthrough moment for the advancement of a right to counsel in adversary criminal trial which traces to the Treason Trials Act of 1696. This limited introduction of defence counsel was described as the tripping point that marked the critical transition to a modern, genuinely two-sided adversarial trial practice with its roster of attendant rights – all of which are predicated upon the existence of counsel. This

[57] The plaintiff stood and stated a case, and the defendant gave a reply. In ancient times, a verdict was not made strictly in accordance with the technicalities of the law codes, which were intended only for guidance, but according to what the judge considered right, fair and just. See Andrew Roth and Jonathan Roth, Devil's Advocates: The Unnatural History of Lawyers 2 (1989).

unfolded slowly over the 18th and into the 19th centuries in England and then spread more rapidly, and formatively, in the colonies.[58]

Accompanying the acceptance of the notion of the rule of law, Goldschmidt wrote, is the law's ever-increasing complexity as well as the necessity of obtaining assistance from those with specialized knowledge of its contents to access the justice that is law's promise.[59] That ironically, the necessity of legal counsel coexists with societal anti-lawyer sentiment, a relationship with a long history beginning in ancient Greece.[60] However, what is different today from previous historical periods is that the pro se litigant is returning to court, insisting on access to justice without a lawyer. Such litigants are most common in domestic jurisdictions, and increasingly now in international criminal tribunals, especially former military and political vanguards.

2.1.2 The contemporary perspective of the right to self-representation

It has already been shown in Chapter One that an ideal criminal trial is one conducted under the conditions described by the provisions of Article 14 of the ICCPR, these only being the baseline guarantees and rights protecting the accused's right to a fair trial. Article 14(3) (d) expressly provides for two ways in which the defence in a criminal trial can be presented: 'in person or through legal assistance of counsel.'

Pro se or self-representation is when the defendant in a criminal case represents themselves in a court of law. Instead of relying on a lawyer for representation and advice, a pro se defendant researches and argues their own case in front of the judge or judge and the jury. A

[58] Eugene Cerruti (1989), "Devils Advocates: The Unnatural History of Lawyers 2. In: Andrew Roth & Jonathan Roth, Vol. 2, Pages 43-44, 46-47 & 49-52.
[59] Jona Goldschmidt, The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance, Family Court Review Volume 40, Issue 1,pp 36–62, January 2002. Available at http://onlinelibrary.wiley.com/doi/10.1111/j.174-1617.2002.tb00818.x/abstract.
[60] Ibid.

defendant who represents themselves in court, whether domestic or international is called a "pro se or self-represented defendant". Most lawyers and judges would agree that pro se representation is not always the best decision for a defendant facing criminal charges, more so in international crimes which would require fluency in substantive and procedural legal aspects of international humanitarian law, comparative law, and trial and written advocacy skills.[61] Many legal professionals can point to figures and statistics which demonstrate where attempts at self-representation have failed and led to unnecessary convictions.[62]

In addition, as Gillett avers, self-representation guarantees the accused's right to choose how they will run their defence but it does not guarantee a fair trial and a fair trial can only be guaranteed by the proper running of the trial by the Trial Chamber.[63]

In the case of Johnson v Zerbst, a warning was sounded when the court stated that:

> *"The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done'. It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer – to the untrained layman – may appear intricate, complex, and mysterious."*[64]

However, as alluded to in Chapter One, and enshrined in several international human rights instruments[65] as well as numerous national Constitutions[66], and in almost identical wording,

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[61] M.S. Ellis, "The evolution of defence counsel appearing before the international criminal tribunal for the former Yugoslavia", 37 New England Law Review (2003), at 970-971.
[62] http://www.legalmatch.com/law-library/article/self-representation-in-criminal-cases.html
[63] Matthew Gillett, Prosecutor at ICTY and Member of the Peace and Justice Initiative (The views expressed herein are personal and they do not reflect the position of Peace and Justice Initiative, The Hague). E mail correspondence. 15, April 2012. .
[64] 304 U.S (1938) at 462.
[65] See art. 6(3) (c) ECHR and art. 14(3) (d) ICCPR also Human Rights Committee (HRC), ICCPR General Comment No. 13, 13 April 1984.
[66] See art. 28(3) (d) of the 1995 Constitution of Uganda.

the right to be tried in one's presence, and to conduct his own defence in person is one of the fundamental minimum guarantees accorded to a defendant to ensure a fair trial.[67] Indeed the drafters of the statute clearly viewed the right to self-representation as an indispensable cornerstone of justice, placing it on a par with defendant's other rights to due process. But some scholars have wondered whether self-representation, given the grave implications associated with it, is indeed a fundamental right entrenched in international law. The drafting history of Article 14(3) (d) of the ICCPR which entitles an accused to defend himself in person shows that the United States of America provided the first substantive contributions to the first session of the drafting committee of the Universal Declaration of Human Rights. These provisions later became part of Article 14 of the ICCPR, but were originally aimed to be included in the proposed Articles 6 and 27 of the Declaration. It is noteworthy that the initial proposal for the text that eventually became Article 14 of the ICCPR included only the right to consult with and be represented by counsel, there was no right to self-representation. The revision introduced at the second session provided that everyone is entitled to the aid of counsel. It was not until the end of the committee's fifth session that the eventual Article 14 of the ICCPR was drafted to the effect that, 'in the determination of any criminal charge, one is entitled to defend himself in person or through legal assistance'.

At the sixth session, 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. This, Scharf[68] observes, evinces the limited weight the drafters placed on the wording which the Milosevic trial chamber has interpreted as creating a right to self-representation. Further, distinguished

[67] See Rome Statute, supra art. 67(1) (d), art. 21(4) (d) of the ICTY Statute, art. 20(4) (d) ICTR Statute, and art. 17(4) (d) of the SCSL Statute.
[68] Professor Michael P. Scharf: Self-Representation versus Assignment of counsel before International Criminal Tribunals, Journal of International Criminal Justice, Vol. 4, No. 1, pp. 31-46, 2006. available at http://jicj.oxfordjournals.org/content/4/1/31.full.pdf

scholars like Bassiouni[69] have not read this clause as imposing a right to self-representation. Bassiouni contends that the right to self-representation compliments the right to counsel and is not meant as a substitute thereof. He then outlines the purpose of the right to self-representation as to assure the accused of the right to participate in his or her defence, including directing the defence, rejecting appointed counsel, and conducting his or her own defence under certain circumstances. Whereas Egonda-Ntende[70] avers that the right to self-representation is an illusionary right, Cerruti[71] considers it as a right without reason, which has outlived its usefulness that had only occurred during the early days of jury and adversarial trials in common law jurisdictions. It is critical to note that the common law jurisdictions referred to by Cerruti are national by nature and not international.

2.1.3 Causes of self-representation

Multiple causes are responsible for self-representation, including increased literacy, consumerism, a sense of rugged individualism, the costs of litigation and attorney's fees, anti-lawyer sentiment, and the breakdown of family and religious institutions that formerly resolved many disputes that are now presented to courts instead. The latter is normally common in post conflict or transitional societies where the domestic dispute resolution mechanisms have totally broken down and international tribunals set up against such background. The other reasons cited range from the incompetence of lawyers to negligence and lack of interest and commitment in a client's case. The suspicion of existence of a conspiracy theory to convict former leaders, rejection of court's jurisdiction[72] (Milosevic,

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[69] Professor M. C. Bassiouni. "Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions', 3 *Duke Journal of Comparative and International Law* (1993), at 283. Bassiouni studied 139 constitutions to determine the level of international protections given to a defendant with respect to various types of rights. He found that the right to self-representation is guaranteed in only 33 of the national constitutions that he surveyed.

[70] Egonda-Ntende, Chief Justice (Former Justice of Appeal, East Timor UNTAET and International Judge, hybrid courts in Kosovo, UNMIK). Face-to-face interview. 23 June 2012, Victoria, Seychelles.

[71] Professor Eugene Cerruti, Self-Representation in the International Arena: Striking a False Right of Spectacle.

[72] S. Jennings; 'Self-Representation under Scrutiny Karadzic case highlights sensitivities and challenges around key principle of Justice', International Justice, ICTY TRI Issue 623 6 November 2009.

Karadzic) and the intention to delay and frustrate the proceedings for various reasons, have been the major causes of having self-represented defendants before the international criminal tribunals. In cases of indigence, since defence counsel are not of the accused's own choosing but rather chosen, allocated and paid for by the court, some defendants suspect them to be part of the implementation machinery of the conspiracy theory to effect their conviction and detention under all circumstances. Other litigants have considered such proceedings as political rather than legal trials and, as such, believe they are in a better position, as compared to a lawyer, to tell the story to the court first-hand or even turn the court into a political platform to communicate to their supporters at home. This presupposes not only the full attendance of the trial by the defendant in person but also a clear comprehension and grasp of the proceedings all through.

2.1.4 The nature, context and analytical arguments of the right to self-representation

The thesis also briefly examines the various options of self-representation. One option considered during the study is for an argument in favour of its total abolition from the statute books given the gravity of the charges, complex procedures and volume of technical evidence involved. Looking at the delays and problems encountered during such trials, as articulated in the case law discussed in front, in chapter three, one would be convinced to support the view that self-representation should be totally abolished. It is harmful to the accused, and impedes his attainment of a fair trial. Further, litigating international criminal law is a new phenomenon which has to date not yet been properly grasped by lawyers. However, such a drastic step, like it happened in the Iraqi trial of Saddam Hussein,[73] may be heavily lambasted. It may not easily be acceptable because it has been a sacred right since time of civilization for a defendant to represent himself, with the bottom line being that as long as

[73] H. Weistern and R. Boudreaux, 'Hussein Will Not Be Allowed to Represent Himself at Trial', Los Angeles Times, 21 September 2005.

one is human then that right cannot be taken away. For instance, Jorgensen suggested that rather than removing that right from the statute, the rules could have stipulated the circumstances under which it could be restricted or revoked and also institute appropriate tools for the judges to control proceedings, including mandatory assignment of counsel if necessary.[74]

One of the greatest dangers related to the foregoing, and the accused person exercising his right to choose how he should conduct his defence, is that in developing countries many people are poor, illiterate and lack the knowledge to make an informed or meaningful choice. For instance, in pre-colonial times, African communities had their own law that governed them. Some of the law in force now was imported, and some of it is still in Victorian mode as statutes of general application.[75] The technical nature of this law, imported from different cultures and settings, possess some difficulties. A case in point is the Republic of South Africa applying common-law and Roman Dutch law yet the majority of the people are Africans and alien to the values and settings of the Roman and Dutch societies from where it was borrowed.

It is worth noting that international criminal trials have tended to adopt the American justice system which is either alien or inimical to how trials are undertaken in most parts of the world. There is need to go back to the drawing board to ensure that international criminal trials reflect widely accepted approaches and especially in designing tribunals specific to

[74] Nina H.B. Jorgensen, The Problem of Self Representation at International Criminal Tribunals, Striking a Balance between Fairness and Effectiveness, page 76 – 77. The Iraqi Tribunal now stands out as the first international or internationalized tribunal that does not recognize the right to self-representation. In a sense, this may be viewed as a bold and sensible move, building on the experience of the other tribunals, in which allowing defendants to represent themselves has led to delays and difficulties in the smooth administration of justice (See M. P. Scharf and C.M Rassi, 'Do Former Leaders Have an International Right to Self Representation in War Crimes Trials?, 20 Ohio State Journal on Dispute Resolution (2005) 3-42). However, such an outright removal of an internationally recognized minimum fair trial to ensure a fair outcome overall, must surely be seen as a regressive step.

[75] Statutes of general application are all the laws that were in force in England before the 1st of January 1900.

certain jurisdictions, it is critical that effort is made to ensure the overall court procedure adopted reflects the criminal procedure that the defendants, witnesses and victims are used to in their prior lives.

Furthermore, even if one were to agree that the right to self-representation be totally abolished, as Cerutti[76] and Gaynor[77] suggest, this would raise new constitutional or human rights questions begging for equally difficult answers. The immediate one would be in respect of imposition of counsel on all defendants, including those that are unwilling and uncooperative. How can counsel then be expected to act for a defendant who has not given him instructions? The other argument would be in favour of a consideration of both rights: the right for an accused to defend himself by actively participating in his trial together with an effective counsel, from beginning to end of the case. This arrangement would suit international criminal trials. But even this proposition, compared to those above, has some challenges and limitations, though fewer, as is discussed in detail in chapters three and four ahead. The former proposition of imposition of counsel against the wishes of a defendant is also further discussed herein below in this chapter.

In the United States, vide Faretta, historical evidence showed that a right of self-representation had a better defence as existed since the founding of the United States of America, and while interpreting the Sixth amendment it was concluded that even though as an objective matter most defendants would receive a better defence if they accepted a lawyer's representation, a knowing and intelligent waiver must be honoured out of that respect for the individual which is the life blood of the law. This right exists regardless of the

[76] Professor Eugene Cerutti, "Self-representation in the international arena: Striking a false right of spectacle", (2009) [40] Georgetown Journal of International Law 919, 921.
[77] Fergal Gaynor Trial Attorney Office of the Prosecutor, ICTY, (and formerly at ICTR). Email correspondence. 13, April 2012. The views expressed herein are personal and they do not reflect the position of Peace and Justice Initiative, The Hague.

seriousness of a case and cannot be controlled by financial restrictions. However, the right to self-representation is not without limitations, it is not absolute. A trial court may limit, refuse or terminate it any time and appoint or impose standby counsel, even over a defendant's objections. However, the right should not become an obstacle to the achievement of a fair trial.

In some jurisdictions, the indisputable right to self-representation is expressly disregarded and ousted by legislation which emphasizes legal assistance in capital and very serious offences likely to result into long term jail sentences or severe consequences on the offender and or his family.[78] The position for appellate and Constitutional Courts is the same.[79] Most recently in Iraq, in the Saddam Hussein trial, the right to self-representation was expressly removed from the Statute whereupon the defendant had to engage services of defence counsel. [80]

Recognizing that this right is not categorically inviolable, England, Scotland, Canada, New Zealand and Australia have all developed the principle that, in order to protect vulnerable witnesses from trauma, courts may severely restrict the right of defendants to represent themselves in sexual assault trials, Scotland even going so far as to forbid such defendants from conducting any portion of their defence in person. In Venezuela, for instance, no one may appear before a judge unless represented by a lawyer.[81] Hence, the defendant is left with no choice since he is considered more often than not inexperienced, unfamiliar with court

[78] See s. 41 of the Austrian Code of Criminal Procedure; art. 317 of the French Code of Criminal Procedure; s. 140 of the German Code of Criminal Procedure; art. 97 of the Italian Code of Criminal Procedure; art. (28)(3)(e) of the Constitution of Uganda. See Prosecution's Submissions on Self-Representation, *Krajisnik* (IT-00-39-t), 31 May 2005, §§ 42 ff.
[79] *McKlaskle v Wiggins*, 465 U.S. 168 (1984).
[80] The Statute of the Iraqi Special Tribunal for Crimes against Humanity, Law No. 1 of 2003.
[81] Rogelio Pérez-Perdomo, "The Venezuelan Legal Profession: Lawyers in an Inegalitarian Society," in *Lawyers in Society: The Civil Law World,* vol. 2, eds. Richard L. Abel and Philip S.C. Lewis, 380-399 (Berkeley: University of California Press, 1988), 387.

protocols, not knowledgeable in law and generally legally incompetent yet the imposition of counsel is presumed to be in his best interest. Even if the accused is a lawyer,[82] self-representation should be strongly discouraged and avoided completely especially in international crimes which are complex, with voluminous records of technical evidence and so intellectually demanding even to legal professionals. The danger posed by self-representation can be equated to the challenges arising from self-diagnosis by medical practitioners. As has been aptly concluded in the medical practitioners' arena, self-diagnosis (the process of diagnosing or identifying, medical conditions in oneself), especially for potentially serious conditions, is prone to error and may be potentially dangerous if inappropriate decisions are made on the basis of a misdiagnosis and is therefore strongly and officially discouraged.

Further, the usual practice in the common law system is to ensure that the accused fully understands the options at his disposal and the corresponding repercussions of such unequivocal election made voluntarily and intelligently to represent oneself as long as it is not calculated to unduly protract the trial or in any way abuse the judicial process.[83] Unlike the common law system, the civil law system is inflexible and limits the accused to few options or none at all,[84] by imposing counsel on him. Although international criminal adjudicating bodies are a hybrid of both of these legal systems, the common law concepts are more dominant and have been applied and followed in a number of cases.[85]

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[82] See *Prosecutor v Milosevic* ICTY (IT-02-54-T). The accused was a lawyer by profession.
[83] Judges must confirm that the accused resorts to his right to self-representation 'voluntarily and intelligently'. *Faretta v. California*, 422 United States Reports (US) 806 (1975), at 807. Moreover, there are no high demands for procedural capacity: when an accused is mentally competent to stand trial, he is competent to choose self-representation. See *Godinez, Warden v. Moran*, 509 US 389 (1993), at 399 and 400.
[84] See Jarinde Temminck Tuinstra, Self-Representation in International Criminal Justice, Assisting an Accused to Represent Himself: Appointment of Amici Curiae as the Most Appropriate Option. Journal of International Criminal Justice, March, 2006, page 2.
[85] International Criminal Courts have made an effort to ascertain whether an accused's request for self-representation was unequivocal and made knowingly and voluntarily, as required under common law; e.g. Appeals Judgment, *Kambanda* (ICTR-97-23-AS), Appeals Chamber, 19 October 200, §§ 16 ff; Appeals

Consideration has been made of all the above views regarding the definition, nature and context of the right to self-representation. It cannot be said that the right to self-representation compliments the right to counsel since the former is an unalienable right and therefore, a cornerstone to the administration of the right to fair trial. Conversely, the right to counsel should complement the right to self-representation. Therefore, this study will adopt the definition of self-representation as enshrined in Article 14 of the ICCPR.

2.2 The right to fair trial

A defendant's access to fundamental fair trial rights is a key indicator of equitability in any system of criminal justice, as proceedings lose their credibility and integrity without the consistent application of due process standards. Therefore, for the ICC to succeed and be considered credible it must guarantee and afford the defendants a fair trial. This is crucial in the ever increasing effort to create and maintain standards for human rights at international and national levels.[86]

Article 14 of the ICCPR is of a particularly complex nature, combining various guarantees with different scopes of application. The provision starts with the right-to-equal arms principle before the courts and tribunals, regardless of the nature of proceedings before such

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Chamber Judgment, *Akayesu* (ICRT-96-4-A), Appeals Chamber, 1 June 2001, § 65; Reasons for Oral Decision Denying Mr. Krajisnik's Request to Proceed Unrepresented by Counsel, *Krajisnik* (IT-00-39-T), Trial Chamber, 18 August 2005 (hereinafter: Reasons for Oral Decision); Decision following Registrar's Notification of Radovan Stankovic's Request for Self-Representation, *Jankovic and Stankovic* (IT-96-23/2-PT), Trial Chamber, 19 August 2005, §§ 16-18 (hereinafter: Decision following Registrar's Notification); Decision on the Application of Samuel Hinga Norman for Self-representation under article 17(4)(d) of the Statute of the Special Court. *Norman, Fofana and Kondewa* (SCSL-04-14-T), Trial Chamber, 8 June 2004, § 20 (hereinafter: Decision on the Application): Decision on Application for Leave to Appeal Gbao – Decision on Application to Withdraw Counsel, *Sesay, Kallon and Gbao* (SCSL-2004-15-T), Trial Chamber, 4 August 2004, § 56; Gbao – Decision on Appeal against Decision on Withdrawal of Counsel, *Sesay, Kallon and Gbao* (SCSL-04-15-AR73), Appeals Chamber, 23 November 2004, § 49.

[86] See David Harris, "*The Right to a Fair Trial in Criminal Proceedings as a Human Right*", 16 INT'L & COMP. L.Q. 352 (1967) cited by Basil Ugochukwu; 'Comparative_Fair_Trial_Between_the_African_and_European_Human_Rights_Systems', p.2. LL.M Thesis presented at Central European University, Budapest, 2008. Retrieved from URL , http://www.academia.edu/941388/Comparative_Fair_Trial_Between_the_African_and_European_Human_Rights_Systems.

bodies, and to a fair trial which is a key element of human rights protection and serves as a procedural means to safeguard the rule of law. It entitles individuals to a public hearing by a competent, independent and impartial tribunal established by law, if they face any criminal charges or if their rights and obligations are determined in a suit at law. This study will however be limited to procedural guarantees available to persons charged with a criminal offence only. The aim of Article 14 is to ensure the proper administration of justice and to this end guarantees a series of specific rights, which States parties to the ICCPR must respect, regardless of their legal traditions and their domestic law.[87]A brief discussion of these guarantees and rights, individually, follows below. It is worth noting that most of the cases referred to in this discussion are decisions by committees which interpret international human rights instruments. Although the mandate and status of these committees differs from that of national and international tribunals, their decisions offer good guidance and are persuasive on the subject at hand.

2.2.1 Equal treatment to all before the law

Article 14(1) generally provides that parties to proceedings before courts and tribunals or judicial bodies entrusted with a judicial task shall be treated equally, and the right not to be limited to citizens of States parties, but must also be available to all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State party. This right also covers the right to equal access to the courts services and the principle of equality of arms which ensures that the same procedural rights are to be provided to all the parties unless distinctions are based on

[87] International Covenant on Civil and Political Rights (ICCPR), General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, General Assembly Resolution 2200 A (XXI) of 16th December, 1966 (Entry into force 23/3/1976), general remarks, page 1. Retrieved from URL:http://www1.umn.edu/humanrts/hrcommittee/gencom32.pdf

law and can be justified on objective and reasonable grounds not entailing actual disadvantage or other unfairness to the defendant.[88]

It must be specifically stressed from the outset that all persons charged with a criminal offence, be they self-represented or represented by counsel as provided for under article 14 paragraph 3(d), shall access and enjoy all these guarantees and rights in the same manner without any kind of discrimination, whether based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[89] However, the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. A pro se defendant may therefore not be able to point out whether he has been deprived of some of these guarantees and rights yet any deviation from fundamental principles of fair trial is prohibited at all times.[90] Of importance to note here is that Article 14 expressly addresses guarantees of legal assistance and encourages States Parties to provide free legal aid for defendants without sufficient means to pay for it, while in some cases they are obliged to do so,

> *"For instance, where a person sentenced to death seeks available constitutional review of irregularities in a criminal trial but does not have sufficient means to meet the costs of legal assistance in order to pursue such remedy, the State is obliged to provide legal assistance in accordance with article 14, paragraph 1, in conjunction with the right to an effective remedy as enshrined in article 2, paragraph 3 of the Covenant."* [91]

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[88] Equality before courts and tribunals also requires that similar cases are dealt with in similar proceedings. If, for example, exceptional criminal procedures or specially constituted courts or tribunals apply in the determination of certain categories of cases (like jury trials), objective and reasonable grounds must be provided to justify the distinction.

[89] See General Comment No. 377/1989, on non-discrimination, para.7. See also *Curie v Jamaica* para 13.14 U.N Doc CCPR/C/50/D/377/1989 retrieved 26/05/2011from URL: http://www.bayefsky.com/pdf

[90] General Comment No. 29 (2001) on article 4: Derogations during a State of emergency, para.11.

[91] Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007). Retrieved from URL: http://www1.umn.edu/humanrts/gencomm/hrcom32.html

2.2.2 Fair and public hearing by a competent, independent and impartial tribunal

Another major component of a fair trial is the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, as guaranteed by paragraph one of article 14, in cases regarding the determination of criminal charges against individuals.

Article 14 therefore guarantees access to such tribunals to all who have criminal charges brought against them, whether legally assisted or not. The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and disciplinary action and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.[92]

With regard to the requirement of impartiality, two aspects are put forward. First, judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other.[93] Second, the tribunal must also appear to a reasonable observer to be impartial. For, all courts and tribunals within the scope of Article 14, whether ordinary or specialized, civilian or military, whose standards fall below those stipulated in article 14, or whose trials take place under conditions which do not conform to or afford the full guarantees outlined above, must be regarded as having failed to satisfy the basic standards of fair trial.[1]

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[92] Communication No. 468/1991.See also *Bahamande v Equatorial Guinea.* Para 9.4 CCPR/C/49/468/1991 Retrieved 26/05/2011 from URL: http://www.bayefsky.com/pdf/

[9] Communication No. 387/1987.See also Karttunen v Finland, Para 7.2 CCPR/C/46/D/387/1989 retrieved 26/05/2011 from URL: http://www.bayefsky.com/html

The burden to put in place and maintain the requirements of competence, independence and impartiality of a tribunal, in this sense, an absolute right that is not subject to any exception, is laid upon the establishing authority of such judicial body and the office bearers. The States or relevant authorities should take specific measures guaranteeing the independence of the judiciary, protecting the judges from any form of conflicts of interest and intimidation, political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the handling of issues regarding their security of tenure and terms of reference.

The notion of fairness of proceedings entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive. A hearing is not fair, for example, if the defendant in criminal proceedings is faced with the expression of a hostile attitude from the public or support for one party in the courtroom that is tolerated by the court, thereby impinging on the right to defence,[94]or is exposed to other manifestations of hostility with similar effects. Expressions of racist attitude by the jury[95] that are tolerated by the tribunal or a racially biased jury selection are other instances which adversely affect the fairness of the procedure. Another important aspect of the fairness of a hearing is its expeditiousness, which will be examined in detail ahead while dealing with Article 14(3) (c), explicitly addressing undue delays in criminal proceedings.

The publicity of hearings is crucial as it ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large. Therefore, all trials in criminal matters must, in principle, be conducted orally and publicly,

[94] Communication No. 770/1997. See also *Gridin v Russian Federation*, para 8.2 CCPR/C/69/D/770/1997 Retrieved 26/05/2011 from URL: http//www1.umn.edu/humanrts/undocs/session69/view770.htm
[95] See Committee on Elimination of Racial Discrimination, Communication No. 03/1991 See also *Narrainen v Norway* para 9.3 CERD/C/44/D/3/1991 Retrieved from URL: http://www.bayefsky.com/pdf/101_norwaycerddec03.pdf

and courts must make information regarding time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, the potential interest in the case and the duration of the oral hearing.[96] Article 14 (1) on the other hand recognizes the power of the court to exclude all or part of the public from the entire or part of the hearing for reasons of morals, public order, national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice. The exceptions also cover appellate proceedings which may take place on the basis of written presentations and pre-trial decisions made by prosecutors and other public authorities. Otherwise, the media too must be allowed to attend the proceedings, and in cases where the public is excluded, the judgment, including the essential findings, evidence and legal reasoning must be made public, except when, for instance, the interests of juvenile persons otherwise require.

2.2.3 Presumption of innocence

Article 14 (2) provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be proved until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons charged of a criminal act must be treated in accordance with this principle. Nothing should be done that would undermine this presumption either by way of treatment of the accused person or statements made by public authorities or the media pre-

[96] Communication No. 215/1986. See also *Van Meurs v The Netherlands*, para 6.2 U.N DOC CCPR/C/39/215/1986 Retrieved from URL: http://www1.umn.edu/humanrts/undocs/cessions39/215-1986html

judging the outcome. Similarly, the length of pre-trial detention or denial of bail should never be taken as an indication of the guilt of the accused as this will affect the presumption of innocence and prejudice the accused's enjoyment of a fair trial.

A package of rights is availed to persons charged with a criminal offence as a guarantee to facilitate the administration of trials in a fair manner.

2.2.4 Right to information regarding the charges

Article 14(3) (a) presents the first of the minimum guarantees that a person charged with a criminal offence has to be informed promptly and in detail in a language which they understand of the nature and cause of criminal charges brought against them. This right would require that the information be given promptly, as soon as the person concerned is formerly charged with a criminal offence or publicly named as such. The specific requirements of this provision may be met by stating the charge either orally – if later confirmed in writing -- or in writing, provided that the information indicates both the law and the alleged general facts on which the charge is based. Notification of the proceedings to the accused and the observance of all the above steps cannot be waived by reason of absence of the accused or trials in absentia.[97]

2.2.5 Right to adequate time and facilities to prepare a defence

Pursuant to Article 14(3) (b), an accused person must have adequate time and facilities for the preparation of his defence and to communicate with counsel of his choosing, if he wishes to be represented. The right to have the free assistance of an interpreter if the accused cannot understand or speak the language used in court as provided for in Article 14 (3)(f), enshrines another aspect of the principles of fairness and equality of arms in criminal proceedings. This right arises at all stages of the oral proceedings and applies to aliens as well as nationals, as

[97] Communication No. 16/1977 See also *Daniel Mbenge v Zaire,* para 14.1 UN Doc Supp. NO 40 (A/38/40) at 134 (1983) Retrieved 05/06/2011 from URL: http://www.umn.edu/humanrts/undocs/session38/16-1977.htm

long as one does not know the official language of the court. Providing access to facilities is crucial for the right to fair trial and also touches upon the application of the principle of equality of arms. In case of an indigent defendant, communication with counsel might only be assured if a free interpreter is provided during the pre-trial and trial phase. It is incumbent upon the court to grant reasonable time for preparation of the defence case, basing on indication of sufficient or adequate time required by defence counsel. The adequate facilities envisaged here must include access to inculpatory documents, materials and other pieces of evidence which the prosecution intends to submit in court against the accused as well as those that are exculpatory. For exculpatory material will include not only that evidence establishing innocence but also other evidence that could assist the defence in various ways, for instance, indication that the confession was not voluntary, or that evidence was obtained in violation of Article 7 of the ICCPR.

The right to communicate with counsel requires that the accused is granted immediate access to counsel who should in turn be able to meet and communicate with his client in private, and in conditions that fully respect the confidentiality of their communication. The lawyer should also be able to advise and represent the accused in accordance with generally recognized professional ethics without restrictions, influence, pressure or undue interference from anywhere. An unrepresented defendant should not only be promptly informed of his rights but must also be served with all the documents and evidence in the case to enable him prepare his defence in a timely manner.

2.2.6 Right to be tried within reasonable time

Article 14(3) (c) provides for the right of the accused to be tried without undue delay. It is not only designed to avoid keeping persons too long in a state of uncertainty about their fate and,

if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case, but also to serve the interests of justice. The complexity of the case, conduct of accused, and the manner in which the matter was generally handled by the administrative as well as the judicial authorities would be some of the considerations to look at in assessing whether there was a delay.[98] All stages, whether in first instance or on appeal must be handled expeditiously, more so in cases where the accused were refused bail. Article 14(3)(d), which forms the basis of this research contains three distinct guarantees namely the requirement to have every accused tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

2.2.7 Right to attend trial in person

An accused person is entitled to attend his trial in person from beginning to end save for where he, after sufficiently being notified of the date, time and place of the trial, decides not to avail himself this right and does not turn up for apparently no good cause, or he behaves in a very obstructive manner making it difficult for the court to continue with the trial in his

[98] Communication No.818/1998. See. *Sextus Vs Trinidad and Tobago*, Para 7.2 regarding a delay of 22 months between the charging of the accused with a crime carrying the death penalty and the beginning of the trial without specific circumstances justifying the delay. Retrieved from U.N Doc CCPR/C/72/D/818/1998 Retrieved from URL: http://www1.umn.edu/humanrts/undocs/818-1998.htm In Communication No. 537/1993, *Kelly Vs Jamaica*, Para. 5.11, an 18 months delay between charges and beginning of the trial did not violate Art. 14, para.3(c). See also UN DOC CCPR/C/41/D/253/1987 at 60 (1991) Retrieved from URL: http://www1.umn.edu/humanrts/undocs/session41/253-1987.htm See also Communication No. 676/1996, *Yasseen and Thomas Vs Guyana*, para 7.11 (Delay of two years between a decision by the court of Appeal and the beginning of a retrial) See also UN DOC.CCPR/C/62/D/676/1996 (31 March 1998) Retrieved 05/06/2011 from URL: http://www1.umn.edu/humanrts/undocs,session62/view676.htm and Communication No.938/2000, *Siewpersaud, Sukhrum, and Persaud Vs Trinidad and Tobago*, para. 6.2 (Total duration of criminal proceedings of almost five years in the absence of any explanation from the State party justifying the delay). See also UN.DOC. CCPR/C/81/D/938/2000 (2000). Retrieved 05/06/2011 from URL: http://www1.umn.edu/humanrts/indocs/html/938-2000.html

presence and is removed. Merely being physically present at trial is not enough, the accused must be able to comprehend and follow the proceedings if this right is to be of any benefit to him.

The second part of this provision refers to two types of defence conducted, either in person or with legal assistance of one's own choosing. Thus, a represented accused has a right to instruct his lawyer on the conduct of his case within the limits of professional responsibility, and to testify later on his own behalf. But the right to represent oneself without assistance of counsel is not absolute, for example, where the interests of justice in a given case may require the assignment of a lawyer against the wishes of the accused, especially in cases of persons substantially and persistently obstructing the proper conduct of the trial, or facing grave charges but being unable to act in their own interests, or where it is necessary to protect vulnerable witnesses from further distress or intimidation if they were to be questioned by the accused. But any restrictions on a self-represented accused must have an objective and sufficiently serious purpose and not to go beyond what is necessary to uphold the interests of justice.[99]

2.2.8 The right to legal assistance in the interest of justice

The third part of the provision guarantees the right to have legal assistance assigned to accused persons whenever the interests of justice so require, and without payment by them in any such case if they do not have sufficient means to pay for it. The gravity of the case, such as one carrying a death sentence as well as the chances of success of an appeal would be some of the important factors to be considered. The counsel assigned must offer effective representation and shall not be hindered from fulfilling his tasks by the court or other relevant authorities.

[99] Communication No. 1123/2002, See *Correia de Matos Vs Portugal*, paras. 7.4 and 7.5 UN.DOC.CCPR/C/86/D/1123/2002-CCPR/C/OP/9 Retrieved 05/06/2011 from URL: http://bayefsky.com.pdf

2.2.9 Right to call and examine witnesses

The right of accused persons to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them is provided for under Article 14 (3)(e). The provision demonstrates an application of the principle of equality of arms by guaranteeing the accused the same legal powers as the prosecution in compelling the attendance of witnesses, and of examining or cross-examining witnesses as are available to the prosecution. This also provides a proper opportunity to the accused to confront, question and challenge witnesses testifying against them.

2.2.10 Right not to incriminate oneself

Article 14 (3) (g), guarantees the right not to be compelled to testify against oneself or to confess guilt. It is unacceptable to treat an accused in a manner contrary to Article 7 of the ICCPR and any statements or confessions obtained contrary to Article 7 must be excluded from the evidence, except if such material is to be used as evidence that torture or other treatment prohibited by this provision occurred.[100]

2.2.11 Special protection of juveniles

For juvenile persons who may appear in a criminal trial, procedures should take account of their age, situation and desirability of promoting their rehabilitation as provided for by Article 14(3) (40). Apart from enjoying the same protections and guarantees as adults, the juveniles need special protection and arrangements. They should be informed directly of the charges against them and, if appropriate, through their parents or legal guardians, be provided with appropriate assistance in the preparation and presentation of their defence; be tried as soon as

[100] Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment, Art. 15. http://www2.ohchr.org/english/law/cat.htm

possible in a fair hearing in the presence of their counsel, other appropriate assistance and their parents or legal guardians, unless it is considered not to be in the best interest of the child. Measures are to be taken to establish an appropriate juvenile criminal justice system to treat the accused in a manner commensurate with their age, and to avoid their detention before and during trial as much as possible, and also to establish a minimum age, taking into account their physical and mental immaturity, below which juveniles and children shall not be put on trial for criminal offences. Whenever appropriate, alternative measures such as rehabilitation, counselling or community service, educational programmes, conferences, and mediation between the juvenile offender and victim and or their respective families should be considered as long as they are compatible with the required human rights standards and the requirements of the ICCPR.

2.2.12 Right of review

Article 14(5) entitles a convicted person in a criminal case to a right of review of that decision, both on the basis of sufficiency of the evidence and of the law, by a higher tribunal. The right basically allows an appeal where the law provides for it, and most importantly that the convicted person must have effective access to the process, a duly reasoned and written judgment as well as transcripts of the trial court. But most important to note here is that the right of appeal is of particular importance in death penalty cases. A denial of legal aid by the court reviewing the death sentence of an indigent convicted person constitutes not only a violation of Article 14, paragraph 3(d), but at the same time also of Article 14, paragraph 5, as in such cases the denial of legal aid for an appeal effectively precludes an effective review of the conviction and sentence by the higher instance court. The right to have one's conviction reviewed is also violated if defendants are not informed of the intention of their counsel not to put any arguments to the court, thereby depriving them of the opportunity to

seek alternative representation, in order that their concerns may be ventilated at the appeal level.

2.2.13 Right to compensation

Pursuant to Article 14(6), compensation according to law shall be paid to persons who have been convicted of a criminal offence by a final decision and have suffered punishment as a consequence of such conviction, if their conviction has been reversed or they have been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice.

2.2.14 Principle of ne bis in idem

Article 14(7) provides for the principle of ne bis in idem, meaning that no one shall be liable to be tried or punished again for an offence of which they have already been finally convicted or acquitted in accordance with the law and procedures. This applies to all charges brought whether before same court or tribunal, or another, military or civilian, within or outside the jurisdiction, as long as it is the same offence based on same facts. The exception to the provision is in case of an order for a retrial by a higher court after quashing a conviction, and where a retrial of a person tried and convicted in absentia is also ordered. Such orders will not be at issue with Article 14 (7).

All these procedural guarantees and rights must be put in place and maintained by the court for they play a very important role in the implementation of the more substantive guarantees in the ICCPR and other laws and legal instruments that should be considered while determining criminal charges. Until then, it could not be said that the accused, defended or not, a juvenile or adult, received a just and fair trial from the court. The same standards and

guarantees apply to criminal trials in international criminal courts and tribunals and must be strictly honoured.

Conversely, the fears expressed about a possibility that strict adherence to the necessary procedural guarantees may make some prosecutions impossible should, if taken into account, be juxtaposed with the ramifications of not adhering to these rights. It is the mandate of each judge or court to strike a proper balance, on a case-by-case basis, among the due process rights of the accused, the public interest in transparency, and the safety and dignity of victims and witnesses. Moreover, the accused cannot waive his right to fair trial which obligates the court to be protective of the legitimacy of its own processes and to consider fairness globally.

Considering the fairness of the trial to be of greater concern than the exercise of the rights available to a defendant, the SCSL in Norman Hinga stated:

> *"Permitting self-representation regardless of the consequences, threatens to divert criminal trials from their clearly defined purpose of providing a fair and reliable determination of guilt or innocence....a defendant could not waive his right to a fair trial, and that their right implicated not only the interests of the accused but also the institutional interests of the judicial system."*[101]

Therefore, the developments in the interpretation of fair trial rights of the accused, as most prominently articulated in Articles 9(3) and 14 of the ICCPR and repeated almost verbatim in the statutes establishing international criminal tribunals, will no doubt influence the interpretation and implementation of human rights law at a domestic level.

However, whether in a domestic or international court, a pro se defendant will inevitably face a multitude of impossibilities not only with regard to comprehension of the law, procedures

[101] The Prosecutor v. Norman, Case No. SCSL-04-14-T, *"Decision on the Application of Samuel Hinga Norman for Self-representation under Article 17(4) (d) of the Statute of the Special Court"*, 8 June 2004.

and rules of evidence but also failing to point out whether all the features of a fair trial are present. Although it is incumbent upon the court to ensure a fair trial globally, in trials which are largely adversarial like those before international criminal tribunals, the judges play the neutral role of umpire otherwise they risk sliding into the arena of defence counsel especially if and when they offer guidance to the pro se defendant on the flaws and weaknesses in his case and generally how he is supposed to conduct his defence. It is obvious that one cannot claim what they do not know. Even where it becomes clear that guarantees of due process are missing, a defendant may not be able to pursue such rights on grounds of lack of requisite knowledge and expertise which, in turn affects the quality of trials and the justice rendered.

Whatever the circumstances, derogation from those procedural rights considered essential to a fair trial should not be permitted in international courts and tribunals like the ICTY and the ICC.[102] For a trial with derogation obviates the need for an international, rather than national forum.[103] However, it is noteworthy that while Article 14 is not included in the list of non-derogable rights of Article 4, paragraph 2 of the Covenant, States derogating from normal procedures required under Article 14 in circumstances of a public or State of emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. Similarly, while reservation to particular clauses of Article 14 may be acceptable, a general reservation to the right to a fair trial would be incompatible with the

[102] The guarantee of a fair trial is important in any situation in the case of an international tribunal created to enforce human rights. Adherence to internationally recognized standards of fair trial is critical. Further, this can most successfully be achieved through strict interpretation of statutory guarantees, careful interpretation of limitation clauses, and the impossibility of derogation.

[103] See Sara Stapleton, *Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation, 1999,* at page 581. The ability to derogate is reserved for states which the ICC is not. Even if the definition were expanded to include non-state entities like the ICC, derogation from the enabling treaty is not acceptable because: (1) the ICC has no derogation clause – thus there is no textual basis for derogation; (2) the ICC cannot meet the standards for derogation set out in previous human rights instruments; (3) there is no mechanism for review of a decision by the ICC to derogate; and (4) derogation allows for deviation from minimum procedural rights of the accused.

object and purpose of the Covenant.[104] Although the institution of trial makes justice possible, it is the fairness of the process that makes it justice. Therefore, the trial should not be a mere charade that circumvents those basic human rights, for it will not in any way enhance the justice and the administration of the rule of law.

2.3 Right to counsel

As provided for under Article 7 of the ACHPR and Article 14(3) (d) of the ICCPR, the right to counsel (legal representation) is universally acknowledged as the most fundamental right to assure an accused person of a fair trial. Arguably, fair trial rights include the right to have counsel, not the right not to have it. Trials in many jurisdictions are considered unfair and fatally irregular if the presiding judge fails to inform the accused person of his or her right to be assisted by a counsel; if he or she denies the accused his right to appoint a counsel; if he or she fails to facilitate the effective and full participation of a counsel or if he does anything that would impede the counsel in the performance of his duty. For it should be stressed that the right to counsel is the most fundamental procedural safeguard to assure a fair trial in which the State and the accused stand on equal footing before the law.

The counsel's role at the trial stage is most vital because of his knowledge of the applicable laws and rules of procedure in the matter before the court, and his ability to relate them to the facts, sieve relevant, admissible and sometimes complex and technical evidence from what is irrelevant, voluminous and inadmissible. A layperson may not have the ability and competency to effectively do so and to vigorously defend the accused's interests. The same is true for a defendant who is a lawyer by profession, like Milosevic, Barayagwiza and Seselj, because of a deeply vested interest they have in the case as accused persons and yet, while in

[104] General comment, No. 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 14 of the Covenant, para.8.

the dock, they are emotional and under a lot of pressure and stress which may impair their objectivity and reasoning to a considerable extent. For it had long been noted by Johnson that:

> *"As it rarely happens that a man is fit to plead his own cause, lawyers are a class of the community, who, by study and experience, have acquired the art and power of arranging evidence, and of applying to the points at issue what the law has settled. A lawyer is to do for his client all that his client might fairly do for himself if he could"*[105]

Therefore, an impartial but properly instructed defence counsel would do a better job, simply as a professional. Moreover, conventional wisdom holds that a lawyer who represents himself has a fool for a client while a person who chooses to represent himself has a fool for a lawyer and a damn fool for a client. In the same vein, and in a bid to avoid problems associated with self-representation especially by former leaders, such as intentional delays of the trial and political speeches, the statute of the Supreme Iraqi Criminal Tribunal was amended to specifically outlaw self-representation.[106] This amendment left Saddam Hussein with no choice but to be represented by counsel. Acknowledging that the time had now passed when minimal justice would permit an accused to be forced to represent himself against the modern prosecutorial arsenal of the state, and therefore stressing the need for counsel, the court in Gideon v Wainwright held thus:

> *"Not only precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person hauled into court, who is*

[105] Dr Johnson, 5 *Boswell's life of Johnson* (Birkbeck Hill, Ed) 26. Cited by Lord Simon of Glaisdale in *Waugh v British Rails Board* [1979] 2 All E.R. 1169 at 1176.
[106] Article 19(4) (d) provides that the accused is entitled to the following minimum guarantees: To be tried in his presence, and procure legal counsel of his choosing; to be informed of his right to ask for legal assistance in case he does not have sufficient means to pay for it; and of his right to receive assistance that allows him to procure legal counsel without legal burden.

> *too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both State and Federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money to hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."*[107]

Proceedings before the international criminal courts are largely adversarial, where the prosecution and defence are left to fight it out while the judge serves as an umpire who intervenes only to enforce compliance with the rules and ensure fairness of the proceedings. Egonda-Ntende[108] observed, and rightly so, that "failure to employ defence counsel would run the risk of turning the court into counsel for the accused yet, given the gravity of the charges, judges need to concentrate on their job without necessarily looking into the accused's case." It is therefore only lawyers who by study and experience have the knack to argue the cases intelligibly and on an equal footing with the opponent, and successfully employ the applicable law to the facts of the matter. At the end of it all, counsel's advocacy skills in argumentation and power of persuasion count a lot. The importance of counsel as an official of the court was succinctly emphasized by the SCSL while determining whether to grant an application for self-representation in the following terms:

[107] 372 U.S 335 (1962).
[108] Egonda-Ntende, Chief Justice (Former Justice of Appeal, East Timor UNTAET and International Judge, hybrid courts in Kosovo, UNMIK). Face-to-face interview. 23 June 2012, Victoria, Seychelles.

> *"The role of a defence counsel is institutional and is meant to serve, not only his client, but also those of the court and the overall interests of justice. The right of counsel is predicated upon the notion that representation by counsel is an essential and necessary component of a fair trial. Further, the right to counsel relieves the 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 pro-active participant in the proceedings."*[109]

However, for counsel to perform his role, he must be properly instructed by the accused. Without such necessary information or instructions about the case, especially the defendant's version of the story, lawyers, regularly referred to as the mouthpiece of the accused, are left helpless with no defence to prepare and arguments to articulate before the court.

In order to make this right a reality the above provisions of the said legal instruments also provide for the assignment of legal assistance by the court to those accused persons that cannot afford to pay for such services, but only in cases where the interests of justice so require. It is interesting to note that whereas Combs[110] holds the view that because of the high profile status of these cases and the availability of money (legal fees), experienced defence counsel are easily attracted to assist the self-representing defendants, Nyaberi[111] points out that defence counsel are usually understaffed and underfinanced as compared to the prosecution, which affects the equality principle, and at the same time makes it less likely for the right to fair trial to prevail.

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[109] *Prosecutor v Sam Hinga Norman, Moinina Fofana and Alieu Kondowa*, Case No. SCSL-04-14-t, June 2004 p.9, para.23.

[110] Professor Nancy Combs, Member of the International Expat Framework developing general rules and principles of International Criminal Procedure. (Former Legal Advisor at the Iran-United States Claims Tribunal in The Hague, The Netherlands). E-mail correspondence. 24, March 2012.

[111] Nyaberi J. Lumumba, Senior Lecturer Criminal Law and International Law. (Former Defence Counsel of J. B. Barayagwiza at ICTR, and amicus curiae in Prosecutor v C. Nzabonimana, ICTR). E mail correspondence. 15, March 2012.

Article 14(3) (d) further states:

> *"...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;.."*

Creta, observed that by allowing the assignment of counsel under Article 21(4) (d) of the ICTY statute '...in any case where the interests of justice so require...' means that a mere showing of indigence should suffice to trigger the right to appointed counsel, and further, that a per se rule should accordingly be established[112].

Roots of the modern right to counsel for the defendant who cannot afford to pay a private lawyer can be found more than a century ago, vide Webb v Baird, when the Indiana Supreme court recognized a right to an attorney at public expenses for an indigent person accused of crime as being grounded in the principles of a civilized society and not in constitutional or statutory law:

> *"It is not to be thought of in a civilized community for a moment that any citizen put in jeopardy of life or liberty should be debarred of counsel because he is too poor to employ such aid. No court could be expected to respect itself to sit and hear such a trial. The defence of the poor in such cases is a duty which will at once be conceded as essential to the accused, to the court and to the public"*[113]

The Registrar however follows prescribed criteria pursuant to Rule 44 ICTY RPE for determining indigence which is subject to judicial approval, and assigns a lawyer to a successful applicant drawing from the list of approved and available counsel filed in the

[112] Vincent M Creta, The Search for Justice in The Former Yugoslavia and Beyond: Analyzing the Rights of The Accused under the Statute and The Rules of Procedure and Evidence of The International Criminal Tribunal for The Former Yugoslavia, page 13.
[113] 1853, 6 Ind. 13.

registry.[114] Of importance to note here is that there is no right to choice of counsel when an indigent accused relies upon legal aid. Indeed the ICTR Appeals Chamber has settled this matter in various cases when it held that:

> *'...the right to free legal assistance by counsel does not confer the right to choose one's counsel'.*[115]

If the right to counsel is to have any meaningful effect to the defendant's enjoyment of a fair trial, the defence counsel assigned must not only be very knowledgeable and conversant with the procedures of both common law and civil law justice systems but also confident to articulate international humanitarian law and war crimes issues before the international tribunals. Merely providing resources and manpower is not sufficient, and unless legal representation is of high quality, the rights of the accused risk being compromised. Schabas remarks that:

> *"We do not have the stars of international criminal justice that we deserve."*[116]

In addition, the right to counsel should attach immediately at the point the suspect or accused is apprehended and placed in the hands of the court, and at the instance of prosecution and maintained all through the questioning exercise by the prosecutor and the trial. Unfairness may be occasioned especially during the pre-trial interrogations and identifications unless counsel is present to object to any suggestive features, irregularities and prejudices, and avoid self-incrimination by the accused. For such evidence may later be relied on in the trial when

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[114] Lawyers are eligible for appointment if they speak one or both of the working languages of the tribunal, meet the requirements of Rule 44 of the Rules of Procedure and Evidence of the ICTY, and have indicated their willingness to be assigned. See also Rule 45(A). Counsel meets the requirements of Rule 44 by filing a power of attorney with the Registrar promptly after the suspect or accused engages him and if he is either admitted to practice law in a State or is a University professor.

[115] *Kambanda* (ICTR 97-23-A), Judgment, 19th October, 2000, para 33; *Akayesu* (ICTR-96-04-A), Judgment, 1st June, 2002, paras 60-61; *Ntakirutimana* (ICTR-96-10-T and ICTR 96-17-T), Decision on the motions of the accused for replacement of assigned counsel, 11th June, 1997.

[116] Speech by Professor William Schabas on the 7th March, 2005 at the closing ceremony of an EU-funded project to train defence lawyers for the ICC at the Academy of European Law in Trier, Germany: in drawing comparison with national legal systems.

it is too late to ameliorate the situation or difficult to have it excluded.[117] So, the mere right to have counsel is no longer sufficient; it is the actual presence and performance of counsel that is essential because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results.

The Biblical analogy of a David fairly taking on a Goliath will in the circumstances of criminal trials, no doubt, adversely interfere with the accused's enjoyment of the right to affair trial. The right to counsel has been held to be indispensable to the fair administration of adversary system of criminal justice and further, that without counsel, the right to a trial itself would be of little avail.[118]

The right to counsel has developed into the most vital of all the protections guaranteed to criminal defendants and without the guiding hand of counsel, all the other safeguards of a person on trial are not secured, while his right to a fair trial may be empty.[119] For a better understanding of the main question at the heart of this study, it is imperative to first carry out an examination of all the methods of legal assistance already outlined herein above which are usually accorded to the pro se accused in preparation and support of his defence, and/ or in lieu of defence counsel. Jorgensen noted that:

> *"In the jurisprudence of international criminal tribunals, various possible regimes for the presentation of the defence tailored to the fair trial requirements*

[117] Since the statute provides for allegations of rape and other 'inhumane acts', the likelihood that a witness-victim will be susceptible to suggestiveness may be magnified. See *United States v Wade*, 388 U.S. 218, 230 (1967). This is because these types of prosecutions "present a particular hazard that a victim's understandable outrage may excite vengeful or spiteful motives". Suggestive practices sometimes involve photographs. In *Simons v United States*, 390 U.S. 377 383 (1968), the court recognized that the danger of misidentification "will be increased if the police display to the witness only a picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. Also, the Supreme Court of Canada, vide *Regina v Ross* (1989) 1 S.C.R 3, has held that line up identification must be excluded from evidence when the police do not allow the suspect a reasonable opportunity to obtain counsel.

[118] James J. Tomkovicz, The Right to The Assistance of Counsel 45 (2002)

[119] William J. Brennan, Jr, The Bill of Rights and the States, 36 N.Y.U.L. Rev. 761,773 (1961).

> *of individual cases are emerging. That the most common arrangement is for the defence to be left exclusively to counsel. Exclusive self-representation is rare and that even Milosevic had the assistance of experienced lawyers behind the scenes before counsel were imposed on him inside the courtroom. Further, that the two emerging categories are qualified self-representation, with the accused presenting his own case in conjunction with standby counsel, and qualified or indeed revoked self-representation, with court assigned counsel presenting the defence case without instructions, particularly if the accused refuses to appear.*[120]

2.4 Amicus curiae

According to Rule 47 of the ICTY, which is similar to Rule 103 of the ICC:

> "*A chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the chamber deems appropriate.*"[121]

Amicus curiae, also known as *'friend of the court'*, may not necessarily be a legal professional but a person with expertise in any field or subject that may come up before the court. He does not have to be directly engaged in the case. Since judges in adversarial system rely on the evidence presented by the individual parties and/or their witnesses to reach an informed decision, the realization of this role may prove futile if the accused is not trained to do the job and decided to represent himself. The amicus curiae could thus come in handy and provide them with a broader range of arguments not only on the defence but also any other issue to which the prosecution and defence shall have opportunity to respond. He must discharge his duties to court impartially, fairly[122] and with confidentiality.

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[120] Nina H.B. Jorgensen, The problem of Self-representation at International Tribunals: Striking a Balance between Fairness and Effectiveness, Journal of International Criminal Justice 4 (2006), page 71.
[121] The ICC Rules of Procedure and Evidence (RPE), and the Rules of Procedure and Evidence (RPE) of the ICTY.
[122] ICTY, Code of Professional Conduct for Counsel Appearing before the International Tribunal (hereinafter: ICTY Code of Conduct). See, e.g. Decision, *Milosevic* (IT-02-54), Registrar, 11 October 2002. Decision Concerning Amicus Curiae, *Milosevic* (IT-02-54-T), Trial Chamber, 10 October 2002. For instance, the former amicus remained under a duty of confidentiality, in accordance with the Code of Conduct. ICTR, Code of Professional Conduct for Defence Counsel, art. 19; ICTY Code of Conduct, art. 4.

It will be stressed that amicus curiae are not defence counsel but for purposes of securing a fair trial, the ICTY stated that they could undertake anything to assist the Judges. For instance, in the Milosevic case[123], the amici were allowed to make submissions as to preliminary or other motions, object to evidence or point out exculpatory or mitigating evidence to the Chambers. They were also to draw the Judges' attention to defences open to the accused or point out witnesses for the Court to call *proprio motu* and also cross-examine witnesses. On the face of it, they had already performed the role of defence counsel in open court, though without the accused's instructions, when the Judge's kept switching and changing their status as well as expanding their roles. Yet, the amici are independent with an obligation not to act for or adversely to the accused's interests. In other words, no 'client – counsel' relationship exists between the accused and amici curiae. Indeed, Egonda-Ntende stated that the amicus curiae propagates a certain view before the court and cannot formulate a defence strategy for the accused.[124]

Jarinde[125] contends that appointing experienced defence counsel as amici curiae to make legal contributions to add to the judge's informed decisions seems to entail fewer undesirable ethical consequences than being added as standby counsel or court assigned counsel since he will occupy a neutral position, not being required to represent the accused, whereby his input may balance the flow of defence and prosecution arguments and thus contribute to the fairness of international criminal trials. Kay[126] seems to agree with this position when he states that amicus curiae can be used to deal with legal issues to assist an unrepresented

[123] See Order inviting Designation of Amicus Curiae, *Milosevic* (IT-02-54-T), Trial Chamber, 30 August 2001 and also Order concerning Amici Curiae, *Milosevic* (IT-02-54-T), Trial Chamber, 11 January 2002.
[124] Egonda-Ntende, supra.
[125] Self-representation in International Criminal Justice, Assisting an accused to represent himself, Appointment of amici curiae as the most appropriate option, 4 J.Int'l Crime. 47. p 1.
[126] Steven Kay, QC, Founder Member of International Criminal Law Bureau. (Former Defence Counsel in Dusko Tadic and Slobodan Milosevic cases at ICTY, and Alfred Musema case at ICTR). E mail correspondence.23, March 2012.

accused in a complex case and Combs[127] concludes by citing Milosevic's case and saying that these arrangements by the tribunals have worked well.

It should however be remembered that the participation of amici curiae in any proceedings is limited to issues and within the parameters prescribed by the court. Amicus curiae cannot act beyond his mandate however apparent and crucial a matter may be. Participating as amicus curiae changes his status from that of defence counsel in the proceedings and is therefore subjected to a different legal regime or code of conduct. As such, amici curiae cannot be a perfect replacement of defence counsel who would take up the whole case for and in the interest of the defence and plan and make informed arguments to the court without any restrictions. In the same breath, amicus curiae can neither be substituted for standby counsel nor court assigned counsel because, unlike the other two, he is supposed to be neutral. Nyaberi's[128] view is in agreement with this position when he stressed that amicus curiae does not necessarily act to assist a pro se defendant. It was for this reason that the ICTY, while designating counsel to appear before it as *amicus curiae* to assist the chamber in the conduct of a fair and expeditious trial pursuant to Article 20(1) of the Statute, warned that the role of the amici was not to represent the accused since they were not parties to the case but to assist in the proper determination of the case.[129]

Besides, in most, if not all prosecutions, it is the defence that is normally placed at a disadvantage hence, occasioning an injustice and inequality of arms. By representing the accused in certain motions, cross-examining and calling witnesses to controvert the prosecution case, the tribunal[130]was over stretching the rule designed to allow *amicus curiae* to offer submissions on law or relevant facts or on any matter or observations that it may

[127] Professor Nancy Combs, supra.
[128]Nyaberi J. Lumumba, supra.
[129] See Milosevic's case, supra, Order inviting designation of Amicus Curiae, 30th August, 2001. See also Rule 73
[130] See Milosevic's case, supra.

deem appropriate, and would assist the court in a way in which it would otherwise not have been assisted. Representation of the accused in court, however brief it may be, certainly entails more than the submissions of observations on any issue or assistance to the court envisaged under the above Article 103 or Rule 47. This, in essence, transcends the borders and distorts the traditional functions of *amicus curiae* (a friend of the court). However, the making of submissions by the amici on the NATO bombing of Kosovo fell within the ambit of the pertinent legal provisions.[131]

In this respect, Nsereko comments that:

> *"the appointment of amici and the broad and open-ended mandate given to them is somewhat troublesome because the things that the chambers mandated the amici to do were, stricto sensu, "submissions" on "issues", and in common parlance, submissions are arguments presented before the court while issues, on the other hand, are points, matters or questions in dispute between two parties on which they desire the court's decision. That these were not matters in issue on which they were required to make submissions, instead, the chamber merely secured the participation of counsel and generally mandated them to perform virtually all the tasks ordinarily performed by defence counsel without referring to them as such. Therefore, the mandate given to the amici was in verity representation, albeit indirect, of an accused that had clearly and unequivocally told the chamber that he did not want to be represented by counsel."*[132]

Therefore, the appointment of *amicus curiae*, who, going by the rules is only required to make submissions on specified issues, would not substantially or sufficiently improve on the representation of a pro se defendant that will have to plan and strategize his defence from beginning to end, in light of the prosecution case. Furthermore, the court, and not the

[131] Order concerning amici curiae, *Prosecutor v Milosevic*, Case No. IT-9937-PT, T.Ch. III, 11th January, 2002.
[132] Professor Daniel D. Ntanda Nsereko, The right to legal representation before the international criminal tribunal for the former Yugoslavia, page 20 to 21. The author opined that with regard to the orders in the Milosevic case on amicus, the Tribunal appears to have transformed the institution of amicus curiae traditionally known as a friend of the court to that of hired experts.

accused, appoints the amicus curiae and also determines on what subject the submissions should be made, whether crucial or irrelevant to the defence case. The accused has no input at all in the amicus curiae's submission. It is hardly necessary to emphasize that the roles of a defence counsel and amicus curiae are to a large extent poles apart and any attempt to substitute defence counsel with amicus curiae would be like inserting a square pen in a circular hole which leaves glaring gaps. Strictly speaking, the amici do not represent the accused but assist the judges to secure a fair trial and in the proper determination of the case. Moreover, the amici, just like the accused, may not fulfil the requirements for defence counsel, and their conduct before the court may be wanting while the treatment by the court may be different and less strict from that administered to defence counsel. Attainment of a fair trial in such circumstances may not be possible with such minimal assistance by the amicus curiae to the accused.

2.5 Standby counsel

Defence counsel could also be substituted with standby counsel if the accused waives his rights to legal representation. The particular characteristic of standby counsel is that he or she assists the accused, where necessary and appropriate, but that the latter remains in control of his case. Standby counsel actively engages in the case in order to always be prepared to take over from the accused completely if the accused behaved badly and is removed from the courtroom. He could also question witnesses on behalf of the accused.[133] Both civil law and common law jurisdictions permit the appointment of a standby counsel in such situation irrespective of the accused's objections and wishes. This notion was first given prominence in international criminal proceedings by the ICTR in the case of *Barayagwiza*[134] wherein

[133] Consequential Order on Assignment and Role of Standby Counsel, *Norman, Fofana and Kondewa* (SCSL-04-14-T), Trial Chamber, 14 June 2004 (hereinafter: Consequential Order on Assignment). See also note 40, supra.
[134] *Barayagwiza* (ICRT-97-19-T), Separate opinion of Judge Gunawardana.

Article 20(4) (d)[135] was judicially interpreted leading to standby counsel being appointed in the Interest of Justice. He was to serve the interests of the accused as well as the administration of justice[136].

Standby counsel are not *amicus curiae* and the court can assign counsel to an accused on a case-by-case basis[137] not only in the interests of justice but depending on numerous reasons. In *Norman Hinga*, the interests of the co-accused and the fact that *Norman Hinga* had opted for self-representation relatively late in the proceedings were the considerations by the SCSL[138] in appointing standby counsel while in *Seselj*,[139] it was the disruptive behaviour of the accused that formed the basis of that decision. In *MacKaskle v. Wiggins*,[140] the purpose of appointing of standby counsel was to familiarize an accused who represented himself with the basic trial procedures to relieve the judges of such task. A similar appointment could also be made in aid of the accused if he requested help or in the event that termination of his self-representation is necessary as was in *Faretta*.[141]

Therefore, standby counsel, on orders of the chambers or upon request by the accused could assist the defendant in preparation of his case, offer him advice particularly on evidential and procedural matters, address the court, and receive copies of all material handed out to the

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[135] This provision equates to art. 21(4) (d) ICTY statute and art 17(4) (d) of the SCSL Statute.
[136] Jarinde Temminck Tuinstra, Self-representation in International Criminal Justice, Assisting an accused to represent himself, Appointment of amici curiae as the most appropriate option, 4 J. Int'l Crime. 47 Page 6 to7.
[137] The position of standby counsel is subject to change and safeguards to the advantage of the accused can be removed on a case-by-case basis. Initially, in *Seselj*, standby counsel was required to speak the accused's language. When Seselj protested against his second standby counsel's failure to meet this requirement, the majority of the Judges simply decided to remove it. See Decision on Prosecution's Motion in *Seselj*, Decision on the Accused's Motion to Re-examine the Decision to Assign Standby Counsel, Seselj, Trial Chamber, 1 March 2005; Dissenting Opinion of Judge Antoinette, appended to same Decision.
[138] SCSL-04-14-T.
[139] See the holding in *Faretta v*, 422 United States Reports (US) 806 1975, at 835 that *"...The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law."*
[140] 465 US 168 (1984), at 183 and 184. See also Judge Gunawardana in *Barayagwiza*, and Decision on the Application, *Norman, Fofana and Kondewa*, SCSL-04-14-T.
[141] The holding in *Faretta* 422 United States Reports (US) 806 1975, at 835.

accused as well as attend courtroom proceedings.[142] But standby counsel is not without limitations within which to operate. The court has held the relevant provisions on the obligations and qualifications of defence counsel to be applicable to standby counsel yet, contrary to defence counsel who is entirely free and independent, standby counsel's activities are to a large extent controlled by the court.[143] No doubt, the role of standby counsel is critical in ensuring that the accused fully enjoys his rights especially that to a fair trial.

However, advising or representing an accused who refuses to communicate with counsel is a very futile exercise. Moreover, the SCSL[144] has warned standby counsel to refrain from conduct that may directly or indirectly impact adversely on the exercise of the accused's right of self-representation. Jarinde observed, and rightly so, that this order would make it impossible for standby counsel to act where the 'client-counsel' relationship is non-existent. In the same breath, he suggested that it might be more productive and with fewer ethical implications for counsel involved if the court appoints *amici curiae* as an alternative to standby counsel.[145] The amicus curiae being more independent is seen as one who will provide more facts and information to the Court for the benefit of the prosecution, defence as well as the Judges which the accused alone is unable to bring to light. However, Jorgensen,[146]prefers to have both standby counsel and *amici curiae* appointed to the accused. It is opined that given the limitations faced by both standby counsel and amicus curiae, their appointment to assist the self-represented defendant would still be inadequate, and a potential source of conflicts between them especially on how the defence should be conducted.

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[142] See Decision on Prosecution's Motion in *Seselj*, Decision on the Accused's Motion to Re-examine the Decision to Assign Standby Counsel, *Seselj*, Trial Chamber, 1 March 2005; Dissenting Opinion of Judge Antoinette, appended to same Decision.
[143] Special Court For Sierra Leone Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone Adopted on 14 May 2005. This code also applies to prosecution counsel, amicus curiae and 'counsel representing a witness or any other person before the Special Court' (art. 1(A)).
[144] Consequential order on assignment and role of standby counsel, *Norman, Fofana and Kondewa* (SCSL-04-14-T), Trial Chamber, 14th June, 2004.
[145] Jarinde, supra, page 7.
[146] N.H.B.J. Jorgensen, 'The Right of the Accused to Self-Representation before International Criminal Tribunals', 98 American Journal of International Law (2004) 711-726, at 726.

There is a high possibility of wastage of resources in case the standby counsel's services are neither sought by accused nor engaged by the court especially if the accused cooperates with the court and behaves well, although poorly represents himself in the trial. The standby counsel may remain in waiting all through or until the last minute of the trial to take over the conduct of the defence from the accused when the injustice has already been occasioned in his presence and cannot be ameliorated. Even where he partially takes over the defence case against the wishes of the accused, it may be late. It is for these reasons that Nyaberi's[147] view that standby counsel is a mere public relations exercise because in most cases the advice given by him to the defendant comes too late to be of any realistic impact, is supported. There is also likely to be a conflict with the accused, who retains the overall control of the case, in the strategy to be adopted and the presentation and examination of witnesses and arguments before the court.

In *Hinga*,[148] the four standby counsel caused a lot of unfairness to the prosecution and the co-accused and also exploited the system when they all extensively cross-examined the witnesses. Yet, as the guardian of self-representation, standby counsel's role is to advise the accused rather than presenting his own line of questions or raising issues on his own initiative. This places more burdens on the court to take an extra role in the control and management of proceedings. In addition, why should amicus curie be appointed concurrently with standby counsel to waste more time and resources and create further complications in the trial yet defence counsel alone can do the same job better and fully?

Unlike the amici curiae, standby counsel is part of the defence and operates in the sphere of the accused as his assistant unless the accused has been removed from the courtroom, in

[147] Nyaberi J. Lumumba, supra.
[148] SCSL-04-14-T, Trial Chamber.

which event he fully takes over the control of the case. It is clear that standby counsel is unable to act wholly on his own or on the instructions of an uncooperative accused to plan for the entire case and offer meaningful advice and representation like defence counsel. He has to wait for a court order to act; get into or out of the case. The whole of this basically leaves the accused on his own to vigorously present his case and face the team of well trained and facilitated prosecutors. Such piecemeal and regulated representation is inadequate and only tantamount to poor or no representation at all. Therefore, standby counsel would not sufficiently improve on the situation of a pro se defendant even if amicus curiae is added onto the case as suggested by Jorgensen because both are not free to completely take on the defence in their hands from beginning to end. Moreover, compared to defence counsel, they suffer a lot of limitations and do not act absolutely in the interests of the accused which hinders the attainment of the right to fair trial meant to be enjoyed by the accused.

2. 6 Court appointed counsel

Court appointed counsel is a counsel appointed to represent a defendant during trial. He acts as an assistant to his client – which is a defence counsel's primary role in an adversarial justice system. This is done for a variety of reasons, for example in *Milosevic*[149]it was his ill health, and the court defines their task on appointment whether to represent the accused fully, as was in *Milosevic*, or partially.[150] It is however opined that such imposition of counsel by the court, as against the wishes of the accused, contravenes his right to self-representation. He does not only lose the planning and control of his case but also the management thereof.

[149] Milosevic was ill and in a precarious physical condition. See Reasons for Decision on Assignment of Defence Counsel. *Milosevic* (IT-02-54-T), Trial Chamber, 22 September 2004.

[150] As this was a new phenomenon and there were no provisions to regulate such counsel, the trial Chamber outlined reasons for the decision on assignment of defence counsel and his role (IT-02-54-T, 22 September 2008) which initially included full representation of Milosevic. The counsel were required to establish how to represent the case for the accused, determine what witnesses to call and to prepare and examine them, and to make submissions on fact and law. Additionally they were to request the Chamber to issue subpoenas or order what would be necessary to properly present and conduct the accused's case, discuss the conduct of the case with the accused, 'Endeavour to obtain' the accused's instructions and take account of his views. And finally to act throughout in the accused's best interest.

As seen above, Milosevic would need the Chamber's permission to participate actively in the conduct of his case. Even when he did obtain permission to examine witnesses the court appointed counsel would conduct their examination first. Duplicity of roles wastes time and other resources and could be a source of delays and conflict between accused and the assigned counsel. But it could be argued that should self-representation have the impact of disrupting the proceedings and undermining the integrity of a trial, then a counsel can be assigned, in the interests of justice, to conduct the defence case, if the accused will not appoint his own counsel or request full legal representation.

After all, the imposed counsel rejected and therefore not recognized by the accused could still draw the court's attention to flaws in the indictment or to exculpatory materials and generally serve a valuable function in the filing of written legal submissions on any important aspects touching the conduct of the defence case. This would be in pursuance of preservation and observation of the defendant's rights since disruption of a trial, whatever the circumstances, may give rise to the risk of miscarriage of justice as the whole proceedings have not been conducted and concluded fairly. That is why Judge Meron, P encouraged the court assigned counsel to realize the breadth of activities that they can carry out even in the absence of Milosevic's cooperation that 'they should simply continue to make the best professional effort possible on his behalf.'[151]

Just like the standby counsel, court appointed counsel faces challenges of instructions to act which should emanate from the accused rather than the court. In addition, the highly cherished independence of the defence counsel supposed to be enjoyed by the standby counsel and court appointed counsel as well in directing affairs during the conduct of the

[151] See Decision Affirming the Registrar's Denial of Assigned Counsel's Application to withdraw, Milosevic (IT-02-54-T), § 10.

defence case is interfered with by the chamber when it prescribes their role and limitations as well as bar such counsel from withdrawing their services.[152]

Monageng[153] opines that some of the mmajor challenges would be the risk of hindering the prospect of a fair trial resulting from a defendant's non-cooperation as a result of counsel being imposed upon him/her. He/she may refuse to communicate with his counsel, preventing his side of the story from being aired and crucial details and arguments may be lost in this regard. He/she may refuse to testify on his/her own behalf, preventing a tribunal of fact from weighing all possible evidence available to it and make a fully informed and considered judgment as a result.

Just as forcing an accused to cooperate with 'his counsel' seems counterproductive and could ultimately result in an unfair trial for the accused, so might forcing a lawyer to continue to represent a person in a way that clashes with his professional standards. This, in light of ethical obligations, is likely to embarrass and hurt the lawyer's profession. Arguably, it might make them appear to be a tool being used by the court to facilitate the cosmetic appearance of the court rendering 'fair trials'. Indeed Nyaberi[154] contends that a court appointed counsel can help the self-represented defendant attain a fair trial except that in most cases, these counsel are merely appointed not out of competence but their availability to the court and or connections with the court officials.

However, Jarinde observes that it remains to be seen how the chamber treats and weighs such submissions on fact and evidence presented by the court appointed counsel who has not been

[152] Refusing a counsel to withdraw on his own request makes them largely dependent on the Court and endangers their duty of loyalty to their clients consistent with their duty to the Court to act with independence in the administration of justice. Yet counsel shall never permit their independence, integrity and standards to be compromised by external pressures. See also Decision on Assigned Counsel's Motion for Withdrawal, Milosevic (IT-02-54-T), Trial Chamber, 7 December 2004.
[153] Judge Sanji M. Monageng, Judge of the International Criminal Court at The Hague. E mail correspondence. 20, February 2012.
[154] Nyaberi J. Lumumba, supra.

duly instructed on the defence's side of the story by the accused.[155] Although the court appointed counsel will not waste time in familiarization since he has knowledge of the case, and also represents the accused when he is sick or for any reason unable to attend proceedings in court, his assistance, like that of standby counsel and amici, may not be of much help to a pro se defendant and cannot compare to defence counsel.

2.7 Imposition of counsel against the will and wishes of accused

International criminal courts are increasingly experiencing more cases where the accused prefer to waive their right to counsel on different grounds. But for purposes of administering fair trials, the courts have discouraged exclusive self-representation and aided the accused with experienced lawyers behind the scenes as well as equipment to facilitate their preparation of the case before coming to the courtroom. Even in the courtroom, counsel are put on standby ready to offer assistance should the need arise. By so doing, the courts keep in mind the cherished and deeply-rooted right to self-representation in the ICCPR and the ECHR whose provisions are re-echoed in the statutes establishing international criminal tribunals and national constitutions. That right cannot be ignored nor revoked just lightly, even if it is well known that it hurts not only the accused and his co-accused but also everybody involved and interested in the trial.

Be that as it may, the interests of justice dictate that a defendant, whether indigent or not, a lawyer by profession or not, presented before international criminal adjudicating bodies, which are largely adversarial, should be defended by well qualified robust and competent defence counsel, given the seriousness of the charges and complexity of the procedures and legal regime involved as well as the volume and type of evidence. But encouraging a

[155] Jarinde Temminck , Self-representation in International Criminal Justice, Assisting an accused to represent himself, Appointment of amici curiae as the most appropriate option, 4 J. Int'l Crime. 47. Page 7 to 10.

defendant to engage the full services of defence counsel in some cases has proved futile, hence leaving the court in an unenviable position of trying out all available means to respect and observe the un represented defendant's rights while at the same time ensuring the conduct of a fair trial. It is a tricky and delicate balancing act.

However well-prepared a party may be, the crucial moment lies in the tact in court: how the pertinent evidence is adduced, witnesses examined and arguments articulated before the judges. It is for this reason and more, that the courts, while recognizing the existence of the accused's entitlement to defend himself in person, have gone ahead to impose different types of counsel, as shown above, depending on the circumstances, even against the protests and wishes of pro se defendants. Egonda-Ntende[156] supports such imposition of counsel because it allows for the prosecution case to be tested and probed even if the counsel has no instructions from the accused.

Clark,[157] just like Combs and Nyaberi, agree that imposition of counsel against the wishes of a defendant is advantageous in that the trial proceeds expeditiously on schedule, and professionally within the rules of procedure thereby making it efficient and devoid of unnecessary delays. Kay[158] believes that imposition of counsel makes it look a proper trial while Goldstone[159], in addition to calling it an efficient trial said that it assists the court to reach a balanced conclusion with regard to disputes of fact and law. On this point, Combs adds that the court is more likely to see the evidence and hear the legal arguments that it should hear in order to decide the case in the most accurate and fair manner. It is also Nyaberi's contention that imposition of counsel serves to limit incidences of appeal based on

[156]Egonda-Ntende, supra.
[157]Professor Roger Clark, Lecturer of International Criminal Law. (Represented Samoa in negotiations to create the International Criminal Court and participated in drafting the amendment to the Court's Statute to activate its nascent jurisdiction over the crime of aggression). E mail correspondence. 18 March 2012.
[158]Steven Kay, QC, supra.
[159]Judge Richard Goldstone, Former Chief Prosecutor of the ICTY and ICTR. E mail correspondence. 23 March 2012.

denial of right to fair trial since such trials must not only be fair and impartial but also be seen to be fair and impartial on all the parties.

Though a step in the right direction, the appointment of standby and court appointed counsel and the engagement of amicus curiae, as already discussed, cannot offer sufficient assistance in terms of representation to the accused, especially in light of trials of this magnitude. Such assistance is not only in bits and inadequate but also not wholly in the interest of the accused. Counterbalancing the prosecution and defence to serve the interests of justice as well as those of the accused, and to attain a fair trial would require having a competent host of robust defence counsel to face the prosecution expertise throughout the trial, whether in the presence or absence of the accused in the courtroom. This is better than the constant enlargement of the roles and switching of the status of appointed counsel, standby counsel and amicus curiae, which has caused inconsistencies and uncertainties in the recent past in the jurisprudence of the ICTY, ICTR and SCSL with regard to their actual functions.

Of course representing an unwilling and uncooperative defendant puts the counsel in a difficult personal and professional situation yet, it is trite that counsel acts on the instructions of the client. Clark[160] observed that although some defences may not require the cooperation of a client, it is generally a difficult challenge to represent a defendant without instructions. Whereas Nyaberi[161] is also of the same view as Clark, he further warns of the challenge emanating from some defence counsel who drag their cases longer than necessary to remain on the tribunal payroll whereby the very essence of retaining him, namely to guarantee the right to a fair trial in a reasonable time, is lost. He proposes that a mode where counsel commits to completing the case in a specific period be devised. Although lawyers are regularly described as the mouthpiece of the accused, without knowledge of the accused's

[160]Professor Roger Clark, supra.
[161]Nyaberi J. Lumumba, supra.

assertions as to what he believes to be the truth and his understanding of events, it is extremely difficult, if not impossible for an advocate to attempt to construct the thoughts and mind-set of an accused who is not his client and therefore providing little or no information at all. Kay considers this situation to be insurmountable. Some fears are also expressed by Combs that such defendant is likely to lose trust in the assigned lawyer and the court system as well, and if he self-represents, he may feel the result to be more just, even if it is not favourable. Further, loss of legitimacy in the lawyer will inevitably lead to lack of cooperation between the lawyer and the defendant, which may cause crucial defence evidence not being uncovered or presented. Goldstone[162] contends that such counsel can only be of assistance with regard to the law but not usually with regard to issues of fact. It was for this reason that the SCSL commented on the new trend which some defendants were taking of not showing up in court that;

> *"...we want them to be present in court, because their presence assists their counsel in their own interests. When they are absent, they are prejudicing their interests as accused persons, because counsels are left with no proper instructions on which to base and ground their defences".*[163]

But rather than appointing standby counsel or amicus curiae, the desired results would better be attained by appointing defence counsel in his proper place, whether with or without the approval and instructions of the accused. Defence counsel would then study the documents and all the evidence, come up with a defence strategy, then appear and address the court from beginning to end, whether the defendant is in attendance or not. All the efforts of the court, counsel and jurists, amici, scholars and researchers would then be committed to finding modalities of how defence counsel can represent an unwilling and uncooperative defendant, as this research attempts to do, bearing in mind his well-grounded fundamental right to

[162] Judge Richard Goldstone, supra.
[163] *Sesay, Kallon and Gbao* (SCSL-2004-15-T), Record of proceedings of 11th January, 2005 at page 43.

defend himself in person. Letting the pro se defendant to continue spoiling his own case with inferior and regulated representation and at the same time hurting co-accused and making scathing attacks on the judges and witnesses, all culminating in inordinate trial delays, wastage of scarce resources and obstruction of justice cannot be a solution. Neither can it be said to be anywhere near the intended purpose and realization of the right to self-representation. A court of law mandated to administer fair trials should not conduct such proceedings which appear to be a mockery of justice.

The problems caused by self-representation and imposition of counsel are real and coming to the fore as have been acknowledged by both the national and increasingly international courts. No doubt, this calls for bold actions to be taken now. In the *Milosevic Case*, the defence had queried why the civil law practice of imposition of counsel on an unwilling accused was being introduced in the ICTY proceedings which are predominantly adversarial. It was also their contention that an imposed lawyer could not put the accused's case without instructions or know and protect the accused's interests. Therefore, the risk that the accused's health would prevent him for protracted periods from acting in his own defence was substituted by the risk that the defence case would be put incorrectly. More queries were raised including the possibility of the accused's refusal to testify as a witness and the likelihood of the defence witnesses also refusing to cooperate with the appointed or assigned counsel, all of which could constitute grounds for appeal given the defective way in which the defence was conducted by such counsel.[164]

On the other hand, the prosecution argued that court assigned counsel were perfectly able to act in the best interest of the accused, those interests being forensic. That this would mean calling evidence to defeat the legal case brought against the accused while ignoring any other

[164] Appeal against the Trial Chamber's decision on assignment of defence counsel, corrigendum, Milosevic (IT-02-54-AR73.7), 29th September, 2004. Counsel had applied successfully for leave to appeal (IT-02-54-T).

agenda he might have. And if an issue arose between the accused and the counsel as to what was in the best interests of the accused, counsel's judgment would prevail. It was also suggested that a record could be kept so that the judges could review disagreements between counsel and the accused to decide whether to call additional witnesses. That such record could also be of importance in an eventual appeal.[165] Moreover, as was noted in *Gbao*, since the court is constituted by professional judges, they would take note of the apparent fact that counsel in the matter had no instructions when he represented the accused.[166] But interestingly, the trial chamber itself entertained some fears earlier on that prevented it from assigning defence counsel to Slobodan Milosevic. The position was that should Slobodan Milosevic refuse to instruct that counsel, the Trial chamber could either: not allow the accused to make submissions and question witnesses, thereby effectively preventing the accused from putting forward any defence; or it could allow him to make submissions and question witnesses, in which case the defence counsel could do no more than the amicus curiae.

Jorgensen, referred to the two ICTR cases of *Ntahobali* and *Barayagwiza*, wherein the institutional role of defence counsel as being to serve the interests of justice and the court as well as those of the client was emphasized.[167]It was stated in the former case that counsel was independent of the accused and that there were matters of professional judgment for which counsel alone was liable. That the trial chamber needed to be assured that a counsel properly conducts an accused's defence and protects the latter's lawful interests during trial, but also has to verify that the accused does not abuse this right. The Trial chamber also emphasized that while counsel must keep the accused informed of the steps taken to protect his interests

[165] Nina H.B. Jorgensen, The problem of Self-representation at International Tribunals: Striking a Balance between Fairness and Effectiveness, Journal of International Criminal Justice 4 (2006), page 73-74.
[166] Decision on appeal against decision on withdrawal of counsel, *Sesay, Kallon and Gbao* (SCSL-04-15-AR73) Appeals Chamber, 23 November, 2004.
[167] Nina H.B. Jorgensen, supra page 74.

and provide an explanation for those steps, there was no need to consult with the accused in relation to each step.[168] In the latter case, further emphasis was laid on the obligations of counsel appearing for an indigent accused to ensure that the accused received a fair trial and was represented efficiently.[169]

Defence counsel, just like the way standby counsel has been previously mandated, could be allowed to call and examine witnesses and make submissions and full representation of the defence case alongside the accused and also continue with the case if the accused were for one reason or another removed from or not to turn up in court. This practice is not from without the court system and cannot be said to be alien. It had only been done at a smaller scale which could however be enlarged and built upon in future cases to solve some of the problems posed by self-representation and counsel acting without instructions. Analysis of some cases below shows that lack of instructions should never be a major obstacle in the path of justice and fair trial since legal and just means to circumvent such hurdles do exist.

In *Barayagwiza*, [170]the accused refused to attend court and also instructed defence counsel not to represent him in any respect during the trial. It was held that by boycotting the trial, the accused's actions were obstructing the course of justice, and that defence counsel should not withdraw even if the accused failed to attend proceedings. The duty of the court being to ensure that a fair trial took place and in respect of which they needed counsel to be present and participate in the proceedings on behalf of the accused even if he failed to engage in them.

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[168] Decision on Ntahobali's Motion for withdrawal of counsel, *Nyiramasuhuko and Ntahobali* (ICTR-97-21-T), Trial Chamber, 22 June, 2001.
[169] Decision on defence counsel motion to withdraw, *Barayagwiza* (ICTR-97-19-T), Trial Chamber, 2 November, 2000.
[170] Case No. ICTR-97-19-T, Decision on defence counsel motion to withdraw, 2 November, 2000.

Similarly, the ICTY compelled Milosevic's assigned counsel to continue representing him despite their application to withdraw from the case, one of the reasons being that he had not recognized them and had therefore not offered any instructions.[171]Norman Hinga's application to dispense with his counsel and represent himself on the date set for the start of the trial was rejected by the SCSL.[172] The counsel continued to participate in the case although the accused did not want to recognize them as his lawyers. More interestingly, in the latter stages of the Slobodan Milosevic trial, it turned out that the accused had even started directly instructing the court assigned counsel he had initially opposed and refused to give instructions.

It is also open to the judges, since international criminal tribunals draw from both civil and common law adversarial legal systems, to take a pro-active role and call further evidence including statements made by the accused and that of potential defence witnesses who may have refused to cooperate with defence counsel or testify on behalf of the accused so that the court is seized of all pertinent facts of the case to enable it execute its mandate of establishing the truth and finally reach a just decision. From this discourse, it is clear that defence counsel, even if acting without instructions can still put up a better presentation of the defence case than the pro se defendant himself, whether assisted by amicus curiae and or standby counsel and a team of behind-the-scenes legal associates or not, as long as he acts in the best interest of the accused.

As Judge Meron, P[173] had encouraged the court assigned counsel *'to realize the breadth of activities that they can carry out even in the absence of Milosevic's cooperation and simply continue to make the best professional efforts possible on his behalf'*, the counsel should

[171] Decision affirming the Registrar's denial of assigned counsel's application to withdraw, Milosevic (IT-02-54-T).
[172] Decision on the application of Samuel Hinga Norman for self-representation under Article 17(4) (d) of the statute, (SCSL-04-14-T).
[173] Decision affirming the Registrar's denial of assigned counsel's application to withdraw, *Milosevic* (IT-02-54-T).

endeavour to bring out the best possible arguments and defences in light of the charges preferred against the accused and the supporting evidence. After all, every counsel at the Bar, as an officer of the court, is professionally duty bound to act and perform their duties in the best interest of the administration of justice by assisting in the establishment of the truth – the aim of the international criminal tribunals. In the same vein, Zappala observed that

> "*...counsel are to assist the court in ensuring that fair trials are conducted on the whole and as has been stated, judges, as the ultimate guardians of justice, will manage to ensure a fair trial even without the assistance of amici curiae.*"[174]

It is not surprising therefore that in all the international criminal trials where the defendants, especially former leaders, have rejected defence counsel and stood on their own, the proceedings have been unnecessarily protracted leading to frustrations on the side of the Bench and Bar, victims and witnesses as well as entire public. Clear incidents of intentional abuse of court process have been exhibited by defendants who seem to wield unfettered powers through judge and witness intimidation and other unacceptable and disruptive acts of misconduct in court thereby making it difficult for the court to continue with its business in that fashion. Sight must not be lost of the fact that a speedy and timely trial of an accused person is one of the fundamental elements of a fair trial. Moreover, it is trite that justice delayed is justice denied.

Be that as it may, where the court is minded to allow the accused to exercise the right to self-representation, Jarinde suggests[175]that different kinds of substitutes for defence counsel: 'amici curiae'; 'standby counsel' and 'court assigned counsel' be introduced to safeguard his fundamental rights and to ensure fairness of the proceedings at the same time.

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[174] S. Zappala, Human Rights in International Criminal Proceedings (Oxford: OUP, 2003) at 63.
[175] See Jarinde, supra page 2-6.

However, it should be noted that even these so called safeguards have a lot of shortcomings and may not be of much assistance to the accused. In the absence of specific provisions and procedures on how to handle such undefended accused persons, the above categories of counsel whose tasks the court set out in individual and specific orders, were initiated into the international criminal justice system.

Recognizing the position and importance of the right to self-representation in international criminal trials, and acknowledging the fact that a pro se defendant cannot measure up to the performance of a defence counsel and yet in most cases they are in detention, the courts have discouraged exclusive self-representation, in a bid to attain fair trials, by further providing additional legal assistance such as a team of paid qualified lawyers and advisors who remain behind the scenes without appearing in court, and special facilities like computers and telephones. But even the defendant's use of his own behind-the-scenes "undercover counsel" was lambasted and found to be irreconcilable with the fundamental principle of a public trial.[176]

As can be discerned from the above discourse and the recent trends in interpretation and application of the right to self-representation, the courts seem to be in a quandary as to the application of that right. Issues like at what point should a court revoke or qualify the right to self-representation remain alive and unsettled. What seems to be settled by the international tribunals is the fact that, in appropriate circumstances, a chamber could restrict or even revoke the right to self-representation on the grounds of poor health or that it was substantially and persistently obstructing the proper and expeditious conduct of the trial. However, what the trial chamber found to be 'appropriate circumstances' in the *Milosevic case* did not meet the standard of the appeals chamber which reversed the trial chamber order

[176] Hans Holthius, ICTY Registrar, ICTY Diplomatic Seminar Addressed to Den Haag Chamber of Commerce, December 2, 2008.

and reinstated the accused's right to self-representation.[177] In particular, the appeals chamber disagreed with the manner in which the accused had been relegated to what they called a visibly second-tier role in the trial and opined that a basic proportionality principle should have been applied.

The *Krajisnik case*,[178]proposed a consideration of the factual context of each case, the timing of the request and the potential disruption to proceedings that self-representation may cause, in light of the need for a fair and expeditious trial, as being the determinant for the success or failure of an application for self-representation. The courts are still grappling with the issue of how to deal with pro se defendants since they are not subject to rules governing the conduct of defence counsel and given that there are no prescribed procedures to follow. The other is how to deal with a situation where a counsel is imposed on an accused against his wishes and he neither cooperates nor offers any instructions to the counsel. All these aspects have considerable effects on the quality of trials conducted and the justice rendered.

Thus, a genuinely fair and credible trial does not seem possible without adequate legal assistance as was the situation at the International Criminal Tribunal for Rwanda (ICTR) in *Akayesu's case* which proceeded for some time up to the end without defence counsel before he was convicted.[179] The advantage of this regime is that lawyers are familiar with the court's customs and procedures, and make the legal system more efficient for all involved. Kent[180] and Feuer[181] concurred that unrepresented parties often damage their own credibility or slow the court down as a result of their inexperience.

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[177] Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, *Milosevic* (IT-02-54-AR737), Appeal Chamber, 1 November 2004.
[178] Reasons for Oral Decision Denying Mr. Krajisnik's Request to Proceed Unrepresented by Counsel, *Krajisnik* (IT-00-39-T), Trial Chamber, 18 August 2005. As the Trial Chamber clarified, '[there] is a presumption that, if the right is asserted prior to the beginning of trial, it will be given effect'.
[179] *Prosecutor vs. Jean-Paul Akayesu*, Case No. ICTR-96-4-T
[180] Gordon Kent, "Lawyerless Litigants: Is Justice Being Served?" *Edmonton Journal,* 27 January 2002, A1.

Further, since 2003, the ICTY has remained in a quandary as to how to proceed and conclude the trial of Seselj due to his obstructionist and offensive behaviour and utterances towards the court and witnesses as he continues to represent himself in the trial without appropriate or effective sanction.[182] That is why the ICTY after repeatedly warning Karadzic of the problems that self-representation carries with it and he persisted, stated that *'he was claiming a right to pretend to represent himself'*, although the same tribunal had earlier emphasised the 'fundamental nature' of the right to represent one self by declaring that it could not be diminished lightly.[183] Similarly, poor independent legal counsel should be equally disallowed as it amounts to no representation at all but a miscarriage of justice. Therefore, such lengthy and chaotic procedures to deal with self-represented defendants, be they lawyers by profession like Milosevic and Seselj, can affect and disrupt the quality, speed as well as integrity of trials thereby impeding the administration of international criminal prosecutions. Moreover, conventional wisdom holds that a lawyer who represents himself has a fool for a client.[184]

2.8 Conclusion

The court must at all times be very mindful of the defendant's rights especially that to self-representation which is well recognized by national constitutions and international human rights instruments, including statutes of international criminal tribunals. That right should not be taken away unless the court is satisfied that the accused fully understands its essence and the consequences that follow, or his behaviour substantially affects the continuation of the

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[181] Alan Feuer, "Lawyering by Laymen: More Litigants Are Taking a Do-It-Yourself Tack," *New York Times,* 22 January 2001, B1.
[182] *Prosecutor vs. Seselj*, Case No. IT-05-67
[183] The ICTR Trial Chamber Judge Bonomy, during a status conference of 20th February 2009, criticised Dr. Karadzic for not engaging defence counsel yet it was apparent he was incapable of conducting his case. In his own words, Karadzic had conceded thus "*This is too much a major issue for me to state my views without consulting my legal advisers*"
[184] Nina H. B. Jorgensen, The Right of the Accused to Self-Representation before the International Criminal Tribunals, p. 1, available at http://jstor.org/pss/3216695 last accessed 23rd March 2010.

trial in an orderly manner. Instead, the accused should be encouraged as much as possible to engage the full services of defence counsel.

However, where the accused is allowed to represent himself, extra care should be even taken not to put him at a disadvantage and occasion a miscarriage of justice considering that he is not a qualified defence counsel. Even if he were, being an interested party in the case and apparently placed in the dock as well as a detention facility, is enough reason to trigger emotions, mount pressure on him and impair his reasoning. His incarceration prevents him from accessing potential witnesses and directing investigators in the search, collection and compilation of evidence from the alleged scene of crime which usually covers a wide area, at times stretching over a number of countries.

There are suggestions that somebody impartial -- probably amicus curiae – could lend assistance to him in advancing the defence case without interfering with the right to self-representation. But just like the court appointed counsel and standby counsel, the functioning of amicus curiae is impeded by a number of limitations. Whereas Amicus Curiae may be helpful in enlightening the Court on specific issues, he may not forcefully articulate the accused's case the way a defence counsel should in an adversarial system. And more so, his instructions emanate from the court and not the accused. Clark feels that these modalities contribute to the end result-that justice is done and also seen to be done, where the system does its best in an imperfect situation while Nyaberi and Goldstone contend that without the cooperation of the defendant, these modalities are of limited adequacy.

This research is in support of these views but not those of Kay when he suggests that unrepresented defendants should not be given court resources to carry out their role. That instead, those supports should be provided to assigned counsel and if one wishes to go the route of self-representation he should carry the consequences of his decision. On the other

hand, Nyaberi[185] holds a contrary view. He advocates for self-represented defendants to be availed the services of attorneys and investigators to ensure that they are well facilitated in mounting an effective defence.

As explained above, leaving a defendant to stand on his own without any assistance is unacceptable in cases of this magnitude which would cause an obvious inequality, and consequently, unfairness. As for Combs, she rightly observed that these modalities of representation are very strong in comparison to those in place in domestic courts to the extent that international courts bend over backwards to ensure that self-representing defendants are given adequate time and resources to conduct their cases.

For lack of instructions and therefore facts and or inside story from the accused, court appointed counsel and the standby counsel cannot perform any better than amicus curiae. They extensively interfere with, or hijack, if not, to a great extent erode the accused's right to self-representation. For this right to be given the seriousness it deserves, the accused could be left to play a considerable role in the management and conduct of his defence unless he intentionally disrupts, unnecessarily prolongs the proceedings and/or unless the court is satisfied that he is unfit or unable, for one reason or another, to mount a meaningful defence on his own. In that case then, the court is to ensure that the accused gets sufficient facilitation and advice to be able to realize and enjoy this right. For instance, availability of legal associates or advisors with whom he can have privileged communication both inside and outside court, and investigators to help in the obtainance of witnesses and extraction of pertinent evidence to build the legal points of his case. The amicus curiae could as well come in handy especially with regard to advising court on particular issues.

[185] Nyaberi J. Lumumba, supra.

Jarinde[186] rightly contends that the most appropriate solution while determining what would be the most desirable form of additional legal assistance to supplement the defence of an accused who wishes to represent himself should be respectful of the rights of the accused and also have due regard for the position of and consequences for defence counsel. Whichever decision that may be taken; a court faced with such a situation will inevitably find itself and the appointed or imposed counsel in a quandary.

The bottom line therefore should be rendering a fair trial which, not only the accused but also the spectators will at once concede was fair. The interests of justice require a balancing of rights which may result in a limitation of an element of the accused's package of trial rights, but the result of any balancing act must be that overall fairness is preserved. The paramount significance of the right to counsel and to all the other rights deemed essential to criminal due process was clearly recognized in the case of *Powell v Alabama* when the Supreme Court answered the question "as to what the due process clause required as a minimal, fundamental guarantee for any defendant that had to answer a criminal case". The answer below offered by Justice Sutherland has not only resonated in the right to counsel cases ever since but has also in effect summarized the discussion in this chapter although it is a domestic jurisdiction decision:

> *"What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial*

[186] Jarinde Termminck, supra, page 1-4.

> *without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him."*

As seen from the above discussion on the concept, causes and operation of the right to self-representation, it is clear that the role and position of amicus curiae, stand-by counsel and court appointed counsel is not yet settled. The law neither defines each one of them precisely nor outlines their distinct roles. It is also not indisputable that most of the problems and gaps in pro se defence caused due to the engagement of these categories of legal assistance could be remedied by full employment of defence counsel. That is why Combs believes that some of them may particularly not be useful. The numerous problems caused by self-representation to attaining a fair trial, as seen herein above, shall now be discussed in detail in the next chapter.

Chapter Three

Problems and challenges posed by self-represented defendants to the realization of the right to fair trial at the ICTY

3.0 Introduction

In this chapter, a critique of the right to self-representation is done by way of looking at the challenges and problems posed by self-represented defendants to the criminal justice system generally and specifically, in the administration of fair trials at the ICTY. This is revealed through the demonstration of how the problems faced by self-represented defendants have affected the accused himself and the co-accused, the public, victims and witnesses, attorneys and judges (court) as well as the criminal justice system as a whole.

It is now well settled that the right to self-representation is recognized as one of the indispensable guarantees open to a person charged with a criminal offence to enjoy, and that his choice must be honoured out of that respect for the individual which is the lifeblood of the law. However, there is no doubt that by choosing to conduct his own defence, the accused deprives himself of resources a well-equipped legal defence team could have been provided with. A defendant who decides to represent himself relinquishes many of the benefits associated with representation by counsel. The legal system's respect for a defendant's decision to forgo assistance by counsel must be reciprocated by the acceptance of responsibility for the disadvantages this choice may bring.[187]

Clearly, even if all the other due process requirements are put in place by the court, one can hardly say that there can be any equality of arms, as depicted in the above case of *Johnson v Zerbst*, where the pro se defendant will match the advocacy skills of the prosecution team in

[187] *Prosecutor v Milosevic*, Case No. IT-02-54-AR 73.6, Decision of 20th January, 2004.

forcefully presenting his case before the court. The courts still struggle to reconcile the competing interests of the unskilled pro se defendant, who seeks to fully exploit his rights, with the interests of the trial court, seeking the orderly and efficient administration of justice.[188] Therefore, self-representation continues unabated to inflict serious harms upon all participants in the criminal justice system and, not least of all, harm upon the system itself.[189] It raises a lot of legal and other problems as illustrated herein below.

In some instances, interventions have been put in place, but these do not necessarily remove the challenges posed by self-representation. According to Monageng,[190] in September 2007, following a decision of the Appeals Chamber in the case of Momčilo Krajišnik,[191] the Tribunal established the Remuneration Scheme for Persons Assisting Indigent Self Represented Accused. Self-represented accused have the right to adequate facilities for the preparation of their case. If a self-represented accused is determined by the Registrar to be indigent or partially indigent, he may receive limited funding from the Tribunal for a defence team of up to five persons who have been authorised by the Registrar to assist him or her. This may include a team composed of legal associates, investigators, a case manager, language assistants and other support staff.

As a result, several problems and challenges have been encountered not only by the court but also by all those directly and indirectly involved in the pro se trials. The obvious problems and challenges include delays in the conclusion of such trials caused at times intentionally by the accused or their apparent lack of legal knowledge and training; unwarranted and scathing attacks on judges, witnesses, Bar and other court officials; absconding from trial and refusal

[188] John F. Decker, The sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the guarantee of Self-Representation Twenty years After *Faretta*, 6 Seton Hall Const. L.J 483 at 524 (1996).
[189] Eugene Cerutti, 1989: 35
[190] Judge Sanji M, Monageng, supra.
[191] ICTY, Appeals Chamber, *Prosecutor v Krajisnik*, (IT-00-39-A) Decision on Krajisnik Request and on Prosecution Motion, 11 September 2007.

to recognize the jurisdiction of the court; failure to follow the decorum of the court and to offer a competent response to the prosecution case. Self-representation also disrupts the court calendar and timetable. Unless the right to self-representation has been implemented before the courts and its operation and worthiness tested, one cannot be able to tell its strength, weaknesses and practical effects. Each one of the above categories of interested parties in the case may be affected in a different way as it is demonstrated herein below through American and international criminal tribunals case law. All these problems will be grouped in three major classes namely challenges to (a) accused and co-accused, (b) public, victims and witnesses, and (c) attorneys, judges and the criminal justice system.

3.1 Challenges of self-representation to the accused and co-accused

It was stated in *Faretta* that the defendant, and not his lawyer or the state, will bear the personal consequences of a conviction[192]. The defendant therefore bears the full risk and burden of his freedom to choose. The accused themselves have on numerous occasions admitted before the court the kind of difficulties they face when presenting a defence without counsel. For instance, when a small procedural issue arose and Judge Bonomy asked Karadzic how he wanted to deal with it, the accused stated thus "*this is too much of a major issue to state my views without consulting my legal advisors*".[193] The same accused, though warned of the dangers self-representation carries with it and he refused to engage counsel, had earlier said that "*I don't have the necessary resources, I don't have a defence team, and with the speed at which matters are progressing ... I am afraid I will be in an even less equal position*".[194]That was not all. Between the months of March and October, 2009 the prosecution made a partial disclosure of a total of 891,572 pages of evidence of which over 100,000 were witness statements and previous testimony to which Karadzic responded

[192] *Faretta v California*, 422 U.S. at: 834
[193] This was during a status conference in the *Karadzic case*. See transcript of 20th February, 2009.
[194] During the status conference of 28th October, 2008.

expressing difficulties and frustration in the following terms: "*why and how is it possible that the prosecution is allowed to literary bury me under a million pages...*". Unlike with the pro se defendant, where a defendant has a team of defence counsel and they know what they want from the voluminous documents of evidence disclosed by the prosecution, they do not have to read every word but can scan for relevant terms and hone in on that.

The problem cannot be put any better than how the defendant in *Prosecutor v Akayesu*, who had on several occasions represented himself, described it in his own words to the court:

> *"I am going to admit something very sincerely to you. I am incapable of replying adequately to the prosecutor's address. How can I reply since I do not have the same weapons? He has led this trial in a masterful manner. He even managed to convince you of my guilt. So I will only try, using my teacher's logic, to say a few words."*[195]

In the famous case of *Zacarias Moussaoui*, believed to be the 20th hijacker of the 9/11 conspiracy, the pro se defendant missed out on very vital evidence in the case since he did not have a security clearance, yet, he was the lawyer on the case, and was therefore not allowed to view that classified information in the hands of the government of the United States.[196] Cerutti then asked pertinent questions on this matter:

> *"...whether it was possible in a contemporary legal setting to imagine a circumstance in which a pro se defendant would not be legally harmed by his self-representation. And, whether it is truly appropriate for any mature legal system, in the name of an airy concept of 'autonomy', to permit someone to self-inflict serious legal harm in return for some self-imagined exogenous benefit."*[197]

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[195] Case No. ICTR-96-4-A
[196] *U.S v Moussaoui*, No. 01-455-A.
[197] Professor Eugene Cerutti, "Self-representation in the international arena: Striking a false right of spectacle", "Self-representation in the international arena: Striking a false right of spectacle", (2009) [40] Georgetown Journal of International Law 919, 921.

It is not unheard of for a pro se defendant to plead guilty to a capital offence and even to be sentenced to death without interposing a challenge to the prosecution's case[198] or even putting across a plea in mitigation outlining extenuating factors so as to get a reduced or suitable sentence. But it should be noted that guilt alone does not establish a just and proper conviction. There are clear detriments when defendants who, by most accounts, should not represent themselves because of their mental or intellectual incapacities, are allowed to proceed pro se regardless. The defendants in these cases are often sent to jail for long periods of time or even put to death, while society's faith in our judicial system is greatly undermined by a feeling that these sentences are unjust given the circumstances.[199]

In *U.S v Kashani Farhad*, the pro se defendant evinced an utter lack of comprehension of the proceedings. He had almost no understanding of the roles played by various persons in court, made no objections during prosecution's case and he wrote to the jury "*Farhad is an innocent man*" then just went ahead during the wrap up of his case to ask the jury to *find him guilty* by returning "*a true verdict, a just verdict, that the prosecution has proved its allegation*", which the jury indeed did.[200] This is an apparent indication of confusion and ignorance of the law and court decorum which is costly in many ways and can only be overcome by engagement of services of defence counsel.

Brennan notes that: "it has been held that without the help of a lawyer, all the other safeguards of a fair trial may be empty."[201] The pro se defendant may be incapable of determining whether all the due process guarantees are fully in place to afford him a fair trial. He is unfamiliar with the rules and procedures and unable to query the correctness of the

[198] Ross E. Eisenberg, The Lawyer's Role When the Defendant Seeks Death, 14 Cap. Def. J. 55 (2001).
[199] Sarah Livingston Allen, Faretta: Self-Representation or Legal Misrepresentation, 90 IOWA L.R. 1553, 1556 (2005).
[200] *U.S v Farhad*, 190 F.3d 1097 (9th Cir. 1999). See also Professor Eugene Cerutti, supra page 49-52. These cases have been extensively discussed by Professor Cerutti in light of the right to self-representation.
[201] William J. Brennan (1961), "The Bill of Rights and the State", 36 New York Law Review, Vole 36, 76: 773.

charge or admissibility of the evidence, all of which leave him in a precarious state.[202] That is why in the *Gideon case*, when the accused was represented by counsel on retrial, the court found him not guilty.[203]

Self-representation poses many dangers and difficulties to an accused, and in addition to those enumerated above, he may be compelled into self-incrimination at the pre-trial or trial stages unknowingly, fail to sort and arrange relevant evidence, not know categories of vital witnesses to call and examine nor how to cross-examine the opponent's witnesses and discredit the prosecution evidence which all goes to the root of the right to fair trial.

Of course some of the problems, if not all, occasioned and or suffered by a pro se defendant may in one way or another affect the co-accused for the obvious reason that they are all being tried together. This could be delays in the trial caused intentionally or unintentionally, or due to lack of skills and knowledge to peruse documents in a timely manner, sort evidence and prepare a defence, unwarranted interruptions and incompetent motions which will inevitably affect the rights of the co-accused. Considering the likely adverse effects on the rights of the co-accused as one of the grounds, the SCSL refused to grant Norman's application for self-representation.[204]

3.2 Challenges of self-representation to the public, victims and witnesses

The problems and challenges of self-representation also extend to the public, victims and witnesses given that the rationale of handling international criminal trials to deal with serious violations of international humanitarian law is that they are considered to be one of the measures by which peace, security and rule of law may be maintained and enforced in regions of conflict. These categories of people have a particular interest in the manner in

[202] *Powell v. Alabama,* 287 U.S. 45
[203] Anthony Lewis, Gideon's Trumpet 237 (1964).
[204] *Norman, Fofana and Kondewa* (SCSL-04-14-T), Decision of the trial chamber of 8th June, 2004.

which the trials are managed and justice delivered expeditiously. Reporting by the media about the defence and prosecution evidence is viewed as a means by which all may see that justice is being done and that the harm suffered by victims is recognized. For instance, if the accused represents himself and at the time still retains a public profile and support, the publicity may be to the disadvantage of the victims but at the same time to his advantage, which will be a result not intended or desired by those prosecuting. Given the complexity and scale of these trials which involve detailed analysis of matters of fact and law, the time spent on the trial causes great frustration to many witnesses, victims and observers as they require a quick resolution of the matters that have involved conflict, war and terror and in respect of which there will have been widespread condemnation. Kay states that these observers feel that a litigant in person adds to the lengthiness of the proceedings, and that trials would be more efficiently and effectively conducted if in the hands of lawyers.[205]

The problems can better be illustrated by an examination of trials before domestic and international courts or tribunals. For example, a child molester, Dean Schwartzmiller, cross examined his eight victims in excruciating detail, asking the boys whether they remembered kissing him and if they enjoyed the sex, which encounter caused great discomfort, embarrassment and agony both to the witnesses and the jurors in the courtroom as well as the relatives of the victims and entire public.[206]

There is yet another pertinent case, even if from a domestic jurisdiction and not directly relevant, some of the issues handled squarely cover the subject under discussion now. The case is a clear illustration of how a pro se defendant can cause pain and difficulties to the

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[205] Steven W. Kay, 'Fair trials and the International Criminal Tribunals – Whose Case is it Anyway? The Right of An Accused to Defend Himself in Person before International Criminal Courts', page 1, (An article submitted to International Commentary on Evidence, Manuscript 1050).

[206] John Cote, Serial Abuse Suspect Guilty, San Francisco Chronicle, Sept 19th, 2006 at A1. See also Carolyn Marshall, Serial child molester receives maximum term in California, N.Y.Times, 30th Jan, 2007 at A 17 (Quoting the prosecutor, Steven Fein).

jury, prosecutor, witnesses and court officials including the judge. It also shows the length at which the pro se defendant can go to abuse the powers and integrity of the court without sanction. It is the case of *Susan Polk,* where the accused admitted to stabbing her husband 27 times with a knife during the middle of a bitter divorce. The accused chose to represent herself after firing two sets of attorneys. She cross-examined her own son who had testified against her for four days regarding what the judge described as irrelevant family history and 'minutiae' which did not concern the actual homicide. She also made 30 personalized non-legal objections during the first hour of the prosecution's cross-examination of one of her sons who testified in her behalf. The judge then warned that: "*I believe that this cross examination is bordering on the abusive and if you were an attorney, I would have imposed sanctions by now."* Susan Polk's own testimony, full of irrelevances and abuses directed to the court, witnesses and prosecution, took 17 hours of the precious judicial time.[207] She took the jury through irrelevancies of her life story, complete with childhood photos and excerpts from her diaries, and also told them she had psychic powers and had foreseen the tragedy of 9/11 but was unable to stop it because her husband was an Israeli spy.

The *Krasjnik Seselj* case,[208] which began in 2007 after his arrest in 2003, provides one of the most serious cases of abuse of court integrity where the defendant exhibited disruptive and obstructionist behaviour, deliberate disrespect for the rules, intimidation and slanderous comments in relation to witnesses, judges, court staff and prosecution. The accused was so vulgar especially in his written submissions to the court which he filled with all sorts of

[207] The case is unreported but court TV has compiled a series of reports available at: http://www.courttv.com/trials/polk . These cases are also extensively discussed by Professor Cerutti, supra.
[208] *Prosecutor v Seselj*, Case No. IT-03-67 (Available at http://www.un.org/icty/cases-e/index.htm). See also Decision on assignment of counsel, 21 August 2006, paras. 48-52 where the defendant wrote in reference to the tribunal registry: "You, all you members of the Hague Tribunal Registry, can only accept to suck my cock." With regard to another named individual associated with the tribunal, he wrote: "Shit remains shit even if wrapped in gold. Therefore, if this slime were to remove the black garment in which he appears that makes him look like a raven and put on a golden uniform, he would still be what he is, shit in a human form". And with regard to another named individual, he wrote: "How to tell him to kneel down and start sucking Dr Vijslav Seselij's Orthodox dick, but only on cue 'bow and begin'? How to simply tell him, monkey, eat shit, that's all you can?'

obscenities. Despite the accused's clear intention and warnings to continue with his insults and attacks and also to destroy the Tribunal, he was left to continue acting as his own lawyer. This also shows how the courts respect and protect the right to self-representation that it can only be revoked in deserving circumstances and after several warnings to the accused. But the exercise of the right to self-representation by some defendants continues to cause disturbances in the proceedings, more so, with impunity, given that a self-represented defendant operates under no code of conduct in an environment well-known to highly observe and enforce rules and ethics.

3.3 Challenges of self-representation to the attorneys and judges as well as the criminal justice system.

Again at the SCSL, Norman and his four standby counsel extensively cross-examined the witnesses and this demonstrated that the justice system could be exploited if not managed carefully by the chamber to avoid unfairness to the co-accused and or the prosecution and its witnesses. [209] This is also an additional burden on the court in taking an extra and active role in controlling and managing proceedings.[210] In the above *Polk case*, her defiance of the court's rulings, her acid-tongue accusations against the judge, prosecutor, court personnel and prosecution witnesses, and her obsessive focus on every mischaracterization or potential slight she perceives had caused frustrating delays of the trial for several months.

In the case of *Zacarious Moussaoui* (the 9/11 case) the accused, throughout the years of the trial, rejected and ridiculed his standby counsel, maintained a stream of personal and professional accusations, in written motions and courtroom proceedings, against his standby attorneys and the Judge, who was also likened to a Nazi that was in a conspiracy with the

[209] *Norman, Fofana and Kondewa* (SCSL-04-14-T), Decision of the trial chamber of 8th June, 2004.
[210] Nina H. B. Jorgensen, The Problem of Self-Representation at International Criminal Tribunals, Striking a Balance Between Fairness and Effectiveness, Journal of International Criminal Justice 4 (2006), 64-67.

attorneys to have him executed. The prosecutor in the *Susan Polk* case was accused by the pro se defendant of engaging in unethical behaviour, continuously interrupted, and referred to as a "moral creep" who ought to be working in a third world dictatorship. The Judge was at pains to control and manage the proceedings professionally since the accused was left to conduct her case without any apparent application of the rules of evidence which led the prosecutor into pleading with the court for guidance.

In all the pro se cases analysed, imposing sanctions against the defence proved a futile exercise to the extent that in some situations the court kept pleading with the accused to behave well, probably for fear of being labelled biased or having the trial to collapse, so that it is completed at all costs. As already intimated in the *Susan Polk case*, the judge seemed stark with a party right in his face continuously exhibiting behaviour meriting punishment but could not at the same time take any steps when he warned that if the accused was an attorney the court would have already imposed sanctions.

Courts have mechanisms and tools to employ to keep and manage proceedings flowing in an orderly manner which however do not seem to apply to pro se defendants. Judges have inherent powers to recommend an appropriate disciplinary action, threaten to expel from the courtroom, impose fines or prison time, or even to suspend the license of an attorney who behaves contrary to the required rules of the court. Unfortunately, this does not seem to be possible with the pro se defendant and poses one of the greatest challenges to the courts in today's international criminal trials where some proceedings, like that of Seselj, are run in a very disorderly, unprofessional and unacceptable fashion, so much so that any right thinking member of the public, or a nosy but intelligent bystander, cannot see how any semblance of justice could be achieved out of such trial. Fair trial has everything to do with the process of

the entire proceedings and not necessarily the outcome, and this majorly lies on the shoulders of the court.

Be that as it may, in the *Krasjnik Seselj case*, the Trial Chamber tried revoking the accused's right to self-representation twice but the decisions were overturned on each occasion by the Appeal Chamber and the accused's right to self-representation reinstated. This is yet another very serious challenge to the international criminal justice system of not being able to determine or set a standard as to when to revoke or qualify the right to self-representation, more so, even in circumstances which may clearly appear to everyone to warrant an immediate revocation of the right. Having also ordered the trial to recommence, Seselj even gained more confidence and hurled further insults to the judges who had revoked his right to self-representation and interruptions which extensively compromised the dignity of the tribunal and jeopardized the very foundations upon which its proper functioning is based. But the trial was to begin anew after a whole one year, and Zahar had this to comment about the matter:

> *"The handling of Krasjnik Seselj's case calls into question the very idea of international criminal justice as an orderly, rational, functional, legal system. One wonders how (if that were not the case) it could come to pass that a vexatious litigant who is the leader of a party of ultra-nationalists whose declared aim is to destroy the Tribunal, who regularly hurls insults at judges, prosecutors, and other tribunal staff, who issues threats to potential witnesses and members of the public, and who is mentally unstable, has managed twice to win back the privilege of self-representation and is allowed to conduct his defence at trial at his pleasure with almost total impunity.*[211]

[211] Alexander Zahar, Legal Aid, Self-representation, and the crisis at the Hague Tribunal, 19 Cr. L.For. 241, 242(2008).

Generally, the major challenge faced by all those concerned in the criminal trials is that the ICTY, just like the other international criminal tribunals and the ICC, does not have specific rules or mechanisms governing self-representation within the Statute and or the Rules of Procedure and Evidence. There is no proper prescription of permissible and impermissible conduct that may result in the revocation or restriction of the right, and how, when and why this should be done.

Even where international tribunals have attempted to establish the criteria for limiting the right to self-representation, the matter has not been clear cut. Monageng[212]states that in 2004, the Special Court for Sierra Leone in the *Norman* case, the Trial Chamber observed that there were six considerations for deciding whether the right to self-representation should be limited: the right to counsel is predicated upon the notion that representation by counsel is an essential and necessary part of a fair trial; counsel relieves the burden on the trial judges of explaining and enforcing basic rules of courtroom protocol and assisting the accused; given the complexity of such trials, permitting an inexperienced (and likely untrained) accused to present his or her own defence risks unfairness to the accused; there is a public interest, national and international, in the expeditious completion of the trial; there is the high potential that self-representation would further disrupt the Court's timetable and calendar; and there is a tension between giving effect to the right of an accused to self-representation and that of his co-accused to a fair and expeditious trial as required by law.[213]

However, these considerations have not been set down in the rules of procedure. The lack of such detailed legal framework leaves each court to determine how to manage and deal with the pro se defendant's case at hand individually, thereby leading to uncertainties and

[212] Judge Sanji M. Monageng, supra.
[213]Decision on the Application of Samuel Hinga Norman for Self-Representation under Article 17(4)(d) of the Statute of the Special Court, Norman, Fofana, and Kondewa ('CDF Case') (SCSL-04-14-T), Trial Chamber, 8 June 2004.

inconsistencies in the jurisprudence as was the situation in the above Seselj case. Sluiter considers the right to self-representation to be a major problem that continues to plague the ICTY, especially in the Karadžic case, which she believes will only be credibly tackled when the Prosecutor and Judges clearly denounce the appeals Chamber ruling in Seselj as being bad law and inappropriate guidance, and restore a reasonable interpretation of this right.[214]

3.4 Conclusion

The above discourse and authorities clearly show how pro se trials are run to the peril of, not only the accused himself, but also all the other participants in the proceedings. Cerutti observed that the system allows the accused to become an abuser, most directly to his victims and accusers yet, he himself has all the status and privileges of an attorney when directly confronting them.[215] Sadly, the accused's lack of professional skills renders him incapable, even if willing, to comply with the rules of evidence and procedure, and as a non-professional cannot be subjected to the standard controls of the court or the embedded culture of the courtroom. This is no longer a level face-to-face encounter; it is now a one-sided beaker with witnesses forced to endure rude and irrelevant – and often endless- questioning as the price for their testimony. It is even disastrous if his removal from the court was ordered in case he misbehaves as the whole defence would be excluded from the trial. Unlike in the pro se defendant's situation, where an accused is excluded from the trial, Article 63(2) of the Rome Statute allows his defence counsel not only to continue with the case in his absence but also to receive instructions from him as he will be observing the trial from outside the courtroom through the use of communications technology.

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[214] Goran Sluiter, Karadzic on Trial: Two Procedural Problems, Hague Justice Journal, Volume 3, Number 2, 2008, at page 50.
[215] Professor Eugene Cerutti, "Self-representation in the international arena: Striking a false right of spectacle", page 46-47.

Entertaining the argument that the right to self-representation could not be permitted to trump the more fundamental right to fair trial, Cerruti, citing the court in the *US v Farhad* case, had this to say:

> *"The court has never directly addressed the argument of the Faretta dissenters that the sixth Amendment right to self-representation would lead to unfair trials and unjust convictions. By now, it is clear that the dissenters' concerns have been borne out. Farhad's trial illustrates the effect of this conflict, one that the court has now the opportunity to face squarely. Under Faretta, courts have no occasion to assess the consequences of the waiver of the right to counsel on the constitutionality of the trial itself. Nevertheless, on the record, it is quite plain that Farhad, like many criminal defendants who choose to be tried without a lawyer, was convicted in a proceeding so fundamentally flawed that, were it not for Faretta, it would undoubtedly offend minimal constitutional standards of fairness."*[216]

It is indeed true that the right to self-representation started and worked well in jury criminal trials in common law domestic jurisdictions. However, it must also be noted that the current challenges faced with its implementation are inevitable given that the right to self-representation is now being applied in a dissimilar environment of international criminal courts without a jury, representing a blending of common-law and civil-law legal systems, and dealing with serious cases of grave violations of international humanitarian law against humanity.

Despite all the criticism that the right to self-representation had become an empty and dysfunctional entitlement in the contemporary setting of the criminal trial, the said right is indisputable and remains inviolable. How the right to self-representation is applied to attain fair trials but at the same time without causing harm to the accused, the other participants in

[216] *U.S v Farhad*, 190 F.3d 1097 (9th Cir. 1999). See also Professor Eugene Cerutti, supra page 49-52.

the trial and the justice system itself, remains a big challenge to the international criminal adjudicating bodies. It is in the best interest of all concerned to ensure the defendant is fairly advised of his rights during the trial, and at the same time reduce the delays, reversals, and courtroom disruptions which occur when an untrained person attempts to be his own lawyer for whatever reasons.

These complex international criminal trials and legal systems leave no room for a person unschooled in law, and specifically international humanitarian law, to represent himself. As seen above, such representation is certainly of very low quality and in turn harmful, incompetent and cannot lead to the much anticipated fair trials and justice by ICTY and other international criminal tribunals.

The next chapter consists of observations and findings made during the study and also provides some solutions to the above problems and recommendations.

Chapter Four

Recommendations and Conclusion

4.0 Introduction

It is no longer in doubt that international criminal practice and procedures continue to fluctuate and oscillate within the parameters of common law and civil law procedural principles, for which, consistence in benchmarks, procedures and jurisprudence is now sought. This chapter offers some solutions to the problems posed by self-represented defendants in international criminal trials, with examples drawn from proceedings at the ICTY, in a bid to prospectively provide lessons and solutions for the ICC. The chapter briefly discusses the findings made during the study and makes recommendations on the enjoyment and implementation of the right to self-representation in light of the right to fair trial in international criminal prosecutions, for a defendant who waives the right to counsel. The major solutions proposed, which are elaborated on hereunder, include new concepts as recommendations which are based on the findings of the study namely (a) establishing a system of hybrid representation at the ICC- which will solve most of the problems and challenges of self-representation discussed in chapter three, and (b) to effect a legislative reform of the Rome Statute and or the RPE to provide for the suggested proposals.

The study investigated "The right to self-representation and its challenges to the administration of fair trial at the International Criminal Tribunal for the Former Yugoslavia: Lessons for the International Criminal Court." It was intended to provide an in-depth understanding and the importance of the right to self-representation as well as the right to counsel, and further, to establish whether the right to self-representation guarantees fair trials to accused persons and or their co-accused arraigned before the ICTY. This was in relation to

the complex nature of international crimes, the volume of technical evidence, the hybrid legal system comprising of civil and common law principles and procedures, and the premise that a self-represented defendant cannot measure up and may not get a fair trial as opposed to one properly represented by defence counsel since they both have to face a competent, adequately facilitated and well prepared team of prosecutors.

In particular, this study sought to ascertain whether: self-representation sufficiently ensures the right to fair trial in international criminal prosecutions; counsel imposed on an unwilling and uncooperative defendant, and therefore appearing without instructions, can effectively defend and assist the accused to get a fair trial; the modalities of representation available in international criminal prosecutions (Amicus curiae, Standby counsel and Court appointed counsel) are adequate to assist a pro se defendant to realize the right to a fair trial; and whether there is a need to review the existing legal framework at ICC to address the challenges presented by pro se defendants.

4.1 Summary of findings

The study established the following major findings.

It was established in Chapter One that the right to self-representation, as expressed in the ICCPR, ECHR, ACHR and reproduced in the Statutes of the ICTY and other tribunals and the ICC, is inalienable and therefore indisputable.

In Chapter Two, the study established that the right to a fair trial consists of a whole package of due process rights, including the rights to counsel and self-representation, open to a defendant on trial to enjoy. The said right is non-derogable under any circumstances. Not even the defendant himself can waive his right to a fair trial. Generally, though the court is

mandated to ensure that the defendant receives a fair trial, the prosecution, as well as the defence has a crucial role to play in the realization of this right.

The right to self-representation is one of the fundamental minimum guarantees accorded to a defendant to ensure a fair trial. The right to counsel compliments it. However, the right to self-representation can only be revoked or restricted by the court in circumstances where the defendant substantially abuses it and behaves in such a disruptive manner interfering with the course of justice. Even then, the courts must not be quick to revoke that right, a matter that has been well articulated by the SCSL. The SCSL[217] propounded that careful regard must be given to the following considerations before limiting the right to self-representation: the right to counsel is predicated upon the notion that representation by counsel is an essential and necessary part of a fair trial; counsel relieves the burden on the trial judges of explaining and enforcing basic rules of courtroom protocol and assisting the accused; given the complexity of such trials, permitting an inexperienced (and likely untrained) accused to present his or her own defence risks unfairness to the accused; there is a public interest, national and international, in the expeditious completion of the trial; there is a considerably high likelihood that self-representation would further disrupt the court's timetable and calendar; and there is tension between giving effect to the right of an accused to self-representation and that of his co-accused to a fair and expeditious trial as required by law.

Additionally, the study found that, apart from spelling out the right to self-representation, the said legal instruments did not prescribe any modalities or procedures on how a tribunal should deal with a self-represented defendant to ensure that he enjoys a fair trial. Judgments at the ICTY and other tribunals clearly show a haphazard practice exhibited in the treatment

[217] Decision on the Application of Samuel Hinga Norman for self-representation under Article 17(4) (d) of the Statute of Sierra Leone Special Court, Norman, Fofana and Kondewa ('CDF Case') (SCSL-04-14-T), Trial Chamber, 8 June 2004.

of self-represented defendants in the various cases handled with each court giving different directions to the defendant, or amicus curiae or standby counsel or imposed counsel, where one was appointed. The failure of the law to precisely define amicus curiae, standby counsel or court appointed or imposed counsel, and also prescribe their distinct roles to be played, has been a source of conflict and challenges encountered in pro se proceedings as the courts resorted to assigning them any duties including what they were clearly not meant to do. As Monageng[218] aptly puts it;

> *"If an accused wishes to represent themselves before an international tribunal, it is important that the relevant structures and procedures are in place to allow the accused to have access to the required resources in order to expeditiously and efficiently realize this right. Such resources include the ability to assemble an adequate legal team to advise and assist him/her in preparation for trial."*

Imposition of counsel makes the trial proceed more efficiently within rules of procedure and on schedule, assists court to reach a balanced conclusion with regard to disputes of fact and law, and minimizes incidences of appeal based on denial of right to fair trial. But counsel's main challenge would be the inability to assist court with regard to issues of fact if the defendant refuses to cooperate and gives no instructions. His failure to testify and also call witnesses denies the court opportunity to weigh all the possible evidence and arguments available to enable it make a fully informed and considered judgment.

The study found that the main causes of self-representation in international criminal tribunals include: the suspicion of the existence of a conspiracy to convict former leaders, and reluctance of the accused to accept counsel allocated and paid for by the court, because the accused has not participated in choosing that counsel, who then is suspected of being part of the implementation machinery of the conspiracy to effect their conviction and detention

[218]Judge Sanji Mmasenono Monageng, supra.

under all circumstances. Other defendants have considered such proceedings as political rather than legal trials, and as such, reject the court's jurisdiction or, if not, they believe they are in a better position than a lawyer to tell the story to the court first hand or even turn the court into a political platform to communicate to their supporters in the home country. The other is the intention to delay and frustrate the proceedings for various self-serving reasons.

It was revealed during the study that there are both positive and negative effects in exercising and practicing the right to self-representation. Compared to a represented defendant who remains passive and limited to giving a statement and or taking the stand as a witness, the pro se defendant enjoys full participation in and control of his case thereby realizing the right to self-representation, though not necessarily the right to fair trial. However, self- representation continues to inflict much harm in various ways on the accused, whether a lawyer by profession or not, who cannot match the advocacy skills of the prosecution. It also affects the co-accused, public, victims and witnesses. Further challenges are also posed on the attorneys and judges conducting such proceedings. This is particularly harmful not only to the ICTY's overall integrity and authority as a custodian of internationally protected human rights but also the international criminal justice system.

The study established that viewed in isolation, the right to self-representation is not completely sufficient to ensure a fair trial. The ICTY had on numerous occasions engaged the services of amicus curiae to assist a self-represented defendant, at times allowing him to literally play the role of defence counsel. However, amicus curiae, also known as 'friend of the court', cannot replace defence counsel since his role is neutral, and to enlighten the court on a given matter thereby assisting it to reach a just decision rather than to vigorously represent the case or interests of the defendant.

Further establishment of the study was that standby counsel, just like amicus curiae, could assist the pro se defendant to get a fair trial but not adequately. They both faced many limitations yet their mandate was prescribed and determined by the court on an ad hoc basis. They also lack the independence enjoyed by defence counsel. Similarly, a court appointed counsel or counsel imposed on a defendant against his will and or wishes will face a multitude of impossibilities starting with lack of instructions or authority to act for the defendant to details of the defendant's inside story forming his case and line of defence.

However, it was also established that a properly instructed, competent and efficient defence counsel would take up the whole of the defendant's case without any limitations and plan for it, confront and attack prosecution evidence, and call relevant witnesses and evidence in support of the defence case, make submissions and generally ensure that the defendant is taken through due process. He could object to a process devoid of features of a fair trial or point out the missing due process rights to the tribunal. For, the right to counsel is the most fundamental procedural safeguard to assure a fair trial in which the State and the accused stand on equal footing before the law. Nevertheless, the mere right to have counsel is no longer sufficient; it is the actual presence, competence and performance of counsel that is essential because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. Being the most vital of all the protections guaranteed to criminal defendants, without the guiding hand of counsel, all the other safeguards of a person on trial are not secured, while his right to a fair trial may be watered down or severely compromised. Yet, the right to counsel has been held to be indispensable to the fair administration of adversary system of criminal justice and further, that without counsel, the right to a trial itself would be of little avail.

Another finding of the study was about the capabilities of the majority of self-represented defendants who were incompetent and lacked capacity and the requisite skills in the science of law and knowledge of court procedures to deal with the voluminous and complex international crimes before a tribunal applying both civil and common law principles. Not to mention, intelligent and educated laymen who are unable to determine whether the indictment is good or bad, the evidence is admissible or inadmissible, and to adequately prepare and present a defence, even though they may have a perfect one. Fergal[219] observes that they may fail to attack the credibility of prosecution witnesses and instead call witnesses who are detrimental to their own interests. Equally, defendants who are lawyers by profession could not effectively represent themselves, given the vested interest and emotional attachment in their own cause which impairs one's objectivity and reasoning to some extent.

In Chapter Three, it was found that unlike lawyers who are guided by a code of conduct, pro se defendants have none, and abuse court protocols and decorum with impunity, without facing any form of sanction, which muddles up the trial and casts the court in bad light as having failed to assert its authority to control proceedings. This behaviour led to unnecessary delays of trials by the disruptive behaviour of the self-represented defendants thereby wasting resources and causing frustration and pain to the Bench, Bar, co-accused, witnesses, public and victims at ICTY. Serious challenges are also posed on the international criminal justice system as well as the defendant himself who will not be able to comprehend or follow the proceedings nor offer a competent response to the prosecution's case.

Numerous solutions to the problem of self-representation have been proposed by some authors including mandatory imposition of defence counsel, regardless; total exclusion of the disruptive defendant from the courtroom; and advocating for a change in the ICTY jurisprudence, especially the Appeal Chamber decision in the *Seselj* case which

[219] Fergal Gaynor, supra.

Sluiter[220]believes contains significant flaws to stand and only served to extend the right to self-representation to individuals who abuse and continue to abuse this right. Others contend that since it is confirmed that the right to self-representation is harmful to all participants and the justice system then the ICTY should totally get rid of it from the statutes. In the *Saddam Hussein* trial, the relevant Statute expressly excluded the right to self-representation and made it obligatory for the defendant to be represented by defence counsel in order to pre-empt the anticipated problems associated with self-represented defendants. This proposal would have been very persuasive indeed had it not been for the fact that the right to self-representation is a human right to be enjoyed by virtue of one being human and therefore should not be lightly taken away. The same position applies to Fergal's[221] view that the broad right to self-representation be abolished and replaced with the practice at the European Court of Human Rights which permits for counsel to be imposed in complex criminal cases.

The solutions provided by the numerous authorities, in the literature reviewed herein, could not sufficiently solve the problems associated with self-representation to afford the defendant a fair trial. In particular, it had been discussed and suggested in Chapter Two that amicus curiae, standby counsel and or court appointed counsel should be appointed to assist a pro se defendant in addition to a team of behind-the-scenes legal advisors and administrative facilities.

In view of these findings of the study, it has been observed that a self-represented defendant may not be able to attain a fair trial in international criminal prosecutions at the ICTY since he lacks the knowledge, ability and skills to aggressively argue his defence to counter the prosecution case and indicate the weaknesses therein, and also point out to the court the

[220] Goran Sluiter; Karadzic on Trial: Two Procedural Problems. Hague Justice Journal, Volume 3, number 2, 2008, page 46.
[221] Fergal Gaynor, supra.

missing fair trial rights. Similarly, counsel imposed by the ICTY on ad hoc basis upon the self-represented defendant without a proper lawyer (counsel)-client relationship, and is denied instructions by his so-called client will also not offer much assistance to the defendant in attaining a fair trial. Contrary to what Gillett[222] opined that the existent modalities are adequate, and as already discussed above, appointing amicus curiae or standby counsel to assist a self-represented defendant in these circumstances is not sufficient in itself to ameliorate the situation. However, a robust team of efficient, well-instructed and knowledgeable defence counsel would ably offer high quality representation to the accused and secure him a fair trial in cases of this magnitude.

The ICTY is a hybrid judicial body applying laws, jurisprudence and principles drawn from both civil and common law systems, but with more inclination to common law principles. Ordinarily, before considering the relevant law, defence counsel depends on the facts provided by the defendant on how the events unfolded to craft his line of defence and submissions. It should be remembered that one of the reasons why some defendants, especially former military and political leaders, opt for self-representation is that they believe that they know the facts of the case better than the lawyers since they were personally present and involved as the events happened, and therefore preferred to explain and narrate the story to the court by themselves. No doubt, the accused is well conversant with the people and situation of their society as well as causes of the conflict, which no lawyer could learn better than him. However, mounting an effective defence in court goes far beyond just knowing what the facts of the case are. Knowledge of the law and courtroom experience too is vital. That is why Fergal opined, and rightly so, that an accused should never be given primary responsibility for the in-court conduct of his defence.[223] Gillett too supports this view that a

[222] Matthew Gillett, Prosecutor at ICTY and Member of the Peace and Justice Initiative. E mail correspondence. 15, April 2012.
[223] Fergal Gaynor, supra.

pro se defendant should never be left attempting to run a large scale case on their own.[224] Nevertheless, a defendant's active role in advancing his version of the story before the court is crucial and not alien to these proceedings. Even the civil law system allows the participation of a defendant in the courtroom proceedings albeit in minor offences only. The case law reviewed in chapter two clearly elaborates on this.

In the case of *Akayesu*, the accused stood unrepresented during the time for mitigation and after outlining the extenuating factors, the court observed that at that stage in the proceedings, professionalism was no longer required and further, that "*no counsel would have expressed what you said better than you did because you spoke with the language of your heart.*"[225] In *Ntahobali*, it was stated that counsel was independent of the accused in matters of professional judgment for which counsel alone was liable, and further, that while counsel must keep the accused informed of the steps taken to protect his interests and provide an explanation for those steps, there was no need to consult with the accused in relation to each step.[226] The judges in *Slobodan Praljak*[227] allowed the defendant to question witnesses in court on issues where he had personal expertise while still being represented by lawyers. These examples were an attempt to straddle and balance the two competing fair trial rights which are at play thus the right to assist in one's defence which encompasses the right of self–representation and the right to a fair trial.

In addition, the study has shown that in some cases where the defendant boycotted the trial and also refused his counsel from attending, the court rejected counsel's application to

[224] Mathew Gillett, supra.
[225] *Prosecutor v Jean Paul Akayesu* (1996), Case NO.ICTR-96-4-A
[226] Decision on Ntahobali's Motion for withdrawal of counsel, Nyiramasuhuko and Ntahobali (ICTR-97-21-T), Trial Chamber, 22 June, 2001.
[227] *Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić & Berislav Pušić* IT-04-74

withdraw from the case in order to ensure a fair trial.[228] Milosevic's[229] assigned counsel was compelled to stay on the case for similar reasons in addition to the ill health of the accused. The SCSL,[230] against the wishes of the accused, rejected the application to dispense with Norman Hinga's defence counsel on the day the trial was scheduled to start. Accordingly, court assigned counsel had been encouraged "to realize the breadth of activities that they can carry out even in the absence of Milosevic's cooperation and simply continue to make the best professional efforts possible on his behalf."[231] It, however, turned out that in the latter stages of the Milosevic trial, the defendant had started directly instructing the counsel he had initially rejected and denied instructions. Though unrepresented, Karadzic intimated to the tribunal that he highly valued the contributions of his behind- the- scenes defence team and even one time, the Chamber, entertaining his own application, granted his legal advisor the right of audience on legal questions.[232]

4.2 Recommendations

Basing on the findings of the study, the following major recommendations are made.

1. Establishment of a hybrid representation scheme

As alluded to in Chapter One, new concepts are introduced in this Chapter as recommendations which are based on the findings of the study. The hybrid modality of representation, where both the accused and imposed counsel present the defence case together, is a new approach and would suit the practice before the ICC, which encompasses civil and common law legal/ judicial system principles and procedures. It should be noted

[228] *Prosecutor v Jean Bosco Barayaguiza*, Case No. ICTR-97-19-T, Decision on defence counsel motion to withdraw, 2 November, 2000.
[229] Decision affirming the Registrar's denial of assigned counsel's application to withdraw, Milosevic (IT-02-54-T).
[230] Decision on the application of Samuel Hinga Norman for self-representation under Article 17(4) (d) of the statute, (SCSL-04-14-T).
[231] Decision affirming the Registrar's denial of assigned counsel's application to withdraw, *Milosevic* (IT-02-54-T).
[232] See Chamber Order on the Procedure for the Conduct of The Trial, 8th October, 2009, App. Lit.T, granting request made in submissions of 28th September, 2009 on Trial Procedure.

that rights are attachments to human beings. The right to defend is personal, thus the right for one to represent himself or be represented by counsel is owned by the accused. His choice in the matter must be honoured out of that respect for the individual which is the lifeblood of the law. It therefore follows that ownership and control of the case should ideally be in the hands of the accused unless he waves it. No doubt, he can deal with some factual and substantive aspects of the case by himself. However, there are some technical aspects of the case which would require only persons trained in law, and international humanitarian law at that, to deal with. Bearing in mind that the right to self-representation is an indispensable cornerstone of justice, and as has been argued in Chapter Two that a self-represented defendant, even with the assistance of amicus curiae and or standby counsel, may not get a fair trial, such defendant should be allowed to actively participate in his case together with counsel installed right from the beginning to the end of the case. This modality of representation is intended to be a solution to the challenges and problems of self-representation as raised in this study.

The hybrid representation scheme will work in such a way that upon coming into the hands of the court, the defendant should as soon as possible indicate to the judge or Trial Chamber if he will self-represent. If so, the chamber should organise a conference at which he should be informed of all his rights and obligations, including the right to counsel, and the advantages and disadvantages of self-representation as well as representation by defence counsel. In case the defendant insists on self-representation, he should be taken through the rules to be followed during the trial and the actions to be taken by the court namely: that counsel will be imposed on him from beginning to end of the case; that he is to work in conjunction with that counsel; that should he change his mind at any time during the trial he will be free to request for a fully-fledged team of defence counsel to be assigned; that certain sanctions, including exclusion from the courtroom proceedings, will be applied against him if he behaves in a

disruptive or any manner calculated to delay the case or undermine the authority or integrity of the court; that the trial will continue with the imposed counsel in his place if he opts to boycott the proceedings etc.

For instance, the mandate of standby counsel could be widened from that of acting on an ad hoc basis and elevated to a full time, on-going role where he functions like defence counsel. This should enable the defendant and imposed counsel (by whatever name so called) to work together, dockets served on both of them and each taking part in the calling, examining and cross-examining of witnesses on matters familiar to them, and the counsel finally drafting submissions incorporating the defendant's ideas and arguments. Each one will bring to the courtroom what they know and do best. The accused will bring all the relevant witnesses and exhibits while Counsel's legal expertise, advocacy, presentation and drafting skills will come in handy and save a lot of time and resources and ensure an expeditious trial.

With the full participation of the defendant, the risk of hindering the prospects of a fair trial resulting from his non-cooperation because of counsel being imposed upon him is limited. Other than remaining passive, the accused will have the opportunity to testify and put before court, details of his side of the story and arguments to enable the tribunal of fact to weigh all the evidence and reach an informed judgment, all this with the guiding hand of counsel. This will also contribute to the truth-seeking function and reconciliatory mission of the ICC.

Even if the accused were to boycott attending court, counsel would just continue with the trial and engage his best professional effort in the circumstances other than having the defence totally absent from the trial or the proceedings aborting. In case the accused is for some reason, say engaging in disruptive behaviour, excluded from attending the courtroom proceedings by the judges, then such accused will be allowed to view, attend and or

participate in the proceedings by way of instructing his counsel from outside the courtroom through the use of information and communication technology (ICT), if required.[233] However, it is incumbent upon the ICC to ensure that the challenges and burdens of applying ICT tools to the trial processes are minimized since the very important human 'face-to-face' element of the trial is taken away yet, the voice alone is not enough for the court to assess a defendant or even a witness' demeanour.

Since the problems encountered at the ICTY were borne of a situation where the area of self-representation was not procedurally foreseen, relevant safeguards and structures should therefore preemptively be put in place to prevent such problems in the future. The ICC can be more pro-active and innovative and borrow a leaf from the Special Tribunal for Lebanon (STL) by incorporating Rule 59 of its RPE couched in much more detail than similar provisions in the Statutes and or RPE of other international criminal tribunals when providing for the imposition of counsel to ensure not only a fair trial but a ***'fair and expeditious trial.'***[234] Such positive development would in future certainly solve a number of problems caused by self-represented defendants at the ICC.

Hybrid representation will clear the fears by the co-accused of suffering at the hands of the pro se defendant(s). For, as long as counsel is installed on a pro se defendant, there will be professionalism and control of what is done and said especially that which will adversely affect the co-defendant. For instance, in the areas of adducing evidence and objecting to what is inadmissible; calling, examining and cross-examining of witnesses for unnecessarily long periods as well as analysing the effects of evidence adduced by the co-accused or

[233] Article 63(2) of the Rome Statute establishing the ICC (as corrected on 10th November 1998 and 12th July 1999).

[234] Special Tribunal for Lebanon, Rule 59 (F) of the Rules of Procedure and Evidence, Rev. 1, 10th June, 2009, 'Assignment of Counsel': "A suspect or an accused electing to conduct his own defence shall notify, in writing, the Pre-Trial Judge or a Chamber of his election. The Pre-Trial Judge or a Chamber may impose a counsel present or otherwise assist the accused in accordance with international criminal law and international human rights where this is deemed necessary in the interests of justice and to ensure a fair and expeditious trial."

accomplice. Further, although there may be some element of 'double work' and wastage of resources as earlier pointed out in Chapter Two, such trial will progress meaningfully as a due process and conclude well in time, compared to one with some of the defendants standing unrepresented.

The Statute and the RPE of the ICTY and ICC should make special provision for rules governing the manner in which proceedings involving a self-represented defendant will be conducted. It is recommended that they include the requirement for counsel to be appointed from beginning to end of the case, whether with or, if the defendant refuses to participate, without his consent and or involvement. Indigence should not be an issue for consideration in such circumstances as long as no defence counsel has been engaged to defend the accused. The rules should clearly stipulate what should then be done, how and when, once a defendant indicates a waiver of his right to counsel. The accused's entitlements from the court should be markedly made known from the outset to facilitate the preparation of his defence. For purposes of having an orderly trial, the rules will indicate the sequence of the distinct roles to be played by each person involved and the consequences of violation of court decorum calculated to lower or abuse the integrity and authority of the court, even if it is by the self-represented defendant.

It shall be the duty of the ICC to immediately take the self-represented defendant through an orientation session where the advantages and disadvantages of self-representation as well as those of engaging defence counsel are explained in detail to enable him make an informed decision. Guidelines governing self-represented defendants too have to be put in place and explained to them. Permissible and impermissible conduct in the courtroom and the likely repercussions in case of any intentional violation, ranging from reprimand to exclusion of the accused from the trial, has to be made known well before commencement of the trial.

For the hybrid scheme of representation to work well and yield the anticipated results, there must be in place a proper case and trial management program. The judges must be proactive in the implementation of the above proposals if a fair trial is to be guaranteed for a self-represented defendant. The running of the trial itself, to regulate and determine who should do what, why, how and when is very crucial in the balancing of the arms in a criminal trial, and this lies in the province of the judges – the custodians of justice. Where the defendant indicates a desire to perform any action, say calling or cross-examining of witnesses, the court should allow him to act first. This would enable imposed counsel not only to obtain and grasp the defendant's line of argument and thinking about the case but also to correct whatever mistakes that may have been occasioned by the defendant in handling that task.

Moreover, as seen from the above discussion, the role and position of amicus curiae, court appointed counsel and standby counsel is not yet settled. It is suggested that this and the procedure to follow while dealing with an unrepresented accused be properly prescribed and outlined in the Statutes and/or Rules of Procedure and Evidence of international criminal tribunals, and the ICC for future guidance and certainty.

2. Implementation of a legislative reform

It is also recommended that the legal framework of the ICC be amended to accommodate the proposed methods of hybrid representation for self-represented defendants to provide for and enable the above guidelines. By implementing such legal regime, the ICC will not only give more visibility to the accused in the conduct of his case but will also avoid those problems and or omissions associated with or occasioned by self-representation and engagement of amicus curiae and standby or court imposed counsel on ad hoc basis, which affected the dispensation of fair and expeditious trials at the ICTY.

Generally, apart from solving the problems outlined in Chapter Three, and in addition to the merits already indicated herein above, this hybrid scheme of representation is advantageous in that the trial will proceed speedily on schedule and professionally with the counsel and the defendant benefitting from each other's contributions, which in turn benefits the court in receiving and assessing all the facts and legal arguments of the case. The defendant particularly benefits from the legal expertise of his lawyer thereby saving extraordinary amounts of time that should have been spent in briefing him of all the evidence and procedural or legal requirements inherent in international criminal proceedings. The scheme is further strengthened by a combination of the advantages and merits of self-representation and representation by counsel. Moreover, the imposed counsel will test and probe the prosecution case even without instructions.

Nevertheless, the hybrid modality of representation, like any other operational scheme, is not without limitations. Further to the disadvantages of imposition of counsel on an unwilling and uncooperative defendant recorded in Chapter Two, the defendant may continue to reject and distrust any assistance provided by the imposed counsel thereby withholding the relevant information to himself, and also develop a dislike for the entire justice system. Yet, his failure to testify and or call witnesses denies the court opportunity to weigh all the possible evidence available to enable it make a fully informed and considered judgment. There is also the challenge of a likely duplication of arguments and the possibility of running of inconsistent arguments by the accused and counsel.

However, what is important to note from the above discussion is that, given the complex nature of international crimes, and voluminous technical evidence involved, as well as the circumstances under which the offences are prosecuted, the hybrid scheme is not only more effective and better than engagement of amicus curiae, standby counsel and court appointed

counsel but also its advantages far outweigh the disadvantages. It is the most suitable modality of representation in an international criminal proceeding where the defendant waves his right to counsel. For, it clearly attempts to balance the scales of justice by bringing about the equality of arms – a situation that should be maintained throughout every trial if fairness is to be achieved.

4.3 Conclusion

With all the proposals put forward, it is expected that the challenge of self-representation which has bedevilled the ICTY and other tribunals will have been overcome. Undoubtedly, the ICTY and the ICC are handling a unique category of offences with serious political ramifications and following procedures drawing principles and guidance from civil and common law systems of municipal courts which are now being applied at international level. It is no longer the ordinary man on the street or the defendant's peers that will constitute the jury to judge him and determine his guilt or innocence, but professionals. The above recommendations make a consideration of these factors and initiate a regime of representation that would allow for the practice and enjoyment of the right to self-representation with minimal or no harm at all to the accused or the other participants in the trial and those concerned, at the same time ensuring a fair trial.

List of Respondents

Name	Current Designation	Relevant Past Experience	Date, Place and Mode of Interview
Judge Richard Goldstone	Chairperson of the Bradlow Foundation, a charitable educational trust, and heads the board of the Human Rights Institute of South Africa (HURISA).	Richard Goldstone served as the Chief Prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR) between 1994 and 1996.	Email correspondence of 23 March 2012
Steven Kay, QC	Member of 9 Bedford Row and founder Member of The International Criminal Law Bureau undertaking international legal cases and provides advice, consultancy and training services to governments, international organisations and private clients.	As defence counsel for the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), Steven Kay has a varied international criminal practice of genocide, murder, war crimes, terrorism, money laundering, fraud, drug trafficking, and human rights issues. Notable cases include *The Prosecutor v Dusko Tadic*, the first international case since the Nuremburg and Tokyo trials and the first UN war crimes trial at the ICTY, *The Prosecutor v Alfred Musema* at the ICTR, and *The Prosecutor v Slobodan Milosevic* at the ICTY. He has also advised on cases concerning Guantanamo Bay.	Email correspondence of 23 March 2012
Nancy Combs	**Vice Dean, Professor of Law**	Professor Combs served as legal advisor at the Iran-United States Claims	Email correspondence of 24 March 2012

	and Director, Human Security Law Center, William and Mary Law School, Virginia, U.S.A	Tribunal in The Hague, The Netherlands. She currently serves as member of the International Expert Framework, an international working group that is developing general rules and principles of international criminal procedure.	
Roger Clark	Board of Governors Professor, Rutgers School of Law	Professor Clark teaches courses in international criminal law and criminal justice policy. United States foreign relations and national security law; and criminal law. He served as a member of the United Nations Committee on Crime Prevention and Control between 1987 and 1990. He teaches regularly in the University of Salzburg's Summer School in International Criminal Law. He has been the general editor of the Procedural Aspects of International Law monographs since 2004, and is a board member of several international non-governmental organizations, such as the International Centre for Criminal Law Reform and Criminal Justice Policy in Vancouver, B.C., and the International League for Human Rights, headquartered in New York. Since 1995, he has represented Samoa in	Email correspondence of 18 March 2012

		negotiations to create the International Criminal Court and to get the Court running successfully. He was very active in Court's Special Working Group on the Crime of Aggression which had the task of drafting an amendment to the Court's Statute to activate its nascent jurisdiction over the crime of aggression.	
Matthew Gillett	Prosecutor, ICTY and member of the Peace and Justice Initiative.	Prosecutor at the ICTY.	Email correspondence of 15 April 2012
Sanji Mmasenono Monageng	Judge of the International Criminal Court, The Hague, Netherlands.	Former Commissioner of the African Human and People's Rights Commission, Banjul, Gambia. Judge for the Judiciary of the Republic of Swaziland and Botswana. Presides over cases before the ICC .	Email correspondence of 20 February 2012
Fergal Gaynor	Trial Attorney at the Office of the Prosecutor, ICTY. Barrister-at-Law, Ireland.	Former Trial Attorney at ICTY and ICTR. Legal Advisor, United Nations International Independent Investigation Commission, and adjunct lecturer Irish Centre for Human Rights.	Email correspondence of 13 April 2012
Fredrick Egonda-Ntende	Chief Justice of the Republic of Seychelles	Former Justice of Appeal, Court of Appeal of East Timor, a Hybrid Court with jurisdiction to try International Law Crimes including crimes against humanity, under the United Nations Transitional Administration in East Timor, 2000 to 2001. International Judge in the	Face-to-face interview, 23rd June 2012 at Victoria, Mahe Island, Seychelles.

		Hybrid Courts in Kosovo dealing with crimes against humanity and ethnically motivated crimes, human and drug trafficking, under the United Nations Mission in Kosovo, 2002-2004. Judge of the High Court of Uganda since 1991.	
Nyaberi Justry Lumumba	Senior Lecturer of Criminal Law and International Law at the Catholic University of East Africa, and Ph.D. candidate	Former Defence Counsel for Jean Bosco Barayagwiza, at trial and appellate stages, ICTR 1997 to 2001. Amicus curiae in *Prosecutor vs. Callixte Nzabonimana*, 2011, ICTR.	Email correspondence of 15 March 2012

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